Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 15 July 2021 [1]

Joined Cases C-693/19 and C-831/19

SPV Project 1503 Srl,
Dobank SpA
v
YB (C-693/19)
and
Banco di Desio e della Brianza SpA,
Banca di Credito Cooperativo di Carugate e Inzago Sc,
Intesa Sanpaolo SpA,
Banca Popolare di Sondrio ScpA,
Cerved Credit Management SpA
v
YX,
ZW (C-831/19)

(Request for a preliminary ruling from the Tribunale di Milano (District Court, Milan, Italy))

(Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Articles 6(1) and 7(1) – Principle of effectiveness – Article 47 of the Charter of Fundamental Rights of the European Union – Order for payment procedure – Enforcement proceedings – Order for payment having the force of *res judicata* – Power of the national court responsible for enforcement to examine the unfairness of contractual terms – Principle of *res judicata* – Time-barring)

I. Introduction

1. These two requests for a preliminary ruling submitted by the Tribunale di Milano (District Court, Milan, Italy) concern the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [2] and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). They are situated in the context of proceedings for the enforcement of orders for payment which were not contested and thus became final.

[1] Original language: English.

[2] OJ 1993 L 95, p. 29.

2. The main issue raised by the present cases is essentially whether Articles 6(1) and 7(1) of Directive 93/13 and Article 47 of the Charter preclude national legislation which does not allow the court responsible for enforcement to examine the potential unfairness of the terms of the contract serving as the basis for the order for payment because of the force of *res judicata* acquired by that order.

3. The present cases are being heard by the Court in parallel with three other cases (C-600/19, C-725/19 and C-869/19) in which my Opinions are being delivered today. Those cases are based on Spanish and Romanian requests for preliminary rulings and also touch on similar and potentially sensitive issues relating to the extent of the national court's obligation to examine of its own motion (*ex officio*) the unfairness of contractual terms in accordance with the Court's case-law interpreting Directive 93/13 and the relationship with certain national procedural principles, including the principle of *res judicata*.

4. Consequently, the present cases provide the Court with the opportunity to develop its case-law on Directive 93/13, and in particular to clarify issues regarding the principle of *res judicata* in connection with the judicial review of unfair terms under that directive. The present cases also raise questions concerning the relationship between the principle of effectiveness and Article 47 of the Charter in this context.

II. Legal framework

A. Union law

5. Article 6(1) of Directive 93/13 provides:

'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.'

6. Article 7(1) of Directive 93/13 states:

'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.'

B. Italian law

7. Decreto legislativo n. 206 recante Codice del consumo (Legislative Decree No 206 on the Consumer Code), of 6 September 2005 (Ordinary Supplement to GURI No 235 of 8 October 2005) ('the Consumer Code'), transposed Directive 93/13 into Italian law.

8. Article 633 of the Codice di procedura civile ('the Code of Civil Procedure') states:

'At the request of the creditor of a sum of money or a quantity of fungible goods, or of the recipient of a delivery of a specific good, the competent judge shall issue an order for payment or delivery:

(1) If the right claimed is supported by written evidence;

…'

9. Article 641 of the Code of Civil Procedure states:

'If the conditions provided for in Article 633 are fulfilled, the judge shall order the defendant, by reasoned order to be adopted within 30 days of the filing of the application, to pay the sum or to hand over the goods or the quantity of goods claimed, or in the case of the latter the sum provided for in Article 639, within a period of 40 days, with the explicit notice that that party may within the same period lodge an objection in accordance with the provisions of the following articles, and that in the absence of such an objection, enforcement shall be carried out.

…'

10. Article 647 of the Code of Civil Procedure states:

'If no objection has been lodged within the prescribed time limit, or if the defendant has not taken legal action, the judge that issued the order, at the request, even verbal, of the applicant, shall declare it enforceable. In the first case, the judge must order a new service when it results or appears likely that the defendant did not have knowledge of the order.

Where the order has been declared enforceable in accordance with this article, the objection may no longer be lodged or pursued, subject to the provisions of Article 650, and any security deposited shall be released.'

11. Article 650 of the Code of Civil Procedure states:

'The defendant may lodge an objection even after the expiry of the time limit set in the order if he proves that he did not know about it in time due to irregularities in the notification, or due to a fortuitous event or *force majeure*.

…

The objection shall no longer be admitted once the period of 10 days from the first act of enforcement has elapsed.'

12. Article 2909 of the Codice civile ('the Civil Code') provides:

'Findings made in judgments which have acquired the force of *res judicata* shall be binding in all respects on the parties, their lawful successors and assignees.'

III. Facts, main proceedings and questions referred

A. Case C-693/19, SPV Project 1503 and Others

13. According to the order for reference, YB, as a consumer, entered into three loan contracts for an amount totalling EUR 18 200 with Findomestic Banca SpA. That company later assigned its claim to Activa Factor SpA, which, in turn, assigned that claim to SPV Project 1503 Srl ('SPV'). Under the terms of those contracts, in the event of late payment, a penalty and default interest were to apply.

14. By decision of 10 July 2012, the competent court issued an order for payment against YB, corresponding to the amount of EUR 16 290.52 in respect of sums due under the loan contracts plus interest for late payment pursuant to those terms. YB did not object to the order for payment, which therefore become final.

15. Thereafter, SPV served YB with an attachment order, dated 21 September 2016, for claims that YB held against third parties in the amount of EUR 31 332, comprising EUR 16 290.52 in capital and EUR 13 539.27 in interest as referred to in the order for payment, with the remainder consisting of expenses and fees.

16. SPV and another creditor then initiated enforcement proceedings against YB before the referring court.

17. In the course of those proceedings, the referring court considered that the term relating to the calculation of the default interest rate, which was more than 14% per year, could be unfair. It ordered SPV to produce the loan contracts on the basis of which the order for payment was issued and invited YB to indicate the intention to invoke the unfairness of the terms regarding default interest which, if established, could potentially reduce SPV's claim. In response, YB invoked the unfairness of the term relating to the calculation of default interest. The referring court noted the possibility of examining *ex officio* the unfairness of that term and fixed a hearing to allow the parties to take a position on the matter. In that regard, SPV argued, inter alia, that the force of *res judicata* acquired by the order for payment could not be overridden.

