Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

19 November 2015*

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court — Consumer protection — Directive 93/13/EEC — Article 1(1) and Article 2(b) — Unfair terms in consumer contracts — Contracts of guarantee or providing security concluded with a credit institution by natural persons acting for purposes outside their trade, business or profession and not having any link of a functional nature with the commercial company in respect of which they act as guarantors or sureties)

In Case C-74/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Oradea (court of appeal of Oradea) (Romania), made by decision of 5 February 2015, received at the Court on 18 February 2015, in the proceedings

Dumitru Tarcău,

Ileana Tarcău

v

Banca Comercială Intesa Sanpaolo România SA and Others,

THE COURT (Sixth Chamber),

composed of A. Borg Barthet, acting as President of the Chamber, M. Berger (Rapporteur) and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Tarcău and Mrs Tarcău, by C. Herța, avocat,

— Banca Comercială Intesa Sanpaolo România SA and Others, by L. Bercea, avocat,

— the Romanian Government, by R. H. Radu, R. I. Hațieganu and A.-G. Văcaru, acting as Agents,

— the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

* Language of the case: Romanian.

— the German Government, by T. Henze and J. Kemper, acting as Agents,

— the Spanish Government, by A. Gavela Llopis, acting as Agent,

— the European Commission, by C. Gheorghiu and D. Roussanov, acting as Agents,

having regard to the decision taken, after hearing the Advocate General, to rule by reasoned order, in accordance with Article 99 of the Rules of Procedure of the Court,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and Article 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 Mr and Mrs Tarcău and Banca Comercială Intesa Sanpaolo România SA and Others concerning a contract providing immovable property as security and a contract of guarantee.

Legal context

EU Law

3 Recitals 9 and 10 of Directive 93/13 are worded as follows:

'… acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts;

… more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; … those rules should apply to all contracts concluded between sellers or suppliers and consumers; … as a result inter alia contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organisation of companies or partnership agreements must be excluded from this Directive.'

4 Article 1(1) of that directive provides that:

'The purpose of this Directive 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 the directive defines the notions of 'consumer' and 'seller or supplier' in the following way:

'For the purposes 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;

(c) “seller or supplier” means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.’

Romanian Law

6 Law No 193/2000 on unfair terms in contracts between traders and consumers (Legea nr. 193/2000 privind clauzele abuzive din contractele încheiate între comercianți și consumatori), in its republished version (*Monitorul Oficial al României*, part I, No 305 of 18 April 2008) is intended to transpose Directive 93/13 into national law.

7 Article 1(1) of that Law provides that:

‘Any contract concluded between traders and consumers for the sale of goods or the provision of services must contain clear terms which are unambiguous and intelligible without the need for specialist knowledge.’

8 Article 2(1) of the same Law states that:

‘A “consumer” means any natural person or group of natural persons forming an association who, on the basis of a contract falling within the ambit of the present law, acts for purposes outside trade, industrial or manufacturing, artisanal or professional activity.’

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

9 On 24 October 2008, a credit agreement was concluded between Banca Comercială Intesa Sanpaolo România SA (‘Sanpaolo’), as lender, and SC Crisco SRL (‘Crisco’), a commercial company, as borrower. Crisco was represented by Cristian Tarcău, in his capacity as sole shareholder and director.

10 At the request of their son, Cristian Tarcău, who wished to obtain an increase in the line of credit which had been granted to Crisco, on 7 August 2009 Dumitru Tarcău and Ileana Tarcău signed an addendum to the credit agreement concluded between that company and Sanpaolo. That addendum restated the essential clauses of the initial credit agreement and added two new forms of security, granted by Mr and Mrs Tarcău, to those established when the contract was originally concluded.

11 The new forms of security, which were intended to secure the repayment of the credit granted to Crisco, were provided by Mr and Mrs Tarcău in the form of a contract providing immovable property as security, dated 7 August 2009, by which they granted a mortgage to Sanpaolo over immovable property belonging to them, and by a contract of guarantee, also dated 7 August 2009, by which they guaranteed the payment of all sums due from Crisco pursuant to the credit agreement.

12 Mr and Mrs Tarcău have stated that they agreed to provide security for the credit granted to Crisco only because their son was the sole shareholder and director of that company.

13 Taking the view that they had acted as consumers and that the provisions of Law No 193/2000 applied to them, Mr and Mrs Tarcău brought the matter before the court of Satu Mare (Tribunalul Satu Mare) seeking the annulment of the addendum of 7 August 2009, the contract providing immovable property as security and the contract of guarantee or, in the alternative, the annulment of certain terms in those contracts which they considered unfair.

14 By judgment of 8 May 2014, the Tribunalul Satu Mare (court of Satu Mare) rejected this request on the ground that, under Article 1(1) of Law No 193/2000, that Law applies only to contracts for the sale of goods or the supply of services to a consumer, a condition which it did not consider to be met in the main proceedings, as the beneficiary of the credit was Crisco. That court also held that the fact that the contract providing immovable property as security and the contract of guarantee were ancillary to the credit agreement did not allow them to be included in the scope of Law No 193/2000 either, given that the beneficiary of the credit was a commercial company which did not have the status of a consumer.

