Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

18 February 2016 * [i]

(Reference for a preliminary ruling — Directive 93/13/EEC — Unfair terms — Order for payment procedure — Enforcement proceedings — Powers of the national court responsible for enforcement to raise of its own motion the fact that the unfair term is invalid — Principle of *res judicata* — Principle of effectiveness — Charter of Fundamental Rights of the European Union — Judicial protection)

In Case C-49/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance, Cartagena, Spain), made by order of 23 January 2014, received at the Court on 3 February 2014, in the proceedings

Finanmadrid EFC SA

v

VA,

QE,

DG,

NZ,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, A. Borg Barthet, E. Levits (Rapporteur), M. Berger and S. Rodin, Judges,

Advocate General: M. Szpunar,

Secretario judicial: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 September 2015,

after considering the observations submitted on behalf of:

– the Spanish Government, by A. Rubio González, acting as Agent,

* Language of the case: Spanish

– the German Government, by T. Henze, J. Kemper, D. Kuon and J. Mentgen, acting as Agents,

– Hungary, by M.Z. Fehér Miklós and G. Szima, acting as Agents,

– the European Commission, by É. Gippini Fournier and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 November 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns in particular the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Finanmadrid EFC SA ('Finanmadrid') and VA, DG, QE and NZ concerning sums due in enforcement of a consumer credit agreement.

Legal background

EU law

3 Article 3 of Directive 93/13 reads as follows:

'1. 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.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.'

4 Article 6 of Directive 93/13 provides:

'1. 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.

2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.'

5 Article 7 of Directive 93/13 is worded as follows:

'1. 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.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

…'

Spanish law

6 Enforcement proceedings are governed by the Law on civil procedure (Ley de Enjuiciamiento Civil) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575), as amended by Law 1/2013 on the strengthening of the protection of mortgagors, the restructuring of debt and social rent (Ley 1/2013 de medidas para reforzar la protección de los deudores hipotecarios, reestructuración de la deuda y alquiler social) of 14 May 2013 (BOE No 116 of 15 May 2013, p. 36373; 'the LEC').

7 Article 551(1) of the LEC provides:

'Once the enforcement claim has been lodged and provided that the procedural rules and requirements have been observed, that the enforceable instrument is marred by no formal defect and that the acts of enforcement sought are consistent with the nature and content of the instrument, the court shall draw up an order containing the general enforcement order and shall issue it.'

8 The second subparagraph of Article 552(1) of the LEC reads as follows:

'When the court considers that any of the terms included in one of the enforceable instruments listed in Article 557(1) may be considered to be unfair, it shall hear the parties within a period of 15 days. After hearing the parties, it shall decide the issue within five working days, in accordance with Article 561(1)(3).'

9 Article 557(1) of the LEC states as follows:

‘Where enforcement is ordered on the basis of [enforceable instruments that are not judicial or arbitral] … the party against whom enforcement is sought may lodge an objection, within the period and in the form specified in the previous paragraph, only if the objection is based on one of the following grounds:

…

(7) that the instrument contains unfair terms.’

10 Article 812(1) of the LEC provides:

‘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) by documents, whatever their form, type or physical medium, signed by the debtor …

…’

11 Article 815 of the LEC is worded as follows:

‘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 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 or she considers that he or she 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 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.

The proposed order for payment must inform the applicant that if no reply is sent within 10 days or if the proposal is rejected, the application will be deemed to have been withdrawn.’

12 Article 816 of the LEC reads as follows:

‘1. If the debtor fails to comply with the order for payment or fails to appear, the Secretario judicial shall issue a direction 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, although the applicant in the order for payment procedure and the debtor subject to the order for enforcement are prohibited from subsequently making a claim in the course of ordinary

proceedings in respect of the amount claimed in the order for payment procedure or for the repayment of the amount obtained through the enforcement.

…'

13 Under the first subparagraph of Article 818(1) of the LEC:

'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*.'

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

14 On 29 June 2006, VA entered into a contract with Finanmadrid for a loan of EUR 30 000 to finance the purchase of a vehicle.

15 DG, QE and NZ were joint guarantors to Finanmadrid in respect of that loan.

16 A commission on opening the file had been set at 2.5% of the capital reimbursement was to be by instalments over 84 months at an interest rate of 7% per annum. For any late payment of the instalments, a late payment interest rate of 1.5% per month was provided for as well as a penalty of EUR 30 in respect of each instalment missed.

