



CASE STUDY: APPLICATION OF EU LAW IN PRACTICE

Bucharest, 16 October 2023

Coordinator: Nicoletta Aloj, judge at the Court of Turin, Italy

Duty to assess the unfairness of a contractual term under Directive 93/13/EEC

Art. 6, paragraph 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.

Art. 7, paragraph 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.

Duty to assess the unfairness of a contractual term under Directive 93/13/EEC

- ECJ 17 May 2022 in joined cases C- 693/19 e C 831/19, *Banco Desio – SPV Project*, point 53: «the national court is required to assess **of its own motion** whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task »
- ECJ 26 January 2017, C-421/14, *Banco Primus*, point 43;
- ECJ 30 May 2013, C-488/2011, *Asbeek Brusse*, points 40-46;
- ECJ 14 March 2013, C-415/11, *Aziz*, point 46;
- ECJ 14 June 2012, C-618/10, *Banco Español de Crédito*, point 42;
- ECJ 9 November 2010, C-137/08, *Pénzügyi Lízing*, point 49;
- ECJ 4 June 2009, C-243/08, *Pannon*, pont 32;
- and others.

Effectiveness vs. *res iudicata*

- ECJ 17 May 2022 in joined cases C- 693/19 e C 831/19, *Banco Desio – SPV Project* «Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as **precluding national legislation which provides that**, where an order for payment issued by a court on application by a creditor has not been the subject of an objection lodged by the debtor, **the court hearing the enforcement proceedings may not, on the ground that the force of *res judicata* of that order applies by implication to the validity of those terms, thus excluding any examination of their validity,** subsequently review the potential unfairness of the contractual terms on which that order is based (...)»
- ECJ 26 January 2017, C-421/14, *Banco Primus*: « Directive 93/13 must be interpreted as not precluding a rule of national law (...) which prohibits national courts from examining of their own motion the unfairness of contractual terms where a ruling has already been given on the lawfulness of the terms of the contract, taken as a whole, with regard to that directive in a decision which has become *res judicata*. By contrast, **where there are one or more contractual terms the potential unfair nature of which has not been examined during an earlier judicial review** of the contract in dispute which has been **closed by a decision which has become *res judicata***, Directive 93/13 must be interpreted as meaning that a national court, before which a consumer has properly lodged an objection, **is required to assess the potential unfairness of those terms**, whether at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose ».

Effectiveness vs. *res iudicata*

- ECJ 17 May 2022 in case C- 600/19, *Ibercaja*: «Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding national legislation which, **by virtue of the effect of res judicata and time-barring, neither allows a court to examine of its own motion whether contractual terms are unfair in the course of mortgage enforcement proceedings,** nor a consumer, after the expiry of the period for lodging an objection, to raise the unfairness of those terms in those proceedings or in subsequent declaratory proceedings, where the potential unfairness of those terms has already been examined by the court of its own motion, at the stage when the mortgage enforcement proceedings were initiated, but **the judicial decision authorising the mortgage enforcement does not contain any grounds, even of a summary nature, attesting to the existence of that examination,** nor state that the assessment of that court at the end of that examination could no longer be called into question if an objection were not lodged within the aforementioned period »

Ex officio investigations

Purposes:

- ascertain whether a party is a consumer
- assess the unfairness of the contractual terms
- ECJ 4 June 2015, C – 497/13, Froukje Faber, point 46: «the principle of effectiveness requires a national court before which a dispute relating to a contract which may be covered by that directive has been brought to determine whether the purchaser may be classified as a consumer, **even if the purchaser has not expressly claimed to have that status**, as soon as that court has at its disposal the matters of law and of fact that are necessary for that purpose or may have them at its disposal simply by making a request for clarification»
- ECJ 9 November 2010, C-137/08, *Pénzügyi Lízing*, point 56: «the national **court must investigate of its own motion whether a term** conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, **falls within the scope of the Directive** and, if it does, **assess of its own motion whether such a term is unfair**»;
- ECJ 21 February 2013, C-472/2011, *Banif Plus Bank*, point 24;
- ECJ 14 March 2013, C-415/2011, *Aziz*, point 47;
- and others.

Is the guarantor a consumer?

- Art. 2 Directive 93/13: ‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession
- ECJ 19 November 2015, C-74/15, *Tarcou*: «Article 1(1) and 2(b) of Directive 93/13 must be interpreted as meaning that that directive can apply to a contract of guarantee or a contract providing security concluded between a natural person and a credit institution in order to secure contractual obligations owed by the commercial company to the credit institution under a credit agreement, where that natural person **acted for purposes outside his trade, business or profession and has no link of a functional nature with that company**»
- ECJ 14 settembre 2016, C-534/15, *Dumitras*

Which contract terms shall be assessed?

- Balance between effectiveness and national procedural principles: the principle of *ne eat iudex ultra petita partium* is safeguarded
- ECJ 11 March 2020, C-511/17, *Lintner*, point 30: «**the effectiveness of the protection** that the national court concerned is deemed to grant to the consumer, pursuant to that directive, by intervention of its own motion, **cannot go so far as to ignore or exceed the limitations of the subject matter of the dispute** as defined by the parties by their claims, in the light of the pleas they have raised, with the result that that **national court is not required to extend that dispute beyond the forms of order sought** and the pleas in law submitted to it, by analysing individually, for the purpose of assessing whether they are unfair, all the other terms of a contract of which only some terms are the subject matter of the action brought before it»

The unfairness assessment when the ownership rights have already been transferred

- ECJ 17 May 2022 in case C- 600/19, *Ibercaja*: Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as **not precluding national legislation which does not allow a national court**, acting of its own motion or at the request of the consumer, to examine the possible unfairness of contractual terms where the mortgage security has been realised, **the mortgaged property sold and the ownership rights in that property transferred to a third party**, provided that the consumer whose property was the subject of mortgage enforcement proceedings may assert his or her rights during subsequent proceedings with a view to obtaining compensation, under that directive, for the financial consequences resulting from the application of unfair terms.