18. The referring court explains that, according to the case-law of the Corte suprema di cassazione (Supreme Court of Cassation, Italy), the principle of *res judicata* covers not only the actual delivery of the decision, but also the reasons which form, albeit implicitly, its logical and legal basis. This approach applies to an order for payment requiring the payment of a sum of money, which, if not contested, becomes final in relation to the claim in respect of which the action is brought, as well as the instrument issued in respect of that claim, thus precluding any further examination of the reasons adduced to justify that application. Thus, the principle, which is derived from national case-law and referred to as the implicit force of *res judicata*, is based on the reasoning that if the court has ruled on a particular matter, it has dealt with all the other matters considered preliminary to the matter actually decided and has found that they do not preclude its ruling.

19. The referring court points out that, as in this case, once an order for payment is obtained, the creditor may, by giving notice of the attachment, initiate enforcement proceedings, referred to as compulsory expropriation proceedings under national law, and that, in the case of expropriation from third parties, the creditor undertakes compulsory expropriation on the basis of the order for payment as an enforceable instrument in respect of the claims that the debtor has against third

parties. In the enforcement proceedings, the court may exercise powers of its own motion aimed at verifying the existence of the enforceable instrument and the correct quantification of the claim, but this does not extend to the intrinsic content of that instrument.

20. The referring court doubts whether the terms quantifying the default interest and providing for a penalty comply with the Consumer Code and Directive 93/13. According to the referring court, the court that issued the order for payment did not review the potential unfairness of those terms. However, under national law, since YB did not contest the order, it became final and the question whether the terms of the loan contracts are unfair is subject to the implicit force of *res judicata*. It follows that the referring court, as the enforcement court, cannot find that the terms are unfair, since it is prevented under national law from assessing the content of the order for payment and that order has acquired the force of *res judicata*.

21. The referring court observes that, according to the Court's case-law on Directive 93/13, the principle of *res judicata* may be disregarded under certain conditions. The referring court therefore wonders whether the need to replace the formal balance between the contracting parties with an effective balance that re-establishes equality between them allows the enforcement court to inform the consumer of the potential unfairness of contractual terms which has not been explicitly ruled out by the order that has become final and, if the consumer wishes to rely on the unfairness of those terms, whether the same court can carry out such an examination, since the failure to do so could result in incomplete and inadequate consumer protection. The referring court notes that, as regards Article 47 of the Charter, the court's initiative in informing the consumer of a possible infringement of consumer protection rules does not undermine its impartiality and that the Court has attached particular importance to that provision from the point of view of the effectiveness of the rights derived from Directive 93/13.

22. It was in those circumstances that the Tribunale di Milano (District Court, Milan) decided to stay the main proceedings and to refer the following question to the Court for a preliminary ruling:

'Under what conditions, if any, do Articles 6 and 7 of Directive 93/13/EEC and Article 47 of [the Charter] preclude a national law, such as the one referred to, which prevents the enforcement court from performing a review of the content of a judicial enforceable instrument that has become final and, where a consumer has expressed his or her desire to rely on the unfairness of a term contained in the contract in respect of which the enforceable instrument was issued, precludes the same court from overriding the effects of the implicit force of *res judicata*?'

B. Case C-831/19, Banco di Desio e della Brianza and Others

23. According to the order for reference, on 18 November 2005, Banco di Desio e della Brianza SpA ('BDB') concluded with YX and ZW guarantee contracts which were intended as security for loans taken out by the commercial company Bimecar Trade Srl.

24. By decision of 20 December 2012, the Tribunale di Monza (District Court, Monza, Italy) issued an order for payment in favour of BDB against, inter alia, YX and ZW. That order was not contested and therefore became final.

25. Subsequently, BDB initiated enforcement proceedings before the Tribunale di Milano (District Court, Milan) for the expropriation of property in respect of assets owned half each by YX and ZW, who are married. Bimecar Trade and other creditors of YX and ZW joined those proceedings.

26. YX and ZW appeared in the enforcement proceedings. At the referring court's request, BDB produced the guarantee contracts. The referring court considered that, while YX's consumer status was excluded since he was the legal representative of Bimecar Trade and a 51% shareholder in it, ZW could qualify as a consumer because she was a 22% shareholder in that company and apparently had not held any position of responsibility within it. To establish her consumer status, ZW produced the deed of transfer, dated 29 January 2013, by which she became a shareholder in Bimecar Trade, along with documents establishing that she has been an employee of another company since 1976. ZW also expressed her intention to invoke the unfairness of a number of terms contained in the contracts concluded with all the creditors on the basis of the Consumer Code. BDB and the other creditors argued, inter alia, that ZW was not a consumer and the force of *res judicata* acquired by the order for payment could not be overridden.

27. The referring court explains, in similar terms as that set out in Case C-693/19, that, under national law and case-law, the implicit force of *res judicata* is based on the reasoning that, if the court has ruled on a certain matter, it has necessarily resolved all the other issues preceding the matter expressly decided, and this approach applies to orders for payment. Once an order is obtained, the creditor initiates enforcement proceedings and, with the expropriation of property, as in this case, the creditor, based on that order as an enforceable instrument, expropriates, by serving a notice of attachment, property owned by the debtor.

28. The referring court indicates that, since ZW can be regarded as a consumer, it has doubts whether the term contained in the guarantee contract between BDB and ZW, designating a court with territorial jurisdiction which is not that of the consumer's domicile, complies with the Consumer Code and Directive 93/13. Since ZW did not contest the order for payment, that order acquired the force of *res judicata* and the question whether the terms of the guarantee contract are unfair is subject to the implicit force of *res judicata*. While the creditors contend that the referring court is precluded from examining whether those terms are unfair, particularly in the light of the judgment of 6 October 2009, *Asturcom Telecomunicaciones*,[3] the referring court wonders whether that judgment is applicable, given the differences between the national systems concerned and the circumstances of the present case.

