

BONDORA: ANOTHER BRICK IN THE PROCEDURALIZATION OF THE CONSUMERS' SUBSTANTIVE RIGHTS

BONDORA: UN PASO MÁS EN LA PROCEDURALIZACIÓN DE LOS DERECHOS SUSTANTIVOS DE LOS CONSUMIDORES

CARLOS SANTALÓ GORIS

*Research Fellow at the Max Planck Institute Luxembourg
Supported by the Luxembourg National Research Fund (FNR) – 10965388*

Recibido: 15.06.2020 / Aceptado: 13.07.2020

DOI: <https://doi.org/10.20318/cdt.2020.5667>

Abstract: Last December 2019, the Court of Justice of the European Union (“CJEU”) rendered the judgment *Bondora* (Joined Cases C-453/18 and C-494/18). In this case, the CJEU explored whether it is possible to carry out an ex officio review of the fairness of the contractual terms in the European Payment Order (“EPO”). Whereas the CJEU had already addressed similar preliminary references in the context of the domestic payment orders, for the first this issue is addressed in an European uniform proceeding. This case note aims at analysing the *Bondora* judgement as well as the impact the judgment had on the functioning and the structure of the EPO proceeding.

Keywords: European civil procedure, European Payment Order, CJEU judgement, consumers’ protection, unfairness of the contractual terms.

Resumen: El pasado diciembre, el Tribunal de Justicia de la Unión Europea (“TJUE”) dictó la sentencia *Bondora* (Asuntos acumulados C-453/18 y C-494/18). En este asunto, el TJUE exploró la posibilidad de examinar de oficio la potencial abusividad de las cláusulas contractuales en el contexto del Procedimiento Monitorio Europeo (“PME”). Si bien el TJUE ya se había pronunciado en relación al examen de las cláusulas abusivas en relación a los procedimientos monitorios nacionales, por primera vez lo hace en relación a un procedimiento civil europeo. El presente artículo analiza el razonamiento seguido por el TJUE, así como las consecuencias mediatas e inmediatas de la sentencia en la estructura y el funcionamiento del PME.

Palabras clave: Derecho procesal europeo, procedimiento monitorio europeo, sentencia TJUE, protección de los consumidores, abusividad de las cláusulas contractuales.

Summary: I. Introduction. II. Facts of the case. III. Spanish ex ante scenario. 1. The implementation of the EPO Regulation in Spain. 2. The ex officio control of fairness of the contractual terms in the Spanish payment order. 3. An abnormal increase of applications for EPOs. IV. Analysis of the judgment. 1. Striking a balance between the claimants and defendants’ rights. A) A familiar question for the CJEU. B) Consumers’ protection as a prevailing interest. C) Altering the nature and structure the EPO Regulation in consumer claims. 2. A more fragmented EPO Regulation in a post-Bondora scenario?. A) Two approaches towards Bondora. B) Need for an integrated solution within the EPO Regulation V. Conclusions.

I. Introduction

1. On 17 December 2019, the CJEU rendered its judgement in *Bondora* (C-453/18 and C-494/18), on Regulation 1896/2006 establishing a European Payment Order (hereinafter, EPO).¹ The EPO Regulation was the first to introduce a European uniform procedure in civil and commercial matters,² and it has already been interpreted by the CJEU on several occasions.³ The *Bondora* decision deals with an issue the Court has already addressed for national payment orders: can domestic courts request additional documentation to assess, on their motion, the fairness of the contract terms backing the creditor's claim? The CJEU is familiar with such question: in prior judgments, it has already acknowledged domestic courts' powers to examine the fairness of contractual terms in domestic civil proceedings under the Directive 93/13/EC.⁴ Now for the very-first time, this question affects a European uniform civil proceeding.

2. This case note analyses *Bondora*, focusing on: (1) the specific material and normative pre-conditions which triggered the preliminary reference; (2) the CJEU's reasoning; (3) the immediate and potential long-term consequences of *Bondora* on the functioning of the EPO Regulation.

II. Facts of the case

3. The first question was referred by the Court of First Instance n°11 of Vigo (Spain). On 21 March 2018, Bondora A.S. ("Bondora"), a company registered in Estonia, filed an application for a EPO against Carlos V.C., domiciled in Spain, before that court.⁵ Since the debtor was a consumer, the court asked Bondora to provide the terms of the contract on which the EPO application was based, in order to conduct an *ex officio* examination of their fairness.⁶ Bondora replied that according to Article 7 EPO Regulation and the Spanish implementing legislation, creditors do not have to lodge any documentation with an application for an EPO.⁷ In light of it, the Spanish court decided to stay the proceedings and to refer the following questions to the CJEU:

- 1) *Is Article 7(1) of ... Directive [93/13], and the case-law interpreting that directive, to be construed as meaning that article of the directive precludes a national provision, like [point 2 of] the 23rd final provision of [the LEC], which provides that it is not necessary to submit documents with the application for a European order for payment and that, where documents are submitted, they will be ruled inadmissible?*

¹ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p. 1 ("EPO Regulation"). The EPO Regulation applies in all Member State except Denmark. In this text, the expressions "Member State" refers to those EU Member States where the EPO Regulation applies.

