FRICORE

Fundamental Rights, Powers of the Courts and Duties of Cooperation: a Cross-Sectoral Training for European Judges and Trainers

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EU judge dealing with consumer cases - Nature

I

The court seised of the action is therefore required to ensure the effectiveness of the protection intended to be given by the provisions of the Directive. Consequently, the role thus attributed to the national court by Community law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task (ECJ, 4 June 2009, C-243/08, *Pannon GSM Zrt.*, p. 32. See also: ECJ, 21 February 2013, C-472/11, *Banif Plus Bank Zrt*, p. 23, ECJ, 14 June 2012, C-618/10, *Banco Español de Crédito SA*, p. 43).

Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court, hearing an action brought by a consumer seeking to establish the unfair nature of certain terms in a contract that that consumer concluded with a professional, is not required to examine of its own motion and individually all the other contractual terms, which were not challenged by that consumer, in order to ascertain whether they can be considered unfair, but must examine only those terms which are connected to the subject matter of the dispute, as delimited by the parties, where that court has available to it the legal and factual elements necessary for that task, as supplemented, where necessary, by measures of inquiry (ECJ, 11 March 2020, C-511/17, *Györgyné Lintner*)

II

"However, in implementing European Union law, the national court must also respect the requirements of effective judicial protection of the rights that individuals derive from European Union law, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. Among those requirements is the principle of *audi alteram partem*, as part of the rights of defence and which is binding on that court, in particular when it decides a dispute on a ground that it has identified of its own motion (see, to that effect, Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraphs 50 and 54)" (ECJ, 21 February 2013 , C-472/11, *Banif Plus Bank Zrt* , p. 29)

In that context, it must be recalled that the principle of *audi alteram partem*, as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure (ECJ, 30 May 2013, C-488/11, *Dirk Frederik Asbeek Brusse, Katarina de Man Garabito*, p. 52)

III

"In carrying out that obligation, the national court is not, however, required under the Directive to exclude the possibility that the term in question may be applicable, if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status" (ECJ, 4 June 2009, C-243/08, *Pannon GSM Zrt.,* p. 33).

IV

"It is worth noting that the fact that a national court examines ex officio the potential unfairness of contractual terms and informs the consumer of the possibility to invoke his or her rights under Directive 93/13 does not appear in itself to impair that court's impartiality, since the court is not 'taking sides', but exercising functions incumbent on it under national and Union law" (AG Tanchev, 15 July 2021, Joined Cases C-693/19 and C-831/19, *SPV Project 1503 Srl and Banco di Desio e della Brianza SpA*, footnote 22)

Ex officio investigative powers

- 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 Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair" (ECJ, 9 November 2010, C-137/08, *VB Pénzügyi Lízing Zrt.*).

- Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees must be interpreted as meaning that a national court before which an action relating to a contract which may be covered by that directive has been brought, is required to determine whether the purchaser may be classified as a consumer within the meaning of that directive, even if the purchaser has not relied on 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, 4 June 2015, C-497/13, *Froukje Faber*).

- Articles 6(1) and 7(1) of Directive 93/13 and Article 10(2) of Directive 2008/48 must be interpreted as meaning that where, in circumstances such as those at issue in the main proceedings, a national court has serious doubts as to the merits of an application based on a promissory note intended to secure the debt arising under a consumer credit agreement and that note was initially left blank when issued by the maker and subsequently completed by the payee, that court must examine of its own motion whether the provisions agreed between the parties are unfair and, in that respect, may require the seller or supplier to produce the document recording those provisions so that that court is able to verify that the rights that consumers derive from those directives are observed (ECJ, 7 November 2019, C-419/18, *Profi Credit Polska S.A.*; see also, ECJ, 19 December 2019, C-453/18 and C-494/18, *Bondora AS*).

Are there further ex officio investigative powers?