29. In that regard, the referring court points out that ZW has assumed an active role in the enforcement proceedings and that when the order for payment was issued, the Court's case-law,[4] establishing the criteria for classifying a guarantor such as ZW as a consumer had not been delivered. Nor had the case-law of the Corte suprema di cassazione (Supreme Court of Cassation) yet taken a similar approach,[5] but at the time had excluded a natural person acting as a guarantor for a commercial company as a consumer.[6] Consequently, ZW was unable to assert that the terms were unfair in an objection to the order for payment, as this was only possible after the enforcement proceedings had commenced, when that order could not be overturned

[3] C-40/08, EU:C:2009:615.

[4] The referring court mentions, in that regard, the orders of 19 November 2015, *Tarcău* (C-74/15, EU:C:2015:772), and of 14 September 2016, *Dumitraș* (C-534/15, EU:C:2016:700).

[5] The referring court mentions, in that regard, the judgment of 13 December 2018 (No 32225).

[6] The referring court mentions, inter alia, the judgments of 13 May 2005 (No 10107) and of 9 August 2016 (No 16827).

under national law. The referring court queries whether, in such a situation, the national legislation makes it impossible or excessively difficult for consumers to exercise the rights conferred by Directive 93/13.

30. The referring court observes that, in the judgment of 26 January 2017, *Banco Primus*,[7] the Court ruled out the possibility of overriding the explicit force of *res judicata*, but that it has not yet examined the compatibility of the implicit force of *res judicata* with Articles 6 and 7 of Directive 93/13 and Article 47 of the Charter. According to the referring court, it is likely that, when issuing the order for payment, the court did not examine the unfairness of the contractual terms, since the possibility of qualifying ZW as a consumer was excluded. The referring court therefore wonders whether Articles 6 and 7 of Directive 93/13 and Article 47 of the Charter allow the implicit force of *res judicata* to be overridden where it results in the consumer being deprived of the right to an effective remedy and rights derived from that directive.

31. It was in those circumstances that the Tribunale di Milano (District Court, Milan) decided to stay the main proceedings and to refer the following questions to the Court for a preliminary ruling:

'(a) Under what conditions, if any, do the combined provisions of Articles 6 and 7 of Directive 93/13/EEC and Article 47 of [the Charter] preclude a national rule, such as that under consideration, which prevents the court hearing enforcement proceedings from carrying out a review of the content of an enforceable judicial instrument that has acquired the force of *res judicata*, when the consumer, having become aware of his [or her] status (an awareness not previously possible under the law as applied at the relevant time), requests such a review?

(b) Under what conditions, if any, do the combined provisions of Articles 6 and 7 of Directive 93/13/EEC and Article 47 of [the Charter] preclude a legal system, such as the national system under consideration, which, in the light of an implicit decision that a contractual term is fair, a decision having acquired the force of *res judicata*, prevents the court hearing enforcement proceedings, called upon to rule on the consumer's objection to the enforcement, from finding the term to be unfair? Moreover, can such a court be so precluded where – under the law as it was applied at the time that decision acquired the force of *res judicata* – it was not possible to consider whether the term was unfair because the guarantor could not be classified as a consumer?'

IV. Procedure before the Court

32. Written observations were submitted to the Court in Case C-693/19 by the Spanish, Italian and Hungarian Governments and the Commission, and in Case C-831/19 by BDB, ZW,[8] the Spanish and Italian Governments and the Commission.

33. A joint hearing was held on 27 April 2021 at which BDB, ZW, the German, Spanish and Italian Governments and the Commission presented oral argument.

[7] C-421/14, EU:C:2017:60 ('the *Banco Primus* judgment').

[8] It is noted that YX submitted written observations in the interest of ZW.

V. Summary of the observations of the parties

34. BDB submits that the question in Case C-831/19 is inadmissible because ZW does not qualify as a consumer and thus Directive 93/13 is not applicable. In any event, it asserts that the decision on the validity of the contractual terms became final, without ZW having objected or invoked consumer status. Under the Court's case-law, *res judicata* cannot be overridden, even in the face of violations of Union law, and, as it emphasised at the hearing, the protection granted to consumers in Directive 93/13 does not outweigh legal certainty.

35. ZW claims that it is evident in Case C-831/19 that she qualifies as a consumer under Directive 93/13. ZW explains that she did not lodge an objection to the order for payment due to national case-law, which excluded persons in her position as consumers, but has since been changed in line with the Court's case-law. As ZW argued at the hearing, to deny the possibility for the enforcement court to review terms whose unfairness was not examined when the order was issued would deprive consumers of effective protection under Directive 93/13.

36. The German Government submits that the division of tasks between the court ruling on the merits and the enforcement court is based on the principle of national procedural autonomy, and Directive 93/13 does not require a substantive review in the enforcement procedure, as long as the first procedure offers the consumer sufficient opportunity to assert the rights conferred by Directive 93/13. Thus, if, as it appears in the present cases, the national system provides for the judicial review of unfair terms at the order for payment stage, there is no need for a second check at the enforcement stage.

37. The Spanish Government claims that Articles 6 and 7 of Directive 93/13 do not preclude the national legislation at issue. In matters of unfair terms, the Union legal order does not require the national court to review indefinitely a claim that has been the subject of a final judicial decision, which applies when the consumer has not made timely use of the remedies provided for in national law, and the possibility to review unfair terms outside the procedure foreseen for this purpose results in a loss of effectiveness of the enforcement procedure. As it argued at the hearing, the principle of effectiveness requires that national legislation be analysed in terms of the national procedural system as a whole and, contrary to what the Commission contends, the present cases concern *res judicata*. It adds that, as regards Case C-831/19, the fact that when the order for payment became *res judicata* the Court had not yet given its rulings on the criteria for a guarantor to be regarded as a consumer does not affect its position.

38. The Italian Government argues that Articles 6 and 7 of Directive 93/13 do not preclude the national legislation at issue. The present cases differ from the Court's previous case-law, and that legislation respects the principle of equivalence, since the enforcement court cannot re-examine *ex officio* the conditions for issuing an order for payment having the force of *res judicata*, even where this concerns possible infringement of public policy rules. As it emphasised at the hearing, the court ruling on the order can examine *ex officio* the unfairness of contractual terms and the consumer is afforded remedies to prevent being bound by such terms, yet if the court has not done so and the consumer has not used such remedies, the enforcement court cannot avoid enforcing the decision based on the order; that decision implicitly excludes the unfair nature of contractual terms, since otherwise it could not have been issued. Contrary to the Commission's position in Case C-693/19, whatever the cause of invalidity of the term on which the creditor's right is based, from the moment this right is established, even if implicitly, by way of a decision having *res judicata*, that invalidity can no longer be declared by the court that must enforce it, and this also applies in cases involving excessive interest. It adds that, as regards Case C-831/19,

it is irrelevant that Union and national case-law recognising a guarantor as a consumer did not exist when the decision on the order was taken, since the court could have made use of the preliminary ruling procedure.

