Consumers' rights strike back! First impressions on C-453/18 and C-494/18 – Bondora

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Introduction

On 19 December 2019, the

Court of Justice of the European Union ("CJEU") rendered its 10th judgment on Regulation
1896/2006 establishing a European Payment Order ("EPO Regulation"). The EPO Regulation introduced the most successful of the uniform civil procedures at European level, allowing creditors the cross-border recovery of pecuniary claims. In this long awaited judgment (particularly by the Spanish tribunals and academia), the CJEU resolved the following inquiry: can tribunals request additional information from the creditor relating to the terms of the agreement in order to examine *ex officio* the
fairness of the terms of the contract invoked as a basis for a European Payment Order ("EPO")?

**Facts
of the case**

The judicial proceedings,
which led to the preliminary references, were brought before the courts of first instance of Vigo and Barcelona, respectively.

Bondora AS, an Estonian registered company, lodged an application for an EPO before the court of first instance of Vigo. Since the defendant was a consumer, that court requested Bondora to provide "the loan agreement and the determination of the amount of the claim" in order to examine the fairness of the

contractual terms on which the application for an EPO was made. Bondora AS refused to do so. It argued that Article 7(2) EPO Regulation of the EPO does not prescribe to creditors the submission of any documentation to issue an EPO. Furthermore, in accordance with Spanish law, creditors do not have provide any documentation when they apply for an EPO (Final Disposition 23, para. 2 Ley 1/2000 de Enjuiciamiento Civil). Conversely, in the view of the court of first instance of Vigo, courts have the power to make such request. This court took into consideration the CJEU decision, *C-618/10, Banco Español de Crédito*, in which the Court found that the Spanish domestic legislation which precluded the examination of the fairness of the contractual terms during the application for a domestic payment order would "deprive consumers of the benefit of the protection intended by Directive 93/13". This judgment caused a modification of the Spanish payment order legislation. That reform expressly authorised Spanish judges to assess *ex officio* the fairness of the terms of the contract between businesses or professionals and a consumer on which the application for a domestic payment order is based.

In this context, the court
of first instance of Vigo decided to refer the following questions to the CJEU:

- *Is*
  Article 7(1) of [Directive 93/13] and the case-law interpreting that directive,
  to be construed as meaning that that article of the directive precludes a national provision, like the 23rd final provision of [the LEC], which provides
  that it is not necessary to submit documents with the application for a European order for payment and that, where documents are submitted, they will
  be ruled inadmissible?
- *Is Article 7(2)(e) of [Regulation No*
  1896/2006] to be construed as meaning that that provision does not preclude a
  creditor institution from being required to submit documents substantiating its
  claim based on a consumer loan entered into between a seller or a supplier and

a consumer, where the court considers it essential to examine the documents in
order to determine whether there are unfair terms in the contract between the
parties, thereby complying with the provisions of [Directive 93/13] and the
case-law interpreting that directive?

In the same year, Bondora
AS requested another EPO against another debtor (XY) before the court of first instance of Barcelona. This court, confronting the same issue as the court of first instance of Vigo, decided to refer the following questions to the CJEU:

- *Is*
  national legislation such as paragraph [2] of the 23rd final provision of the LEC, which does not permit a contract or an itemisation of the debt to be provided or required in a claim in which the defendant is a consumer and where
  there is evidence that the sums being claimed could be based on unfair terms,
  compatible with Article 38 of the Charter, Article 6(1) [TEU] and Articles 6(1)
  and 7(1) of Directive [93/13]?
- *Is*
  it compatible with Article 7(2)(d) of Regulation [No 1896/2006] to require the
  applicant, in a claim against a consumer, to specify the itemisation of the debt he is claiming in Section 11 of standard form A [in Annex 1 to Regulation
  No 1896/2006]? Is it also compatible with that provision to require that the
  content of the contractual terms on the basis of which the applicant is making a
  claim against a consumer, beyond the principal subject matter of the contract,
  be reproduced in Section 11 in order to assess whether they are unfair?
- *If the answer to the second question is*

negative, is it permissible, under the current wording of Regulation No 1896/2006, to ascertain ex officio, prior to the issue of a European payment order, whether an agreement with a consumer contains unfair terms and if so, on what legal basis may that assessment be carried out?

- *In the event that it is not possible to ascertain ex officio, under the current wording of Regulation No 1896/2006, the existence of unfair terms prior to issuing a European payment order, the Court of Justice is requested to rule* on the validity of that regulation in the light of Article 38 of the Charter and Article 6(1) [TEU].

The CJEU decided to reply jointly to both preliminary references.

The CJEU's Reasoning

After a brief overview of the EPO Regulation as such (paras 34-38), the CJEU proceeded to examine the state-of-the-art of consumer protection against unfair contractual terms under Directive 93/13 (paras 39-44). More specifically, the Court referred to its previous judgement C-176/17, *Profi Credit Polska*. In that decision, the CJEU found that Article 7(1) of Directive 93/13 precludes national legislation permitting the issue of an order for payment where the court hearing an application for an order for payment does not have the power to examine the possible unfairness of the terms of that agreement (para. 44). In the Courts' view, the same logic applies to the EPO Regulation. This means that Spanish domestic legislation (the above mentioned Final Disposition 23, para. 2 *Ley 1/2000 de Enjuiciamiento Civil*), which precludes the submission of documentation by the creditor who applied for an EPO, obstructs the courts' obligation to review the fairness of the terms of the contract. At this point, the question is whether there is any legal basis within the EPO Regulation that would allow courts to request the necessary documentation to examine the fairness of the contractual terms. The CJEU found the solution in Article 9(1) of Regulation No 1896/2006 (para. 49). This provision allows courts to request that the claimant complete or rectify the application for the EPO, and since *Bondora*, courts are also entitled to request,

“the reproduction of the entire agreement or the production of a copy thereof, in order to be able to examine the possible unfairness of the contractual terms” (para. 50).