17 Since the instalments of the loan taken out by VA had not been paid since the beginning of 2011, on 8 July 2011 Finanmadrid terminated the contract at issue in the main proceedings early.

18 On 8 November 2011, Finanmadrid applied to the Secretario judicial of the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance, Cartagena) to open enforcement proceedings against the defendants in the main proceedings.

19 By decision of 13 February 2012, the Secretario judicial of the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance, Cartagena, Spain) declared that application admissible and ordered the defendants to the main proceedings either to pay the sum of EUR 13 447.01, together with interest from 8 July 2011, within 20 days, or, through a lawyer and a 'procurador', to oppose the enforcement of the debt and to appear before that court in order to explain why they considered they were not liable to pay all or part of the amount claimed.

20 Since within the time limit set, the defendants to the main proceedings failed either to comply with the order for payment or to appear before the court, by decision of 18 June 2012 the Secretario judicial closed the enforcement proceedings pursuant to Article 816 of the LEC.

21 On 8 July 2013, Finanmadrid applied to the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance, Cartagena) for execution of that decision.

22 On 13 September 2013, that court requested the parties to the main proceedings to submit their observations concerning, inter alia, the potentially unfair nature of some of the terms of the contract at issue in the main proceedings and whether the legislation governing enforcement proceedings runs counter to the right to effective judicial protection. With regard to the latter

aspect, that court noted that it had not been informed of the application for an order for payment made by Finanmadrid, of the examination of that application by the Secretario judicial, or of its outcome.

23 Only the applicant in the main proceedings submitted observations.

24 The referring court states that Spanish procedural law provides for intervention by the court in enforcement proceedings only where it is apparent from the documents annexed to the application that the amount claimed is not correct, in which case the Secretario judicial must inform the court thereof, or where the debtor contests the order for payment proceedings. It adds that, since the decision of the Secretario judicial is an enforceable procedural instrument with the force of *res judicata*, the court cannot examine of its own motion, in enforcement proceedings, any possible unfair terms in the contract which gave rise to the order for payment proceedings.

25 In that context, having doubts as to the compatibility of the relevant provisions of Spanish law with EU law, that court decided to stay the proceedings and to 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] LEC), which does not mandatorily provide either for the examination of unfair terms or the intervention of the court, except when the Secretario judicial 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] 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 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 LEC)?

(3) Must the [Charter] 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?

(4) Must the [Charter] 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*?’

Consideration of the questions referred

Admissibility

26 The German Government is doubtful as to the admissibility of the first, third and fourth questions, on the ground that they are not of use to the referring court to decide the dispute in the main proceedings. In that regard, it submits that that dispute concerns the enforcement of a decision containing an order for payment which has become *res judicata* and not the order for payment procedure itself. Consequently, an answer concerning the compatibility of the latter procedure with Directive 93/13 bears no relation to the subject of that dispute.

27 In that regard, it is necessary to state at the outset that, in accordance with the settled case-law of the Court, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court of Justice is in principle bound to give a ruling (judgment in *Aziz*, C-415/11, EU:C:2013:164, paragraph 34 and the case-law cited).

28 Thus, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment in *Aziz*, C-415/11, EU:C:2013:164, paragraph 35 and the case-law cited).

29 However, that is not the case here.

30 As the Advocate General noted in point 32 of his Opinion, the relevant body of procedural rules must be kept in mind. In that regard, although it is true that the Spanish procedural system allows a debtor, where he opposes order for payment proceedings, to dispute the possibly unfair nature of a term of the contract in question, that system excludes the possibility of ascertaining whether that term is unfair of the court's own motion both during the order for payment proceedings, when those proceedings are closed by a reasoned decision of the Secretario judicial, and during enforcement of the order for payment, when an objection is lodged before the court to that enforcement.

31 In that context, the questions referred by the referring court must be understood broadly, that is to say, as seeking to assess, in essence, in the light of the process of the order for payment proceedings and the powers held by the Secretario judicial in those proceedings, the compatibility with Directive 93/13 of the lack of powers of the court to check of its own motion, in the enforcement proceedings, whether a term in a contract concluded between a supplier or seller and a consumer is unfair.