39. The Hungarian Government contends that, as regards Case C-693/19, Articles 6 and 7 of Directive 93/13 and Article 47 of the Charter do not preclude the national legislation at issue. It asserts that the *res judicata* acquired in the absence of an objection by the debtor cannot be disregarded, and allowing the enforcement court to review the unfairness of the terms of the contract on which the order for payment is based would render the order for payment procedure meaningless.

40. The Commission submits that, as regards Case C-693/19, Articles 6(1) and 7(1) of Directive 93/13 do not preclude the national legislation at issue, provided that it allows the court to verify whether a term relating to the payment of interest in the event of non-performance or delay in performance of a contractual obligation is potentially unfair and thus to disregard it. This may be the case if it makes it possible to establish the legal non-existence of an enforcement instrument limited to the claim relating to that interest or if it allows the court to limit enforcement, when awarding the sums, to the claim resulting from the removal of the interest deemed excessive. However, if that legislation were to be interpreted as not allowing the court to establish the existence of unfair terms, it is contrary to Articles 6 and 7 of Directive 93/13, read in the light of the principle of effectiveness. It asserts that the authority of *res judicata* does not cover an order for payment in respect of interest on a claim where the rate is unreasonably high,[9] and if it is within the enforcement court's power to verify that the enforcement is carried out by virtue of a valid instrument, in accordance with the principle of equivalence, that same power includes the power to determine the absence of infringements of public policy rules, such as Article 6(1) of Directive 93/13.

41. The Commission contends that, as regards Case C-831/19, the two questions should be answered together to the effect that Articles 6(1) and 7(1) of Directive 93/13 do not preclude the national legislation at issue, provided that it enables the enforcement court to examine whether a term is unfair and to disregard that term accordingly. Otherwise, that legislation is not consistent with those provisions, read in the light of the principle of effectiveness. In its view, the contracts concluded with ZW fall within the scope of Directive 93/13, and the lateness of ZW's awareness of her consumer status is not relevant. In this case, as with Case C-693/19, Article 47 of the Charter should be regarded as a provision in the light of which Article 7(1) of Directive 93/13 is to be interpreted, and the final nature of the order for payment derives from time-barring, and not from *res judicata*. It argues that the *ex officio* review of unfair terms must be the subject of an explicit and duly reasoned assessment by the national court. As it emphasised at the hearing, the courts that issued the orders in the present cases did not review the unfairness of the contractual terms, and it is not enough that the possibility of an unfair term can be identified; the court must do so.

VI. Analysis

42. By its question in Case C-693/19, which corresponds in substance to the first question in Case C-831/19, the referring court essentially asks the Court whether Articles 6(1) and 7(1) of Directive 93/13 and Article 47 of the Charter preclude national legislation which prevents the enforcement court from examining the content of an order for payment which has become *res judicata* and

[9] The Commission refers, in that regard, to the order of the Tribunale di Macerata (District Court, Macerata, Italy) of 1 March 2019.

from setting aside the effects of the implicit force of *res judicata* where the consumer has expressed the intention to rely on the unfairness of a term in the contract on the basis of which that order was obtained.

43. By its second question in Case C-831/19, the referring court, in substance, seeks to ascertain whether Articles 6(1) and 7(1) of Directive 93/13 and Article 47 of the Charter preclude national legislation which, by virtue of the implicit force of *res judicata*, prevents the enforcement court, seised of an objection to the enforcement by the consumer, from examining the unfairness of contractual terms, taking into account that, under the national law in force at the time of the formation of *res judicata*, the assessment of unfair terms was excluded because the guarantor could not be considered to qualify as a consumer.

44. As is apparent from the order for reference and the observations of the Italian Government, these two questions arise from the procedural arrangements concerning the enforcement of orders for payment as set out in Italian law, according to which an order that forms the basis for subsequent enforcement proceedings and the attachment of assets by creditors becomes final and acquires the force of *res judicata* because the consumer, as the debtor, does not bring an objection against it within the prescribed time limit. In the case of an uncontested order for payment, the unfairness of the terms of the contract on the basis of which that order was issued is thereby regarded as being subject to the implicit force of *res judicata*, that is to say, *res judicata* by implication. In addition, national law provides that the court which issues the order may examine *ex officio* the potential unfairness of the contractual terms, and if the consumer lodges an objection, the court ruling on that objection may also carry out an *ex officio* review of the unfairness of those terms. However, it seems to be established that, in the present cases, the courts issued orders for payment which were not contested by the consumers and without there being any indication at that stage of any examination of the presence of unfair terms.

45. Consequently, it seems to me that these two questions can be answered together, since they turn on a central aspect, namely, the consistency with Union law of national legislation that does not allow the unfairness of the terms of the contract serving as the basis for the order for payment to be reviewed by the enforcement court on account of the implicit force of *res judicata* acquired by that order.

46. With a view to answering those questions, I will first address BDB's arguments concerning the admissibility of the question referred in Case C-831/19 (section A). Turning to the substance of Cases C-693/19 and C-831/19, I will next provide some preliminary observations on the late awareness of ZW's consumer status in Case C-831/19 and the potential relevance of Article 47 of the Charter in this context (section B). I will then consider the Court's case-law regarding the national court's *ex officio* review of unfair terms under Directive 93/13 (section C) and the application of the principles developed in that case-law to the circumstances of the present cases (section D).

47. On the basis of that analysis, I have reached the conclusion that the question referred in Case C-831/19 is admissible and that Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, preclude national legislation such as that at issue.

A. The admissibility of the question referred in Case C-831/19

48. According to the arguments put forward by BDB, the question referred in Case C-831/19 is inadmissible because ZW does not qualify as a consumer, thus rendering Directive 93/13 inapplicable.