On the basis of the reasoning set out above, the CJEU concluded that a tribunal “seised in the context of a European order for payment procedure” would be entitled “to request from the creditor additional information relating to the terms of the agreement relied on in support of the claim at issue, in order to carry out an *ex officio* review of the possible unfairness of those terms and, consequently, that they preclude national legislation which declares the additional documents provided for that purpose to be inadmissible” (para. 54).

The three viewpoints of the judgment

Bondora is not only interesting for the reasoning behind the judgment as such. This decision is also a good example of the difficulties that could arise from the application and the implementation of a European uniform procedure, as well as the impact that a CJEU judgment could have on the European uniform civil procedures.

- ### A “very Spanish” preliminary reference

The preliminary reference did not come as a surprise for Spanish courts and academia, which have for a long time debated on this issue. There are certain characteristics of the Spanish legislative framework, which made Spain a more likely jurisdiction to refer these kinds of questions to the CJEU than any other Member State.

The main reason arises from the differences between the EPO and the Spanish national payment order. The latter is a documentary payment order, meaning that with the application for a preservation order, creditors have to provide documentation that provides the justification of the claim at stake. This contrasts with the EPO, in which creditors have merely to describe evidence supporting the claim (Article 7(1)(e) EPO Regulation). There were occasions when Spanish courts

observed EPOs in the light of the rules applicable to domestic law, requesting creditors to provide documentation with the application (e.g. Auto Audiencia Provincial de Barcelona (Sec. 11.a) de 21 de noviembre 2012 (Auto num. 212/2012, ECLI:ES:APB:2012:7729A)). Furthermore, after the above-mentioned CJEU decision in C-618/10, Banco Español de Crédito, and the legislative reform that the judgment provoked, disparities between the EPO procedure and the domestic payment order procedure increased, making it difficult for Spanish courts to reconcile both procedures.

Another aspect that has to be taken into consideration is the way the EPO Regulation had been implemented into the Spanish legal system. In the EPO Regulation, as well as the other so-called second-generation procedures, there are many elements to be "fulfilled" by the domestic law of the Member States where they apply. This leaves ground to domestic legislators to approve reforms to these instruments in their respective systems. Concerning the EPO Regulation, the Spanish legislator went a step further than the letter of the Regulation. The Spanish law states explicitly that creditors "do not need to submit any documentation" when they apply for an EPO. This unfortunate wording was one of the grounds on which the creditor, Bondora AS, relied on to avoid submitting the documentation requested by the Spanish courts (para. 22).

All these specific circumstances eventually triggered the preliminary references of this case.

- **Balancing opposing interests**

Concerning the Court's reasoning itself, the CJEU tries to find a compromise between the creditors' and defendants' interests. As the Court states, one of the purposes of the EPO is "to simplify, accelerate and reduce costs in cross-border disputes concerning uncontested pecuniary claims" (para. 36). Nonetheless, the pursuit of those goals cannot be to the detriment of defendants' rights. Particularly, in this case, "the nature and significance of the public interest constituted by the protection of consumers" (para. 42) prevails over creditors' interests.

It appears that the CJEU

tries to mitigate the imbalance favouring creditors that a literal reading of the EPO Regulation could provoke. Indeed, if we strictly observe Article 7 of the EPO Regulation, no documentation might be needed to obtain an EPO. Nonetheless, as it was demostrated, that would undermine the position of consumers.

From a broader perspective, this search for a balance is not exclusive to the EPO Regulation. We can also find it in CJEU judgments concerning other uniform civil procedures. For instance, the recent decision on Regulation 655/2014, establishing a European Account Preservation Order (C-555/18, K.H.K. (*Saisie conservatoire des comptes bancaires*)) is a good example. It seems that the CJEU is trying to mitigate the pro-creditor aspects of these proceedings.

- **The EPO procedure post-*Bondora***

How does *Bondora* affect the EPO procedure? In the conclusion of the judgment, the CJEU merely acknowledged that courts *can* request additional documentation in order to assess the fairness of the terms of the contract which serves as a basis of the EPO (para. 56). Nonetheless, observing the whole of the Court's reasoning, it follows that domestic courts might also be *obliged* to perform a further examination in order to safeguard consumers' rights against unfair contractual terms. The CJEU stated that "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" (para. 43). Does it mean that every time a creditor indicates in the standard form of the EPO application that the defendant is a consumer, the Court has to examine the fairness of the terms of the agreement between the creditor and the consumer? It seems so. The EPO Regulation only requires creditors the description of the "circumstances invoked as the basis of the claim" and the "description of evidence supporting the claim" (Article 7(1) EPO Regulation). This might not be enough for a court to make a proper assessment of the fairness of the contractual terms. AG Sharpston was of the same view. In the Opinion of this case, she affirmed that "the court's examination of the merits of the claim based solely on the information included in form A is, on the face of it, rather superficial, which is hardly likely to ensure effective protection of the consumer concerned" (para. 93). Therefore, unless creditors provide the contractual terms by their own motion in an application for an EPO, domestic courts would have to request them on the basis of Article 9(1) of the EPO Regulation. Only in this way would courts

be able to assure whether the terms of the agreement are fair or not.

As a consequence of the above, the EPO Regulation, although initially a non-documentary procedure largely inspired by the German payment order, might have turned into something resembling a documentary payment order in those cases when there is involved a contract concluded with a consumer. Whereas Spanish courts might welcome this new approach, in other Member States where payment orders are granted in a more automatic manner, Bondora might be a turning point.

In any case, Bondora has already become a key reference for a proper understanding of the EPO Regulation, a procedure on which the CJEU might still have more to say.