15 Mr and Mrs Tarcău brought an appeal against that judgment before the referring court.

16 In those circumstances the Curtea de Apel Oradae (court of appeal, Oradea) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 2(b) of Directive 93/13/EEC, as regards the definition of “consumer”, be interpreted as including in or, conversely, as excluding from, that definition natural persons who have, as guarantors/sureties, concluded additional acts and contracts (guarantee contracts, contracts providing immovable property as security) ancillary to the credit agreement entered into by a commercial company in order to carry on its activity, in circumstances in which those natural persons have no connection with the activities of the commercial company and have acted for purposes outside their trade, business or profession?

(2) Must Article 1(1) of Directive 93/13/EEC be interpreted as meaning that only contracts concluded between traders and consumers concerning the sale of goods or supply of services fall within the ambit of that directive or as meaning that contracts (contracts of guarantee and of security) ancillary to a credit agreement, the beneficiary of which is a commercial company, concluded by natural persons who have no connection with the activities of that commercial company and who acted for purposes outside their trade, business or profession also fall within the ambit of that directive?’

Consideration of the questions referred

17 Pursuant to Article 99 of its Rules of Procedure, where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

18 It is appropriate to apply that provision in the present reference for a preliminary ruling.

19 By its questions, which should be considered together, the referring court asks, essentially, whether Article 1(1) and Article 2(b) of Directive 93/13 are to be interpreted as meaning that the directive can apply to a contract providing immovable property as security or a contract of guarantee concluded between a natural person and a credit institution in order to secure contractual obligations owed by a commercial company to that credit institution under a credit agreement, where that natural person has no trade, business or professional link with the company.

20 In that regard, it should be observed that the directive applies, as is apparent from Article 1(1) and Article 3(1) thereof, to the terms of ‘contracts concluded between a seller or supplier and a consumer’ which have not been ‘individually negotiated’ (see judgment in *Šiba*, C-537/13, EU:C:2015:14, paragraph 19).

21 As recital 10 of Directive 93/13 states, the uniform rules of law in the matter of unfair terms should apply to 'all contracts' concluded between sellers or suppliers and consumers, as defined in Article 2(b) and (c) of Directive 93/13 (see judgments in *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 29, and *Šiba*, C-537/13, EU:C:2015:14, paragraph 20).

22 The purpose of the contract is thus, subject to the exceptions listed in the recital 10 of Directive 93/13, irrelevant in determining the scope of the directive. In that regard, Directive 93/13 is to be distinguished, in particular, from Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48), which applies only to contracts whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation, which has led the Court to exclude contracts of guarantee from the scope of that directive (judgment in *Berliner Kindl Brauerei*, C-208/98, EU:C:2000:152, paragraphs 17 to 23).

23 It is therefore by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that the directive defines the contracts to which it applies (see judgments in *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 30, and *Šiba*, C-537/13, EU:C:2015:14, paragraph 21).

24 That criterion corresponds to the idea on which the system of protection implemented by the directive is based, namely that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (see judgments in *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 31, and *Šiba*, C-537/13, EU:C:2015:14, paragraph 22).

25 That protection is particularly important in the case of a contract providing security or a contract of guarantee concluded between a banking institution and a consumer. Such a contract is based on a personal commitment of the surety or guarantor to pay a contractual debt owed by a third party. That commitment involves onerous obligations for the person entering into it, the effect of which is to subject that person's own property to a financial risk which is often difficult to quantify.

26 As to whether a natural person who agrees to secure the contractual obligations owed by a commercial company to a banking institution under a credit agreement can be regarded as a 'consumer' within the meaning of Article 2(b) of Directive 93/13, it should be observed that while a contract providing security or a contract of guarantee can be described, with regard to its purpose, as a contract which is ancillary to the principal contract which gives rise to the debt it secures (see, in the context of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31) judgment in *Dietzinger*, C-45/96, EU:C:1998:111, paragraph 18), from the point of view of the contracting parties it presents itself as a distinct contract, as it is concluded between persons other than the parties to the principal contract. It is therefore as parties to the contract providing security or contract of guarantee that the capacity in which those parties acted must be assessed.

27 In that regard, it should be observed that the concept of 'consumer', within the meaning of Article 2(b) of Directive 93/13, is objective in nature (see judgment in *Costea*, C-110/14, EU:C:2015:538, paragraph 21). It must be assessed by reference to a functional criterion, consisting in an assessment of whether the contractual relation at issue has arisen in the course of activities outside a trade, business or profession.

28 The national court before which an action relating to a contract which may be covered by that directive has been brought is required to determine, taking into account all the circumstances of the case and all of the evidence, whether the contracting party in question may be categorised as a 'consumer' within the meaning of that directive (see, to that effect, judgment in *Costea*, C-110/14, EU:C:2015:538, paragraphs 22 and 23).

29 In the case of a natural person who has given security for the performance of the obligations of a commercial company, it is therefore for the national court to establish whether that person acted for purposes relating to his trade, business or profession or because of functional links he has with that company, such as a directorship or a non-negligible shareholding, or whether he acted for purposes of a private nature.

30 In those circumstances, the questions referred should be answered to the effect that 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.

Costs

31 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 (Sixth Chamber) hereby orders:

Articles 1(1) and 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts 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.

[Signatures]