49. In my view, those arguments should be rejected.

50. It is apparent that ZW can be classified as a consumer by the referring court in the light of the Court's case-law.

51. It should be recalled that, as stated in the tenth recital of Directive 93/13, the uniform rules on unfair terms therein apply to 'all contracts' concluded between a consumer and a seller or supplier, as defined, respectively, in Article 2(b) and (c) of that directive.[10] According to Article 2(b) thereof, a consumer means any natural person who, in contracts covered by that directive, is acting for purposes which are outside his or her trade, business or profession.[11] It is therefore by reference to the capacity of the contracting parties that Directive 93/13 defines the contracts to which it applies.[12] The broad definition of consumer makes it possible to ensure the protection afforded by Directive 93/13 to all natural persons who find themselves in a weaker position vis-à-vis the seller or supplier.[13]

52. In that connection, in the orders of 19 November 2015, *Tarcău*,[14] and of 14 September 2016, *Dumitraş*,[15] the Court held that Directive 93/13 is applicable to a guarantee contract concluded between a natural person and a credit institution in order to secure contractual obligations owed by a commercial company to that institution under a credit agreement, where that person acted for purposes outside his or her trade, business or profession and has no link of a functional nature with that company. It is therefore for the national court, taking account of all the circumstances and the evidence, to establish whether that person acted for purposes relating to his or her trade, business or profession or because of functional links he or she has with that company, such as a directorship or a non-negligible shareholding, or whether he or she acted for purposes of a private nature.

53. In the present case, as the referring court has indicated, ZW can be regarded as a consumer, in so far as at the time when the guarantee contracts were concluded with BDB and the other creditors, ZW was acting outside of her professional activities and had no functional links with Bimecar Trade. Indeed, the referring court pointed out that, having regard to the documents submitted by ZW in the enforcement proceedings as referred to in point 26 of this Opinion, ZW acquired a 22% shareholding in Bimecar Trade on 31 January 2013, whereas the guarantee contracts between ZW and all the creditors bear an earlier date, and the order for payment obtained by BDB also predates ZW's acquisition of those shares. In addition, according to the

[10] See judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraph 29), and order of 27 April 2017, *Bachman* (C-535/16, not published, EU:C:2017:321, paragraph 32).

[11] See judgments of 2 April 2020, *Condominio di Milano, via Meda* (C-329/19, EU:C:2020:263, paragraph 24), and of 9 July 2020, *Raiffeisen Bank and BRD Groupe Societé Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraph 70).

[12] See judgments of 30 May 2013, *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraph 30), and of 3 September 2015, *Costea* (C-110/14, EU:C:2015:538, paragraph 17).

[13] See judgment of 21 March 2019, *Pouvin and Dijoux* (C-590/17, EU:C:2019:232, paragraph 28).

[14] C-74/15, EU:C:2015:772, in particular paragraphs 26 to 30.

[15] C-534/15, EU:C:2016:700, in particular paragraphs 31 to 34.

referring court, ZW has been linked to another company by an employment relationship since 1976 and when the guarantee contracts were concluded, ZW did not occupy any management function in Bimecar Trade.

54. Consequently, it should be considered that, subject to verification by the referring court, ZW qualifies as a consumer under Directive 93/13 and thus that directive is applicable to the main proceedings.

55. Therefore, I am of the opinion that the question referred in Case C-831/19 is admissible.

B. Preliminary observations

1. Late awareness of consumer status in Case C-831/19

56. I note that there is an additional element in the second question in Case C-831/19, which arises from the fact that, when the order for payment which was the subject of the enforcement proceedings acquired the force of *res judicata*, ZW, as the guarantor, apparently could not have been aware of her status as a consumer and thus was not able to invoke the unfairness of the contractual terms during the time period for lodging an objection to the order. In that regard, the fact that, as indicated by the referring court and ZW (see points 29 and 35 of this Opinion), Union and national case-law recognising guarantors as consumers under Directive 93/13 had not yet been delivered during the time when the order for payment was issued and the consumer could have lodged an objection to the order does not seem to me to be a relevant consideration in this case.

57. It follows from the Court's established case-law (see point 63 of this Opinion) that Directive 93/13 requires an *ex officio* review of unfair terms by a national court and, as indicated by the Commission, a request by a party, such as the consumer, cannot in itself serve as a substitute for the judicial review of unfair terms under that directive. Indeed, a consumer's late awareness of his or her status underlies the rationale for the existence of that obligation in the Court's case-law. Moreover, as indicated by the Spanish and Italian Governments and the Commission, there are clear indications from Directive 93/13, particularly the tenth recital thereof, that it applies to 'all contracts' (see point 51 of this Opinion), and there was nothing to prevent an examination of the unfairness of the contractual terms by the competent court, which could have submitted a request for a preliminary ruling.

2. Potential relevance of Article 47 of the Charter

58. In its questions, the referring court also asks whether the national legislation at issue is consistent with Article 47 of the Charter. It should be recalled that that provision, which constitutes a reaffirmation of the principle of effective judicial protection, enshrines the right to an effective remedy before a tribunal for every person whose rights and freedoms guaranteed by Union law are infringed.[16] There is no dispute about the applicability of Article 47 of the Charter

[16] See judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 40).

in the present cases. It seems to me that, as indicated by the Italian Republic, the national legislation at issue falls within the scope of Directive 93/13 and thus constitutes an implementation of Union law for the purposes of Article 51(1) of the Charter. [17]

59. I observe that, in the Court's case-law on Directive 93/13, there is a particular relationship between Article 47 of the Charter and the principle of effectiveness, which also embodies an obligation on the Member States to ensure the judicial protection of rights based on Union law (see point 65 of this Opinion). [18] In that regard, the Court has held that the obligation for the Member States to ensure the effectiveness of the rights that individuals derive from Directive 93/13 implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter, which applies, inter alia, to the detailed procedural rules relating to actions based on such rights. [19]

60. Furthermore, as illustrated by the Court's case-law on Directive 93/13 so far, Article 47 of the Charter appears to perform, to a large extent, a supporting or complementary role relative to the principle of effectiveness in connection with the assessment of the compatibility of national procedural rules with the requirements of that directive. For example, Article 47 of the Charter comes into play in this context with regard to matters relating to access to an effective remedy so that parties can exercise their rights based on Directive 93/13, [20] as well as matters relating to a fair trial, such as respect for the principles of equality of arms and *audi alteram partem* in the context of court proceedings where the lawfulness of terms with regard to that directive are at issue. [21]

61. In the present cases, there is no dispute that, as indicated by the Italian Government, the parties have been afforded access to effective remedies enabling them to assert their rights under Directive 93/13. Moreover, as indicated by the Commission, the questions are concerned not with the impartiality of the enforcement court, [22] but rather with the possibility of that court examining the unfairness of contractual terms which could be regarded as having been implicitly ruled on by a judicial decision which acquired the force of *res judicata*. Therefore, in those circumstances, notwithstanding the consideration of Article 47 of the Charter where warranted, these cases should be regarded as being centred on Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness.