32 In those circumstances, and taking into account the fact that it is for the Court to provide the referring court with an answer which will be of use to it and enable it to determine the case before it (see, to that effect, judgments in *Roquette Frères*, C-88/99, EU:C:2000:652, paragraph 18,

and *Attanasio Group*, C-384/08, EU:C:2010:133, paragraph 19), it must be concluded that it is not obvious that the interpretation of EU law sought in the first, third and fourth questions bears no relation to the actual facts of the main action or its purpose.

33 Consequently, the questions referred for a preliminary ruling are admissible in their entirety.

Substance

34 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 93/13 precludes national legislation, such as that at issue in the main proceedings, which does not permit the court ruling on the enforcement of an order for payment to assess of its own motion whether a term in a contract concluded between a seller or supplier and a consumer is unfair, when the authority hearing the application for an order for payment does not have the power to make such an assessment.

35 In order to provide the referring court with a useful answer enabling it to rule in the dispute before it, it must be recalled, first of all, that the court has already ruled, in the judgment in *Banco Español de Crédito* (C-618/10, EU:C:2012:349), on the nature of the responsibilities of the national court, by virtue of the provisions of Directive 93/13, in order for payment proceedings, where the consumer has not opposed the order issued against him.

36 In that judgment, the Court has held, inter alia, that Directive 93/13 must be interpreted as precluding legislation of a Member State that does not permit the court hearing an application for an order for payment to determine of its own motion, *in limine litis* or at any other time, even when it has available to it the matters of law and fact necessary to that end, whether a term in a contract concluded between a seller or supplier and a consumer is unfair, in the case where that consumer has not lodged an objection (judgment in *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 1 of the operative part).

37 It is appropriate to note that the national legislation, in the version applicable to the dispute in which the request for a preliminary ruling was made which gave rise to the judgment in *Banco Español de Crédito* (C-618/10, EU:C:2012:349), conferred on the court, not on the Secretario judicial, the power to give a decision making an order for payment.

38 Since the reform made by Law 13/2009 (BOE No 266, of 4 November 2009, p. 92103), which entered into force on 4 May 2010, it is now for the Secretario judicial, if the debtor fails to comply with the order for payment or fails to appear before the court, to give a reasoned decision which closes the order for payment procedure and has the force of *res judicata*.

39 That legislative amendment, made with a view to accelerating the process of order for payment proceedings, is not, as such, the subject matter of the doubts expressed by the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance, Cartagena) in the present reference for a preliminary ruling.

40 In that regard, it must be noted that, in the absence of harmonisation of the national enforcement mechanisms, the details of their implementation are governed by the internal legal order of the Member States by virtue of the principle of procedural autonomy of those States. Nevertheless, the Court has pointed out that the means of implementation must meet the dual condition 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) (judgment in *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 31 and the case-law cited).

41 As regards, firstly, the principle of equivalence, it must be observed that the Court does not have before it any evidence that might raise doubts as to the compatibility of the national legislation at issue in the main proceedings with that principle.

42 It is apparent, notably from the provisions of Articles 551, 552 and 816(2) of the LEC, that, in the Spanish procedural system, the court hearing the enforcement of an order for payment may neither assess of its own motion the unfair nature, in the light of Article 6 of Directive 93/13, of a term in a contract concluded between a seller or supplier and a consumer, nor determine of its own motion whether such a term runs counter to the national rules of public policy, which it is, nevertheless, for the national court to ascertain (see, to that effect, judgment in *Aziz*, C-415/11, EU:C:2013:164, paragraph 52).

43 Secondly, with regard to the principle of effectiveness, it should be noted that the Court has consistently 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 (judgment in *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 49 and the case-law cited).

44 In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (judgments in *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, EU:C:2013:800, paragraph 34, and *Pohotovosť*, C-470/12, EU:C:2014:101, paragraph 51 and the case-law cited).

45 In the present case, it must be noted that the progress and particular features of the Spanish order for payment proceedings are such that, in the absence of facts requiring the intervention of the court, referred to in paragraph 24 of the present judgment, those proceedings are closed without it being possible for there to be a check as to whether there are unfair terms in a contract concluded between a supplier or seller and a consumer. If, accordingly, the court hearing the enforcement of the order for payment does not have the power to assess of its own motion whether such terms are present, the consumer could be faced with an enforcement order without having the benefit, at any time during the proceedings, of a guarantee that such an assessment will be made.

