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European Order for Payment Procedure and Protection to Consumers

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Protection to consumers: a goal for the European Law

- Art. 38 Charter of Fundamental Rights: “*Union policies shall ensure a high level of consumer protection*”
 - Consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge, which demands a high level of protection (Judgment 27/2/2014, Pohotovost).
- Directive 93/12/EC, April 5th, Protecting consumers from unfair terms in contracts
 - Art. 3.1. A contractual term which has not been individually negotiated shall be regarded as unfair if it causes a significant imbalance in the parties’ rights and obligations to the detriment of the consumer
 - Art. 6: Not be binding on the consumer.
 - Art. 7: Member States shall ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers (Judgment 13/9/18, *Profi Credit Polska*)
 - National Courts must have an active role to compensate for the imbalance existing between the consumer and the seller or supplier (*Océano Grupo, Cofidis, Mostaza Claro, Asturcon Telecomunicaciones, Duarte Hueros, Faber, Aziz, Radlinger*)
 - National Courts have the obligation to examine that issue of their own motion, where it has available to them the legal and factual elements necessary for that task (Judgment 4/6/2009, *Pannon*).



Protection to consumers and Spanish Order for Payment Proceedings

- Judgments 14/6/12, *Banco Español de Crédito*, and 18/2/16, *Finanmadrid*.
- Act 42/2015, October 5th, on the Reform of the Payment Order Proceedings: the new Art. 815.4 Civil Proceedings Code
 - Judge can examine unfair terms of their own motion
 - Hearing to the parties if unfairness is considered
 - Decision by judicial order
 - If the terms happen to be unfair
 - Petition must be dismissed
 - Continuation without considering the unfair terms (the amount may be amended)
 - If terms happen to be fair: the order of payment must be issued
 - Eventual Appeal.
- Consequence: the payment order proceedings lose agility



Scape to European Order for Payment

- Dramatic growth since 2018 in EOP applications

- 2017: 655
- 2018: 5.884 (+798,3%)
- 2019: 29.151 (+395,4%)
- 2020: 21636 (-25,8%)

European trend
(2017/2018)

- Germany: 4563/3706
- Ireland: 110/109
- Lithuania 61/99
- Portugal 62/471
- Luxembourg 233/137.

Spanish EOP

- 2018: + 13%
- 2019: +21,2 %
- 2020: -0,6 %
- Efectiveness:
- 2002: 20,40%
- 2018: 7,4 %
- 2019: 6,8%
- 2020: 5,7 %

- Consumer contracts:
 - Credit cards
 - Banking operations
 - Phone companies
- Transnational dimension:
 - Assignment of receivables to vulture funds or recovery of claims companies (CGPJ, 2018, 2019, 2020)



Differences between Spanish and European Payment Orders proceedings

- The EOP doesn't need documentary evidence
 - Art. 7 REOP: Cause of the action and a description of evidence supporting the claim must be included in the application
 - Purpose: identification of the debt
 - Art. 8: Examination: "*whether the claim appears to be founded*".
 - Art. 9: Eventual Court request to complete or rectify the application
- Spanish proceedings on EOP specifically forbid joining documentary evidence to the application (F.D. 23.2 LEC).
- Consequence: There is no procedure to control the unfairness of contractual terms funding the claim
 - Traditionally, this control has not been made by the Spanish Courts



Reference for a Preliminary Ruling

- First Instance Courts n. 1 of Vigo and n. 20 of BCN demand a copy of the contract to *Bondora* in order to control eventual unfair terms
- Bondora refuses to deliver the contract on the basis of the cited Law
- Must the Court control the unfairness of the contract in its own?
- May the Court request complementary documents to make this control?
- Is there a conflict between the REOP and the Directive 93/12?
- Is there a conflict between Spanish Law (FD 23 LEC) and the REOPM)?



Bondora Judgment (19/12/19): Interests in Conflict

- EOP: simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims (art. 1. REOP)
 - Reversal of the party roles
 - Bigger responsibility for the debtor
- Consumer's Protection: Assure a balance between creditor's rights and consumer debtors' rights
 - The judges must have an active intervention in protecting consumers' rights
 - Efficacy cannot be got at consumer protection's expenses
 - La posibilidad de oponerse a la OEP no es suficiente para asegurar los derechos de los consumidores (*Profi Credit Polska*)
- Goals in conflict (Opinion of the Advocate General).



The Decision

- National Courts must carry out an ex officio review of the possible unfairness of contract terms
- Courts may request from the creditor additional information relating to the terms of the agreement relied on in support of the claim (Profi Credit Polska)
 - Direct application of Directive 93/12
 - It must be determined whether the detailed rules of the opposition proceedings give rise to a significant risk that the consumers concerned will not lodge the objection required (Judgment 20/9/18, *EOS KSI Slovensko, s.r.o.* [Slovakian Order of Payment])



The Decision

- Art. 9 REOP allows the Court to request additional information:
contractual terms
- Preclude national legislation which declares the additional documents
provided for that purpose to be inadmissible.
- Is it possible to defer control until opposition proceedings?
 - The control over unfair terms must be effective
 - It won't be effective if deferred until opposition proceedings, since these may
not happen (shortness of the term, lack of information or consciousness of
consumer's rights) *Banco Español de Crédito*.



Consequences

- It won't be possible to issue an EOP if there is no previous control of consumer contracts
 - An EOP application can be denied if documentation is not provided by the plaintiff or unfair terms are found (arts. 8 & 9 REOP)
- Modification on the principles and structure of the EOP proceedings
 - Breach of simplicity
 - No forms
 - Difficulties to automatize applications
 - There is on the merits discussion before the issuing of the EOP



Consequences

- For consumer debts, the EOP passes to be documentary
- The cause of the action and the basis of the claim are not elements to identify the debt anymore, but evidentiary elements for the eventual upholding
- Hearing to the parties: intervention of the debtor before issuing EOP
- Deterrence effect?
- Need for judicial intervention: control on the merits
- Nationalization risk
 - Application of art. 815.4 LEC, via FD 23.11 LEC: Dismissing the claim / reducing the amount of the claim



Final Remarks

- Bondora Judgment has increased consumer's protection by allowing ex officio control of unfair terms in EOP proceedings
- In fact, EOP proceedings will be different when the defendant is a consumer
- EOP proceedings in Spain may make a quick adjustment applying art. 815.4 LEC (via FD 23.11)
- A new civil procedure for consumers?



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Thank you very much for
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