17 See, in that regard, judgment of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 47); see also Opinion of Advocate General Szpunar in *Finanmadrid EFC* (C-49/14, EU:C:2015:746, points 83 and 84).

18 See, in that regard, Opinion of Advocate General Szpunar in *Finanmadrid EFC* (C-49/14, EU:C:2015:746, points 85 to 97). See further, for example, van Duin, A., 'Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC', *Journal of European Consumer and Market Law*, vol. 6, 2017, pp. 190-198.

19 See judgment of 10 June 2021, *VB and Others* (C-776/19 to C-782/19, EU:C:2021:470, paragraph 29).

20 See, inter alia, judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, in particular paragraph 59); of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, in particular paragraphs 45, 47 and 66); and of 21 December 2016, *Biuro podróży 'Partner'* (C-119/15, EU:C:2016:987, paragraphs 23 to 47); compare judgment of 27 February 2014, *Pohotovosť* (C-470/12, EU:C:2014:101, paragraphs 36 to 57).

21 See, inter alia, judgments of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraphs 29 to 36); of 17 July 2014, *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraphs 21 to 51); and of 29 April 2021, *Rzecznik Praw Obywatelskich* (C-19/20, EU:C:2021:341, paragraphs 91 to 99); compare order of 16 July 2015, *Sánchez Morcillo and Abril García* (C-539/14, EU:C:2015:508, paragraphs 23 to 50).

22 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. See, in that regard, Beka, A., *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion*, Intersentia, 2018, pp. 140-141.

C. Pertinent case-law of the Court on the ex officio review of unfair terms by national courts

62. Article 6(1) of Directive 93/13 requires the Member States to lay down that unfair terms used in consumer contracts are not binding on the consumer. [23] Article 7(1) of that directive, read in conjunction with the twenty-fourth recital thereof, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in consumer contracts. [24] While those provisions have given rise to an extensive body of case-law, I will outline the applicable principles drawn from that case-law relating to the existence and extent of the national court's duty to review *ex officio* the unfairness of contractual terms which are most pertinent to my analysis of the present cases.

1. Existence of the national court's duty of ex officio *review*

63. According to settled case-law, the system of protection implemented by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier as regards both bargaining power and level of knowledge, which 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. [25] In order to guarantee the protection intended by Directive 93/13, the imbalance that exists between the consumer and the seller or supplier may be corrected only by positive action unconnected to the parties to the contract. [26] Therefore, in the light of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, the national court is required to assess of its own motion whether a contractual term is unfair and, in doing so, compensate for that imbalance between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task. [27]

2. Extent of the national court's duty of ex officio *review*

64. Under equally consistent case-law, Directive 93/13 requires the Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair. [28] The Court has also emphasised that the specific characteristics of court proceedings which take place under national law between consumers and sellers or suppliers cannot constitute a factor which is liable to affect the legal protection from which consumers must benefit under Directive 93/13. [29]

65. While the Court has defined, in a number of respects and taking account of the requirements of Articles 6(1) and 7(1) of Directive 93/13, the way in which national courts must ensure that the rights which consumers derive from that directive are protected, the fact remains that, in the

[23] See judgment of 27 January 2021, *Dexia Nederland* (C-229/19 and C-289/19, EU:C:2021:68, paragraph 57). See also the twenty-first recital of Directive 93/13. As the Court has recognised, Article 6(1) of Directive 93/13 is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them. See judgment of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraph 24).

[24] See judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Societé Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraph 52).

[25] See judgments of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 25), and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 49).

[26] See judgments of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, paragraph 48), and of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraph 25).

[27] See judgments of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350, paragraphs 31 and 32), and of 4 June 2020, *Kancelaria Medius* (C-495/19, EU:C:2020:431, paragraph 37).

[28] See judgment of 3 March 2020, *Gómez del Moral Guasch* (C-125/18, EU:C:2020:138, paragraph 44).

[29] See judgment of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 50).

absence of Union harmonisation, the rules governing the procedures applicable to examining whether a contractual term is unfair fall within the legal systems of the Member States, provided they are not less favourable than those governing similar domestic actions (principle of equivalence) and do not make it impossible or excessively difficult to exercise the rights conferred by Union law (principle of effectiveness). [30]

66. As regards the principle of effectiveness, the Court has held that every case in which the question arises as to whether a national procedural rule makes the application of Union law impossible or excessively difficult must be analysed by reference to the role of that rule in the procedure, its conduct and its special features viewed as a whole, along with, where relevant, the principles underlying the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings. [31] In that connection, the Court has considered that the need to comply with that principle cannot be stretched so far as to make up fully for the total inertia on the part of the consumer. [32]

67. In particular, the Court has ruled that the effective protection of the rights conferred on consumers by Directive 93/13 can be guaranteed only if the national procedural system allows the court, during the order for payment proceedings or the enforcement proceedings concerning an order for payment, to check of its own motion whether terms of the contract are unfair. [33] Thus, in a case in which the national court's *ex officio* review of unfair terms is not provided for at the enforcement stage of the order for payment, a national law is regarded as undermining the effectiveness of the protection afforded by Directive 93/13 if it does not provide for such an examination when the order is granted or, in the case where such an examination is provided for only when an objection is lodged against the order granted, if there is a significant risk that consumers will not lodge the objection required. [34] Directive 93/13 therefore precludes national legislation which allows an order for payment to be issued without allowing the consumer to benefit, at any time during the proceedings, from the guarantee of a check that there are no unfair terms undertaken by the court. [35]