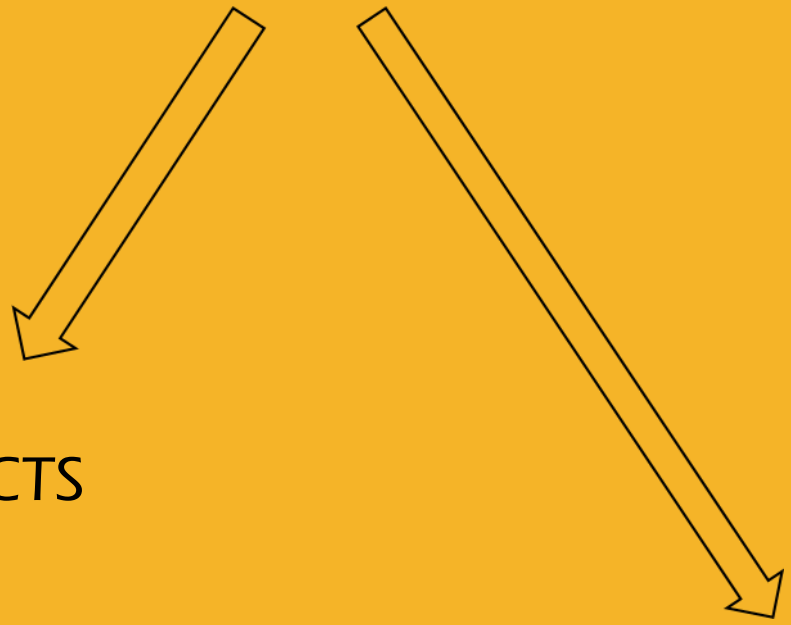
- "Second, regarding the term concerning the fixing of default interest, it should be recalled that, in the light of paragraph 1(e) of the annex to the Directive, read in conjunction with Articles 3(1) and 4(1) of the directive, the national court must assess in particular, as stated by the Advocate General in points 85 to 87 of her Opinion, first, the rules of national law which would apply to the relationship between the parties, in the event of no agreement having been reached in the contract in question or in other consumer contracts of that type and, second, the rate of default interest laid down, compared with the statutory interest rate, in order to determine whether it is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them" (ECJ, 14 March 2013, C-415/11, *Mohamed Aziz*).

- "It is apparent from the considerations stated in paragraphs 17 to 19 of the present judgment and from the documents available to the Court that, to that end, the Tribunal Supremo (Supreme Court) examined the national rules applicable in various branches of law and sought to determine the default rate of interest which could reasonably be agreed to, at the end of an individual negotiation, by a consumer who has been treated fairly and equitably, whilst ensuring in particular that the function of that interest is maintained, which is specifically to deter delays in payment and compensate the creditor in a proportionate manner in the event of such delay. It therefore appears that the Tribunal Supremo (Supreme Court) complied with the requirements set out in particular in the judgment of 14 March 2013, Aziz (C-415/11, EU:C:2013:164, paragraphs 68, 69, 71 and 74)" (ECJ, 7 August 2018, Banco SantanderSA, p. 63).

WHAT ABOUT ITALY?

- "According to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see, inter alia, Case C-78/98 Preston and Others [2000] ECR I-3201, paragraph 31, and Joined Cases C-392/04 and C-422/04 i-21 Germany andArcor [2006] ECR I-0000, paragraph 57)" (ECJ, 26 October 2006, C-168/05, *Elisa María Mostaza Claro*).

- DEFAULT INTERESTS



LOAN CONTRACTS

OTHER CONTRACTS

LOAN CONTRACTS

- USURY

- Legge 7 marzo 1996, n. 108
- Corte di cassazione, Sezioni Unite civili, 18 September 2020, n. 19597:

  i) usury regulation is relevant in the perspective of **public policy**;

  ii) default interests are relevant also in the light of usury legislation;

  iii) although the threshold periodically calculated jointly by the Ministry of the Economy and the Bank of Italy according to legge 108/96 does not consider default interests, usury legislation infringements may be verified -when default interests are at stake- considering the average default interest requested, in the same market area, by banks/financial operators according to Bank of Italy statistical surveys.

- Corte di cassazione, sez. 3, ord. 13 May 2020, n. 8883: it is possible for the judge to access Bank of Italy statistical surveys either directly or through the collaboration of the parties, or through the request of information from the public administration.
- "Accordingly, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy" (ECJ, 6 October 2009, C-40/08, *Asturcom Telecomunicaciones SL*, p. 52).

OTHER CONTRACTS

- Energy/heat supply contracts
- Public resolutions (ARERA resolution, 18 October 2001, n. 229)
- No principle of equivalence (Italy)
- Principle of effectiveness?

- Effective judicial protection vs. right to be judged within reasonable time and without extensive costs?
- Effective judicial protection vs. judicial workloads?