



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

2 April 2020*

(Reference for a preliminary ruling — Consumer protection — Directive 93/13/EEC — Unfair terms in consumer contracts — Article 1(1) — Article 2(b) — Definition of ‘consumer’ — Commonhold of a building)

In Case C-329/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale di Milano (District Court, Milan, Italy), made by decision of 1 April 2019, received at the Court on 23 April 2019, in the proceedings

Condominio di Milano, via Meda

v

Eurothermo SpA,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, M. Safjan, L. Bay Larsen, C. Toader (Rapporteur) and N. Jääskinen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Eurothermo SpA, by A. Fracchia, avvocato,
- the Italian Government, by G. Palmieri, acting as Agent, and by E. Manzo, avvocato dello Stato,
- the European Commission, by G. Gattinara and N. Ruiz García, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

* Language of the case: Italian.

Judgment

- 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 a commonhold association, the condominio di Milano, via Meda ('Condominio Meda') and Eurothermo SpA concerning late payment interest claimed of the former on the basis of performance of a contract for the supply of thermal energy.

Legal context

Directive 93/13

- 3 According to the 12th recital of Directive 93/13:

'... as they now stand, national laws allow only partial harmonisation to be envisaged; ... Member States should have the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive'.
- 4 Article 1(1) of the directive states that its purpose 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 Directive 93/13 states:

'For the purpose 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;

...'
- 6 In accordance with Article 3(1) of that directive, a contractual term which has not been individually negotiated is to 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.
- 7 Under Article 8 of Directive 93/13, Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by that directive, to ensure a maximum degree of protection for the consumer.

Directive 2011/83/EU

- 8 According to recital 13 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Directive 93/13 and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64):

‘Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope. Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive. For instance, Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises. ...’

Italian law

The Civil Code

- 9 Article 1117 of the Codice civile (Civil Code) provides:

‘The owners of each commonhold unit in the building shall, irrespective of whether they have a right of enjoyment from time to time and provided that their title does not state otherwise, hold in common:

- (1) all the parts of the building necessary for common use, such as the land on which it stands, the foundations, the supporting walls, pillars and beams, the roofs, the staircases, the entrance doors, the entrance halls and vestibules, porches, courtyards and façades;
- (2) parking areas and shared-service areas, such as that of the concierge, the washing and drying rooms and a storey beneath the roof which, for structural and functional reasons, is intended for common use;
- (3) structures, installations and manufactured products of whatever type which are intended for common use, such as lifts, wells, cisterns, installations for the supply of water and the disposal of waste water, centralised systems for the distribution and transmission of gas and electricity, heating and air conditioning, reception of radio and television broadcasting services, and equipment enabling access to any other type of exchange of information, including by satellite or cable, and the corresponding network up to the individual unit holders’ points of connection or, in the case of single pieces of equipment until their point of use without prejudice to the provisions of public network sector-specific regulations.’

- 10 Under Article 1117a of the Civil Code, under the heading ‘Scope’:

‘The provisions of the present chapter shall apply *mutatis mutandis* in all cases where several commonhold units or buildings ... have common parts within the meaning of Article 1117.’

- 11 The first paragraph of Article 1129 of the Civil Code, under the heading ‘Appointment, revocation and obligations of the administrator’ states:

‘If there are more than eight commonholders and the annual meeting has not appointed an administrator, one or several commonholders, or the administrator, may bring an action before a judicial authority, which shall appoint one.’

- 12 Under the heading ‘Representation’, Article 1131 of the Civil Code provides:

‘Within the confines [of its powers], the administrator shall represent the commonholders and may take legal action either against unit holders or third parties.’

The Consumer Code

- 13 Decreto legislativo n. 206 — Codice del consumo, a norma dell’articolo 7 della legge 29 luglio 2003, n° 229 (Legislative Decree No 206 on the Consumer Code under Article 7 of Law No 229 of 29 July 2003) of 6 September 2005 (Ordinary Supplement No 162 to GURI No 235 of 8 October 2005), transposed Directive 93/13 into Italian law. Article 3(1) of the Consumer Code, as amended by Legislative Decree No 221 of 23 October 2007 (GURI No 278 of 29 November 2007), defines a ‘consumer’ as ‘a natural person who is acting for purposes which are outside any business, commerce, trade, or profession in which he may be engaged’.