68. Furthermore, the Court has recognised that consumer protection is not absolute and that Union law does not require a national court to disapply domestic procedural rules conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, regardless of its nature, contained in Directive 93/13. [36] Indeed, the Court has emphasised the importance, both for the Union legal order and the national legal systems, of the principle of *res judicata*, and that, in order to ensure stability of the law and legal relations as well as the sound administration of justice, judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights can no longer be called into question. [37] Likewise, in the interests of legal certainty, it is

30 See judgment of 26 June 2019, *Kuhar* (C-407/18, EU:C:2019:537, paragraphs 45 and 46).

31 See judgment of 22 April 2021, *PROFI CREDIT Slovakia* (C-485/19, EU:C:2021:313, paragraph 53).

32 See judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 62).

33 See judgment of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711, paragraph 44).

34 See judgment of 20 September 2018, *Danko and Danková* (C-448/17, EU:C:2018:745, paragraph 46 and point 2 of the operative part).

35 See judgment of 20 September 2018, *Danko and Danková* (C-448/17, EU:C:2018:745, paragraph 49).

36 See judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 68).

37 See judgment of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60, paragraph 46).

compatible with Union law to lay down reasonable time limits for bringing actions on pain of foreclosure.[38] However, national legislation must not adversely affect the substance of the right of consumers under Article 6(1) of Directive 93/13 not to be bound by unfair terms.[39]

69. It should be noted that, in the judgment of 6 October 2009, *Asturcom Telecomunicaciones*,[40] the Court held, in particular, that national rules imposing a two-month time limit, upon the expiry of which, in the absence of any action for annulment, an arbitration award had become final and thus had acquired *res judicata*, were consistent with the principle of effectiveness, noting that that principle could not be stretched so far as to make up fully for the total inertia on the part of a consumer who had not brought any proceedings to assert his or her rights.

70. By contrast, in the judgment of 18 February 2016, *Finanmadrid EFC*,[41] the Court ruled that national legislation providing for the principle of *res judicata* in the context of the order for payment procedure ran counter to the principle of effectiveness, given that the decision of the authority closing the order for payment proceedings became *res judicata*, which made it impossible to check the unfairness of the contractual terms at the enforcement stage simply because the consumer did not lodge an objection within the prescribed time limit, and there was a significant risk that the consumer would not do so.

71. It should also be made clear that, in the *Banco Primus* judgment,[42] which was situated in the context of an objection to mortgage enforcement proceedings brought by the consumer, the Court held that Directive 93/13 does not preclude national legislation which prevents the court from examining of its own motion the unfairness of terms where a definitive decision has already been given on the lawfulness of all the terms of the contract in the light of that directive by means of a decision having the force of *res judicata*. However, according to the Court, where there are one or more terms whose unfairness has not been examined during an earlier judicial review of the contract which has been closed by a decision having the force of *res judicata*, Directive 93/13 requires the court before which a consumer has properly lodged an objection to review the unfairness of those terms, whether of its own motion or at a party's request, where it has the necessary legal and factual elements for that purpose. In the absence of such a review, consumer protection under that directive would be incomplete and insufficient.

72. Consequently, it follows from the foregoing case-law that the Member States are not required by Directive 93/13 to adopt a particular procedural system for the judicial review of unfair terms, provided that they comply with their obligations under Union law, including the principles of equivalence and effectiveness, and therefore ensure that there is a check conducted by a national court with regard to the unfairness of any contractual term irrespective of the proceedings. There must be an *ex officio* review either by the first court in the proceedings, or by the second court, whether seised of the enforcement or on the merits, which can be triggered by the consumer, so long as there is not a significant risk that the particular procedural route will not be undertaken by the consumer, thus closing off the possibility for the judicial review of unfair terms in accordance with Directive 93/13.

38 See judgment of 22 April 2021, *PROFI CREDIT Slovakia* (C-485/19, EU:C:2021:313, paragraph 57).

39 See judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 71).

40 C-40/08, EU:C:2009:615, paragraphs 34 to 48.

41 C-49/14, EU:C:2016:98, paragraphs 45 to 55.

42 See judgment of 26 January 2017 (C-421/14, EU:C:2017:60, paragraphs 49 to 54).

73. Moreover, according to the Court's case-law, while consumer protection is not absolute, neither is the principle of *res judicata*. As illustrated by the judgments mentioned in points 69 to 71 of this Opinion, the Court takes a balanced approach with regard to the interaction between national rules implementing *res judicata* and the requirements of Directive 93/13, whilst ensuring that such rules do not undermine the system of consumer protection established by that directive. In particular, while the *Banco Primus* judgment does not directly address the implicit force of *res judicata*, the Court's emphasis on the need for a definitive assessment of the unfairness of contractual terms in a decision having the force of *res judicata* lends support to the view that national legislation, such as that at issue, is contrary to Directive 93/13. I will return to that judgment later in my analysis (see point 81 of this Opinion).

74. It is in the light of those principles developed in the Court's case-law that it is necessary to examine the circumstances of the present cases.

D. Application of the principles developed in the Court's case-law to the circumstances of the present cases

75. It should be recalled from points 42 and 44 of this Opinion that, in the present cases, the national legislation at issue provides that, in the proceedings for the enforcement of orders for payment which are uncontested and therefore have become *res judicata*, the enforcement court is not permitted to review the content of the order for payment and to examine, either of its own motion or at the request of the consumer, the unfairness of the contractual terms by virtue of the implicit force of *res judicata* acquired by that order.

76. It should be noted at the outset that, contrary to the arguments put forward by the Commission that the present cases concern time-barring and not the principle of *res judicata*, it is apparent from the orders for reference that the referring court considers that the orders for payment which are the subject of the enforcement proceedings have the force of *res judicata*. According to settled case-law, the national court alone has jurisdiction to interpret and apply national law. [43]

77. Furthermore, there do not seem to be indications in the present cases which could give rise to doubts with regard to the principle of equivalence. It appears that, as indicated by the Italian Government, national law does not permit the enforcement court to examine an order for payment having the force of *res judicata*, even where this concerns possible infringement of domestic rules of public policy (see point 38 of this Opinion).

