ECJ upholds National Law Precluding Intervention of Consumer Associations in Enforcement Proceedings of an Arbitration Award

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On February 27th, 2014 the Court delivered its ruling in Case C-470/12 *Pohotovost' s.r.o. v Miroslav Vasuta*. The case forms part of the jurisprudential line of the Court on the procedural implications of the Unfair Terms Directive.

The legal issue raised was whether the important role assigned to consumer associations by the Unfair Terms Directive for the protection of consumers should be understood, in conjunction with articles 38 and 47 of the Charter, as precluding national procedural law which does not give standing to consumer associations to intervene in individual disputes involving consumers for the enforcement of a final arbitration award. The Court upholds the compatibility of Slovak procedural law. One more case is currently pending involving the same credit professional, *Pohotovost'*, on the same legal issue (Case C-153/13 *Pohotovost' s.r.o. v Jan Soroka*). In 2010 the Court had also delivered its Order in Case C-76/10 *Pohotovost' s.r.o. v Iveta Korckovska* .

Facts and questions referred

Pohotovost' applied for authorization to enforce a final arbitration award against the consumer. Its application was partially rejected, as far as the default interest and the costs on the recovery of the debt were concerned and upheld for the remaining debt. While the consumer did not appear in the proceedings, a Slovak consumer association sought leave to intervene. It claimed that the enforcement proceedings should be suspended, on grounds of lack of impartiality of the bailiff appointed by the company, but also, on the reason that the court did not properly apply its *ex officio* obligation to protect the consumer, in accordance with the

Pohotovost' Order (Case C-76/10) and the ruling in Case C-40/08 *Asturcom*. However, intervention of consumer associations at the stage of enforcement was not admissible under national procedural law. It was in this context, that the referring court asked for an interpretation of the Unfair Terms Directive in light also of articles 38 and 47 of the Charter.

The decision of the Court

Admissibility of the request

Serious doubts were raised as to whether the case was still *pending*. The company had already withdrawn its application for enforcement and appealed against the decision of the reference for preliminary ruling. The national court maintained its request and indicated that the case was still pending. The Court relied on this finding of its "*privileged interlocutor*" (Opinion AG Wahl [37]) and accepted jurisdiction. Reference to a recent Order of the Court in *BNP Paribas* (Case C-564/12) demonstrates the importance attached to the requirement of an **actual existence of a dispute**. The situation in that latter case was again very different from the Hungarian procedural system in *Cartesio* (Case C-210/06) that had been ruled incompatible with the Treaties.

Reasoning on the merits

The Court first reiterates its line of case-law on the obligation of national courts to raise *ex officio* the unfairness of contractual terms as a means to establish an effective balance between the parties and ensure the effectiveness of the protection under the Unfair Terms Directive. Particularly in the context of enforcement of an arbitration award this obligation arises in so far as the national rules of procedure confer on the courts powers to examine the incompatibility of an arbitration award with *national rules of public policy* (par. 42) (which was the case under Slovak law). With regard to the role of consumer associations for the protection of consumers, the Unfair Terms Directive requires that they are given the right to take an action for injunction against the use of unfair terms (*see* Case C-472/10 *Invitel*) (par.43). However this directive contains no provision on the role of consumer associations in individual disputes (par. 45). Thus, the question of a possible right of intervention in such disputes falls upon the national legal order of a Member State in accordance with the principle of procedural autonomy, framed nevertheless by the principles of equivalence and effectiveness

(par. 46). The Court was also asked to make an interpretation in light of articles 38 and 47 of the Charter. The reasoning followed is within the spirit of Case C-413/12 *Asociacion de Consumidores Independientes de Castilla y Leon*, where the procedural position of consumer associations was distinguished from that of individual consumers as not characterized by the same imbalance.

With respect first to **article 38 of the Charter**, the Court finds that since the Unfair Terms Directive "*does not expressly provide for a right for consumer protection associations to intervene in individual disputes involving consumers, Article 38 of the Charter cannot, by itself, impose an interpretation of that directive which would encompass such a right*" (par. 52). This part of the reasoning seems to confirm the qualification of article 38 of the Charter as a **principle** judicially cognisable under the conditions of article 52(5) Charter (Opinion AG Wahl, par.66; *see* Opinion AG Cruz Villalón Case C-176/12 *Association de médiation sociale*). As long as the Unfair Terms Directive – the legislation giving "*specific substantive and direct expression to the content of the principle*" (AG Cruz Villalón, par.63) contained in article 38 Charter – does not establish a right of intervention, such right cannot find a constitutional foundation alone in article 38 Charter.

Quid on article **47 of the Charter** on a right to effective remedy? Reliance on this right is assessed on the one hand for the consumer and on the other hand for the consumer association. As far as the consumer is concerned, the lack of an intervention right of consumer associations does not breach the right to an effective remedy "*to the extent that Directive 93/13 requires that the national court hearing disputes between consumers and sellers or suppliers take positive action unconnected with the actual parties to the contract*" (par. 53). This part of the reasoning appears to elevate the principle of an active judge to a component of effective judicial protection. Intervention of consumer associations is moreover "*not comparable to the legal aid which under Article 47 of the Charter must be made available, in certain cases, to those who lack sufficient resources*" (art. 53).

As far as the consumer association is concerned the refusal to grant it leave to intervene "*does not affect its right to an effective judicial remedy to protect its rights as an association of that kind, including its rights to collective action*" (par.54). Besides, consumer associations can acquire a procedural role in individual proceedings since under national law, they "*may directly represent consumers in any proceedings, including enforcement proceedings, if mandated*

to do so by the latter" (par. 55).

In consideration of the above the Court concludes that the Unfair Terms Directive read in conjunction with articles 38 and 47 of the Charter "*must be interpreted as not precluding national legislation which does not allow a consumer protection association to intervene in support of a consumer in proceedings for enforcement, against the latter, of a final arbitration award*".

It needs to be noted that Opinion AG Wahl drew also conclusions from the minimum harmonization character of the Unfair Terms Directive in that it would in any event not preclude Member States from providing "*supplementary action… to the court's unconnected, positive action required by that directive*" (par.72).