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

- 14 On 2 April 2010, Condominio Meda, located in Milan (Italy), represented by its administrator, concluded a contract for the supply of thermal energy with Eurothermo, Article 6.3 of the terms and conditions of which provides that, in the event of late payment, the debtor must pay ‘default interest at the rate of 9.25% from the expiry of the period for payment of the balance’.
- 15 On 18 April 2016, on the basis of a mediation report drawn up on 14 November 2014, Eurothermo demanded that Condominio Meda pay it EUR 21 025.43, which corresponded to late payment interest for a debt under that contract as calculated on the basis of the principal outstanding on 17 February 2016.
- 16 Condominio Meda challenged the order for payment before the referring court, arguing that it was a consumer within the meaning of Directive 93/13 and that Article 6.3 of that contract was an unfair contract term.
- 17 The referring court considers that that term is in fact unfair and that, in accordance with the case-law of the Court, it could annul it of its own motion. However, that court is uncertain whether it is permissible to regard a commonhold association, such as the *condominio* in Italian law, as a consumer within the meaning of Directive 93/13.
- 18 In that regard, that court cites case-law of the Corte suprema di cassazione (Court of Cassation, Italy) according to which, first, that form of co-ownership, although not constituting a legal person, is regarded as a ‘distinct subject of the law’. Second, according to the same case-law, the consumer protection rules apply to contracts concluded between a seller or supplier and the administrator of a commonhold association, defined as a ‘management entity without legal personality other than that of its members’, in view of the fact that it acts on behalf of the various unit holders, who must be regarded as consumers.

19 In addition, it refers to the Court's case-law, in particular the judgment of 22 November 2001, *Cape and Idealservice MN RE* (C-541/99 and C-542/99, EU:C:2001:625), in accordance with which the concept of 'consumer' must be based on the criterion of being a natural person. Nevertheless, according to that court, to exclude the applicability of Directive 93/13 solely on the ground that the person concerned is neither a natural person nor a legal person is liable to deprive certain subjects of the law of protection in cases where they are in a weak position vis-à-vis a supplier or seller such as would justify the application of the protective rules of consumer law.

20 In those circumstances, the Tribunale di Milano (District Court, Milan, Italy), decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the concept of consumer within the meaning of Directive [93/13] preclude an entity, such as the commonhold association (*condominio*) in Italian law, which does not come within the concept of 'natural person' or 'legal person' from being regarded as a consumer in cases where that entity concludes a contract for purposes which are outside its trade, business or profession and where it is in a position of weakness vis-à-vis the seller or supplier, as regards both its bargaining power and its level of knowledge?'

Consideration of the question referred

21 By its question, the referring court asks, in essence, whether Article 1(1) and Article 2(b) of Directive 93/13 must be interpreted as precluding national case-law which interprets legislation intended to transpose that directive into national law in such a way that its protective rules of consumer law also apply to a contract between a seller or supplier and a subject of the law such as the *condominio* in Italian law.

22 In order to answer the question referred for a preliminary ruling, it is necessary, first of all, to analyse the scope of that directive in order to determine whether a subject of the law which is not a natural person may, as EU law currently stands, be covered by the concept of 'consumer' within the meaning of that directive.

23 According to Article 1(1) of Directive 93/13, its purpose 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.

24 According to the wording of Article 1(2)(b) of Directive 93/13, the concept of 'consumer' is defined as referring to 'any natural person who, in the contracts covered by that directive, is acting for purposes which are not related to his trade, business or profession'. It follows from that provision that two cumulative conditions must be satisfied in order for a person to fall within the scope of that concept, namely that that person be a natural person and that he carries out his activity for non-professional purposes.

25 As regards the first of those conditions, the Court has previously held that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of Article 2(b) of Directive 93/13 (judgment of 22 November 2001, *Cape and Idealservice MN RE*, C-541/99 and C-542/99, EU:C:2001:625, paragraph 16).

26 In the present case, the referring court states that, in Italian law, a commonhold association is a subject of the law which is not a natural or legal person.