46 In that context, it must be stated that such a procedural arrangement is liable to undermine the effectiveness of the protection intended by Directive 93/13. Such effective protection of the rights under that directive can be guaranteed only provided that the national procedural system allows the court, during the order for payment proceedings or the enforcement proceedings concerning an order for payment, to check of its own motion whether terms of the contract concerned are unfair.

47 Such a consideration cannot be called into question where the national procedural law, such as that at issue in the main proceedings, confers on the decision issued by the Secretario judicial the force of *res judicata* and endows it with effects analogous to those of a decision of the court.

48 It must be noted that, although 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, those rules must still comply with the principles of equivalence and effectiveness (see, to that effect, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 38 and the case-law cited).

49 As regards the principle of equivalence, as the Advocate General noted in point 70 of his Opinion, there is no evidence in the case in the main 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.

50 With regard to the principle of effectiveness, compliance with which by the Member States must be assessed in the light, in particular, of the criteria set out in paragraphs 43 and 44 of this judgment, it must be noted that, in accordance with the wording of Articles 815 and 816 of the LEC, the power of the Secretario judicial to check an application for an order for payment is restricted to checking the compliance with the formalities to which such an application is subject, in particular the accuracy, in the light of the documents annexed to that application, of the amount of the debt claimed. Thus, by virtue of Spanish procedural law, it does not fall within the powers of the Secretario judicial to assess the potentially unfair nature of a term in a contract on which the debt is based.

51 Furthermore, it must be borne in mind that the decision of the Secretario judicial closing the order for payment proceedings becomes *res judicata*, which makes it impossible to check the unfair terms at the stage of enforcement of an order, simply because the consumers have not lodged an objection to the order within the time limit prescribed for that purpose and the Secretario judicial has not referred the matter to the court.

52 In this regard, however, it must be noted, firstly, that there is a significant risk that the consumers concerned will not lodge the objection required, be it because of the particularly short period provided for that purpose, or because they might be dissuaded from defending themselves in view of the costs which legal proceedings would entail in relation to the amount of the disputed debt, or because they are unaware of or do not appreciate the extent of their rights, or indeed because of the limited content of the application for the order for payment submitted by the sellers or suppliers, and thus the incomplete nature of the information available to them (see, to that effect, judgment in *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 54).

53 Secondly, it is apparent from the order for reference that the Secretario judicial is required to refer the matter to the court only when it is clear from the documents annexed to the application that the amount claimed is not accurate.

54 In those circumstances, as noted, in essence, by the Advocate General in point 75 of his Opinion, it must be held that the Spanish rules at issue in the main proceedings, implementing the principle of *res judicata* in the context of the order for payment procedure, appear to run counter to the principle of effectiveness, in so far as they make it impossible or excessively difficult, in proceedings brought by suppliers or sellers and in which consumers are the defendants, to ensure the protection conferred on the consumers by Directive 93/13.

55 Having regard to all the foregoing considerations, the answer to the first and second questions referred is that Directive 93/13 precludes national legislation, such as that at issue in the main proceedings, which does not permit the court ruling on the enforcement of an order for payment

to assess of its own motion whether a term in a contract concluded between a seller or supplier and a consumer is unfair, when the authority hearing the application for an order for payment does not have the power to make such an assessment.

The third and fourth questions

56 By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the Charter and, more precisely, the right to effective judicial protection enshrined in Article 47 thereof, preclude national legislation such as that at issue in the main proceedings.

57 In that regard, it must be noted that the referring court has not stated the reasons which have led it to doubt the compatibility of such national legislation with Article 47 of the Charter and that the order for reference does not therefore contain information which is sufficiently precise and complete to enable the Court to give a useful reply to those questions.

58 In those circumstances, it is not necessary to answer the third and fourth questions.

Costs

59 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 (First Chamber) hereby rules:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts precludes national legislation, such as that at issue in the main proceedings, which does not permit the court ruling on the enforcement of an order for payment to assess of its own motion whether a term in a contract concluded between a seller or supplier and a consumer is unfair, when the authority hearing the application for an order for payment does not have the power to make such an assessment.

[Signatures]

[i] The names set out on page 1 and in paragraphs 2, 14 to 15 and 17 have been replaced by letters following a request for anonymisation.