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Recent developments in European Consumer Law

SATURDAY, 9 DECEMBER 2017

The 'proceduralization' of Directive 93/13 and its limits

The CJEU's judgment in [Banco Santander \(C-598/15\)](#) that came out this week is the latest addition to a growing body of case law on procedural obstacles to consumer protection under Directive 93/13. The focus on procedures and the role of national (civil) courts in ensuring the effectiveness of the Directive, i.e. its '**proceduralization**', has been the subject of debate between judges, legal practitioners and academics for a while now. It receives attention from the European Commission as well (see, e.g., the [REFIT report of the European Commission](#), the [RE-Jus project](#) aimed at providing judicial training, and a much-anticipated [study of the Max Planck Institute Luxembourg](#)). However, *Banco Santander* reveals the limits of 'proceduralization' driven by preliminary references to the CJEU.

In this case, the referring Spanish court was confronted with a *fait accompli*, which made the judicial review of unfair contract terms impossible. It all started with a mortgage loan agreement between Banco Santander and Ms. Sánchez Lopez. The contract contained a clause - Clause 11 - by which Ms. Sánchez not only expressly agreed to enforcement through extrajudicial proceedings, but also authorised the bank to execute the sale of the mortgaged property on her behalf. Thus, the bank could represent Ms. Sánchez before the notary drawing up the sale instrument without her attendance. The bank had initiated (compulsary) mortgage enforcement proceedings, the property was acquired by the bank for 59.7% of the value, and the sale instrument had been entered into the land register, while Ms. Sánchez continued to owe the residual debt. At first, the bank had allowed her to stay on the premises as a tenant. Later, it brought a claim seeking an order for the eviction of Ms. Sánchez from the property.

The referring court questioned the compatibility of the applicable procedural framework with Directive 93/13. The problem was that it was 'too late' for *ex officio* control of the unfairness of the terms - in particular Clause 11 - of the underlying mortgage contract: the transfer of

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ownership had already taken place. The court was merely required to enforce and protect the bank's property right. On the one hand, it could be said that Ms. Sánchez should have challenged the mortgage enforcement in time. On the other hand, the question could be raised (a) if she had any incentive to do so, because the bank initially allowed her to stay, and (b) whether she was actually aware of her rights, given the fact that the extrajudicial proceedings and the sale had taken place entirely without her involvement.

Last June we reported [on this blog](#) that Advocate General Wahl's answer to the referred questions in this case was, in short: "we can't help you". Directive 93/13 simply does not apply to proceedings concerning property rights. The CJEU basically gives the same answer, but with two important nuances: (i) the proceedings are independent of the legal relationship between the creditor (the bank) and the consumer; and (ii) the consumer has not availed herself of the legal remedies provided. We will discuss these nuances below.

I. No link between the present proceedings and the mortgage

The scope of application of the Directive and the CJEU's competence are limited to proceedings concerning contractual relationships, whereas the present proceedings concerned property rights. Here, the party who had lawfully acquired the property happened to be the bank, but any (other) interested third party could have become the owner. Against such a third party, the consumer-debtor cannot invoke a defence based on the mortgage contract between her and the bank.

Yet, the CJEU does not stop here. It recalls that "it has been held, in particular as regards enforcement proceedings for mortgages, that, failing effective review of the potential unfairness of contractual terms in the instrument on the basis of which the property is seized, observance of the rights conferred under Directive 93/13 cannot be guaranteed" (para 46; emphasis added). The CJEU refers to, in particular, *Finanmadrid* and *Aziz*. As the CJEU explains, the difference between this case and *Aziz* is that here, the action is brought on the basis of an ownership instrument as entered in the land register. This suggests that the CJEU is sensitive to the doubts of the referring court as to the course of events in the present case. It almost seems to regret that no question was asked about the unfairness of the terms in the mortgage contract, within the meaning of Article 3 of the Directive (cf. the obiter dictum in para 48). In this respect, it is a pity that the question regarding the role of the notary was inadmissible (para 31).

II. Availability of legal remedies

The CJEU also reiterates the importance of guaranteeing **effective judicial**

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protection to consumers (cf. Article 47 of the EU Charter of Fundamental Rights), by enabling them to contest the contract at hand in legal proceedings, including in the enforcement phase, and under reasonable procedural conditions (para 38). The CJEU considers that "it appears" that legal remedies were available to Ms. Sánchez, "subject to verification by the referring court" (para 49). The choice of words - the CJEU uses "opportunity" - is interesting. What if such an opportunity existed from a strictly legal perspective, but Ms. Sánchez was, in fact, deterred from using it as a consequence of Clause 11 and the bank's conduct, reinforced by the procedural rules at issue? The effective judicial protection of consumers under Directive 93/13 is based on the presumption that a case comes before a court, as was observed in [an Opinion by AG Sharpston](#) last week. Here, we run into the limits of 'proceduralization'. Perhaps it is time to recognise that the mere existence of a legal remedy is not enough; perhaps, there is a need for a shift in focus to the more fundamental question whether a certain procedural regime is justified in light of the interests it aims to protect [*].

[*] See for a first exploration: Anna van Duin, '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', available on [SSRN](#).

Posted by [Anna van Duin](#) at 15:20     

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