27 In that regard, it should be noted that, as EU law currently stands, the concept of 'ownership' is not harmonised at EU level and differences may exist between the Member States. It must be held that, under Article 345 TFEU, the Treaties are in no way to prejudice the rules in Member States

governing the system of property ownership. In addition, according to a broader systemic interpretation, it should be noted that Article 1(2)(k) of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ 2012 L 201, p. 107) excludes rights *in rem* from its scope.

- 28 Consequently, for as long as the EU legislature has not intervened in that regard, the Member States remain free to regulate the legal institution of co-ownership in their respective national systems, regardless of whether or not they regard it as a ‘legal person’.
- 29 Therefore, a commonhold association, such as the applicant in the main proceedings, does not satisfy the first of the conditions provided for in Article 2(b) of Directive 93/13 and therefore does not fall within the concept of ‘consumer’ within the meaning of that provision, so that a contract between such a commonhold association and a seller or supplier is excluded from the scope of that directive.
- 30 That finding is not inconsistent with the judgment of 5 December 2019, *EVN Bulgaria Toplofikatsia and Toplofikatsia Sofia* (C-708/17 and C-725/17, EU:C:2019:1049, paragraph 59). Although the Court held that the contract for the supply of thermal energy to a building held in commonhold at issue in the case which gave rise to that judgment fell within the category of contracts between traders and consumers within the meaning of Article 3(1) of Directive 2011/83, it should be noted that those contracts had been concluded by the unit holders themselves and not, as in the case at issue in the main proceedings, by the commonhold association, represented by an administrator.
- 31 Nevertheless, it remains to be determined whether national case-law, such as that of the Corte suprema di cassazione (Supreme Court of Cassation), which interprets the legislation intended to transpose Directive 93/13 into national law to the effect that the protective rules of consumer law of that directive also apply to contracts between a subject of the law such as the *condominio* in Italian law, and a seller or supplier, runs contrary to the spirit of the framework of consumer protection in the European Union.
- 32 In that regard, it should be noted that, in accordance with Article 169(4) TFEU, Member States may maintain or introduce more stringent consumer protection measures provided that they are compatible with the Treaties.
- 33 According to the 12th recital of Directive 93/13, that directive provides for only partial minimum harmonisation of national laws on unfair terms, leaving Member States the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of that directive. In addition, under Article 8 of the directive, Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by that directive, to ensure a maximum degree of protection for the consumer.
- 34 Furthermore, according to recital 13 of Directive 2011/83, Member States should remain competent, in accordance with EU law, to apply the provisions of that directive to areas not falling within its scope. For instance, Member States may decide to extend the application of the rules of that directive to legal persons or to natural persons who are not consumers within the meaning of that directive.
- 35 In the present case, it is clear from the order for reference that the Corte suprema di cassazione (Supreme Court of Cassation) has developed a line of case-law which seeks to afford greater protection to consumers by widening the scope of the protection provided for by Directive 93/13 to a subject of the law, such as the *condominio* in Italian law, which is not a natural person under national law.

- 36 That line of case-law is wholly consistent with the objective of consumer protection pursued by that directive (see, to that effect, judgment of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, EU:C:2018:643, paragraph 69).
- 37 It follows that, although a legal person, such as the *condominio* in Italian law, is not covered by the concept of ‘consumer’ within the meaning of Article 2(b) of Directive 93/13, the Member States may apply provisions of that directive to areas not covered by the scope of that directive (see, by analogy, judgment of 12 July 2012, *SC Volksbank România*, C-602/10, EU:C:2012:443, paragraph 40), provided that such an interpretation by the national courts ensures a maximum degree of protection for the consumer and is not precluded by the Treaties.
- 38 In the light of the foregoing, the answer to the question referred is that Article 1(1) and Article 2(b) of Directive 93/13 must be interpreted as not precluding national case-law which interprets legislation intended to transpose that directive into national law in such a way that its protective rules of consumer law also apply to a contract between a seller or supplier and a subject of the law such as the *condominio* in Italian law, notwithstanding that such a subject of the law does not fall within the scope of that directive.

Costs

- 39 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:

Article 1(1) and Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding national case-law which interprets legislation intended to transpose that directive into national law in such a way that its protective rules of consumer law also apply to a contract between a seller or supplier and a subject of the law such as the *condominio* in Italian law, notwithstanding that such a subject of the law does not fall within the scope of that directive.

[Signatures]