78. It should also be pointed out that, contrary to what the Commission contends, the Italian Government rejects the possibility that, in Case C-693/19, the national legislation at issue may be interpreted in conformity with Directive 93/13, so that the enforcement court can examine the unfairness of the term regarding excessive interest (see points 38 and 40 of this Opinion). Thus, this matter is subject to verification by the referring court in the light of the requirement established in the Court's case-law to interpret national law in conformity with Union law. [44]

79. Turning to the heart of the inquiry, there are, in my view, strong indications, based on the Court's case-law, that Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, preclude the national legislation at issue.

[43] See judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Societé Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraph 46).

[44] See judgment of 4 June 2020, *Kancelaria Medius* (C-495/19, EU:C:2020:431, paragraphs 49 to 51).

80. In that regard, it seems to me that the review of the potential unfairness of contractual terms under Directive 93/13 must be the subject of an explicit and sufficiently reasoned assessment by the national court. As illustrated by the circumstances of the present cases, the national legislation at issue has the result that the question of the unfairness of contractual terms is regarded as having been decided on the merits, even when it has not been discussed by the national court at all. To my mind, as indicated by the Commission, if the review of the unfairness of the contractual terms is not reasoned in the decision containing the order for payment, the consumer will not be able to understand or analyse the reasons for this decision or, where appropriate, to oppose the enforcement effectively. Nor will it be possible for a national court that may be seised of an appeal to give a ruling. In this respect, the Court has made it clear that, without effective review of whether the terms of the contract are unfair, observance of the rights conferred by Directive 93/13 cannot be guaranteed. [45]

81. Further support for this approach may be deduced from the *Banco Primus* judgment. [46] As mentioned in point 71 of this Opinion, the Court found incompatible with Directive 93/13 national legislation which extended the effects of *res judicata* to terms on which the national court had not given a definitive ruling. The Court therefore presumes that if the national court has not examined the unfairness of the specific contractual terms in question, it is difficult to consider that the principle of *res judicata* was affected. [47]

82. This approach is also consonant with the objectives pursued by Directive 93/13 as interpreted by the Court's case-law. It should be recalled from point 63 of this Opinion that the national court's duty of *ex officio* review is justified by the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers. The court responsible for enforcement is therefore required to ensure the effectiveness of that protection if it has not been carried out at a previous stage of the proceedings. Otherwise, this obligation incumbent on the national court under Directive 93/13 would be liable to be emptied of its substance.

83. This is borne out by the circumstances of the present cases, in which it appears that no *ex officio* review of unfair terms was carried out by the national court which issued the orders for payment. It is true, as indicated by the German Government, that, following from the Court's case-law as set out in point 67 of this Opinion, it falls within the competences of the Member States to decide whether such a review is to be carried out at the stage of the order for payment or at the stage of the enforcement of that order, and there is no requirement under Directive 93/13 that it must be carried out at both. Nonetheless, such a review must be carried out at one stage or the other. Thus, to preclude the enforcement court from carrying out, for the first time, the assessment of unfair terms simply because of the implicit force of *res judicata* of the order makes it impossible to check for unfairness at any stage of the proceedings.

84. It should be added that this approach appears to be in line with the Court's case-law concerning national legislation implementing *res judicata* outside the context of Directive 93/13. In certain judgments, [48] the Court has disapproved of excessive protection being granted to final decisions through *res judicata* in ways that significantly hinder the effective application of Union

[45] See judgment of 4 June 2020, *Kancelaria Medius* (C-495/19, EU:C:2020:431, paragraph 35).

[46] See judgment of 26 January 2017 (C-421/14, EU:C:2017:60, paragraphs 49 to 54).

[47] See, in that regard, García-Valdecasas Dorrego, M.J., *Dialogue between the Spanish courts and the European Court of Justice regarding the judicial protection of consumers under Directive 93/13/EEC*, Association of Property and Business Registrars of Spain, 2018, pp. 98-99.

[48] See, inter alia, judgments of 3 September 2009, *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506, paragraphs 29 to 32); of 2 April 2020, *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, EU:C:2020:260, paragraphs 94 to 96); and of 16 July 2020, *UR (VAT liability of lawyers)* (C-424/19, EU:C:2020:581, paragraphs 31 to 34).

law.[49] In addition, it should be noted that, in the judgment of 17 October 2018, *Klohn*,[50] the Court indicated that the force of *res judicata* extends only to the legal claims on which the court has ruled and therefore does not preclude a court, in a later dispute, from ruling on points of law on which there is no ruling in that definitive decision. Likewise, in its case-law concerning the application of *res judicata* in Union law, the Court has consistently held that *res judicata* attaches only to matters of fact and law actually or necessarily settled by the judicial decision in question.[51]

85. Consequently, it should be considered that the national legislation at issue runs counter to the principle of effectiveness, since it makes it impossible or excessively difficult to ensure the protection conferred on consumers by Directive 93/13.

86. I therefore conclude that Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, preclude national legislation such as that at issue in the main proceedings.

VII. Conclusion

87. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Tribunale di Milano (District Court, Milan, Italy) as follows:

Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted, in the light of the principle of effectiveness, as precluding national legislation which does not allow the court responsible for enforcement to examine, of its own motion or at the request of a party, the unfairness of the terms of a contract serving as the basis for an order for payment which has become *res judicata* where those terms have not been the subject of an explicit and sufficiently reasoned assessment with regard to that directive.

[49] See, in that regard, Turmo, A., 'National *Res Judicata* in the European Union: Revisiting the Tension Between the Temptation of Effectiveness and the Acknowledgement of Domestic Procedural Law', *Common Market Law Review*, vol. 58, 2021, pp. 361-390, at p. 375.

[50] C-167/17, EU:C:2018:833, paragraph 69.

[51] See judgments of 29 June 2010, *Commission* v *Luxembourg* (C-526/08, EU:C:2010:379, paragraph 27), and of 31 January 2019, *Islamic Republic of Iran Shipping Lines and Others* v *Council* (C-225/17 P, EU:C:2019:82, paragraph 47).