² The other two European "uniform" civil procedures are: Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure OJ L 199, 31.7.2007, p. 1 ("ESCP Regulation"); and Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59 ("EAPO Regulation").

³ Before *Bondora*, there were eight CJEU decisions (orders and judgements) on the EPO Regulation: CJEU, 13 December 2011, C-215/11, *Szyrocka*, ECLI:EU:C:2012:794; CJEU, 13 June 2013, *Goldbet Sportwetten*, C-144/12, ECLI:EU:C:2013:393; CJEU, 4 September 2014, joined cases C-119/13 and C-120/13, *eco cosmetics*, ECLI:EU:C:2014:2144; CJEU, 21 March 2013, C-324/12, *Novotech-Zala*, ECLI:EU:C:2013:205; CJEU, 9 September 2019, C-488/13, *Parva Investitionsbanka*, ECLI:EU:C:2014:2191; CJEU, 10 March 2016, C-94/14, *Flight Refund*, ECLI:EU:C:2016:148; CJEU, 22 October 2015, C-245/14, *Thomas Cook*, ECLI:EU:C:2015:715; CJEU, 6 September 2018, C-21/17, *Catlin Europe*, ECLI:EU:C:2018:675. An additional preliminary reference, CJEU, 7 May 2014, C-121/13, *Rechtsanwaltskanzlei CMS Hasche Sigle*, ECLI:EU:C:2014:478 was withdrawn.

⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29 ("Directive 93/13/EEC").

⁵ CJEU, 19 December 2019, Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, para. 20.

⁶ CJEU, 19 December 2019, Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, para. 21.

⁷ CJEU, 19 December 2019, Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, para. 22.

2) *Is Article 7(2)(e) of Regulation No 1896/2006 ... to be construed as meaning that that provision does not preclude a creditor institution from being required to submit documents substantiating its claim based on a consumer loan entered into between a seller or a supplier and a consumer, where the court considers it essential to examine the documents in order to determine whether there are unfair terms in the contract between the parties, thereby complying with the provisions of ... Directive [93/13] and the case-law interpreting that directive?'*

4. Bondora applied as well for an EPO before the Court of First Instance n° 20 of Barcelona against a different debtor, also a consumer. The contractual terms binding the parties was mentioned by Bondora in the list of evidences supporting the the EPO application, but Bondora refused to produce them, for reasons identical to those given to the Vigo court.⁸ The Barcelona referred to the CJEU a question similar to the one by the Court of First Instance n°11 of Vigo.

5. Since both preliminary references were materially identical, the CJEU decided to reply jointly.⁹

III. The Spanish *ex ante* scenario to *Bondora*

6. For a proper understanding of the *Bondora* decision, an explanation about how the EPO Regulation has been implemented in Spain is required. It will also help grasping the general difficulties that may arise from the interaction between a European uniform proceeding and the domestic civil procedural systems.

1. The Spanish implementation of the EPO Regulation

7. The EPO Regulation left relevant procedural elements in the hands of the national lawmaker¹⁰ Article 26 establishes that “all procedural issues not specifically dealt with in this Regulation shall be governed by national law”. As a consequence, domestic legislators enjoy a considerable margin of appreciation when implementing these instruments.¹¹

8. In Spain, an act implementing the EPO Regulation and the ESCP Regulation was passed in 2011¹² introducing a new section into the Spanish Code of Civil Procedure.¹³ It did not completely reflect

⁸ CJEU, 19 December 2019, Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, para. 28.

⁹ On 17 June 2019, a third Spanish court (Court of first instance n° 2 of Nules) made a preliminary reference asking a similar question to those made in *Bondora*. While the preliminary was still pending, the CJEU rendered the *Bondora* judgment. Therefore, the Spanish court decided to withdraw the preliminary reference. On 13 February 2020, the preliminary reference was removed from the register of the CJEU. See: CJEU, 13 February 2020, C-524/19, *Investcapital Ltd*, ECLI:EU:C:2020:115.

¹⁰ This reliance on domestic procedural law is not exclusive to the EPO Regulation. The other two European uniform civil procedures, the ESCP and the European Account Preservation Order also contain numerous references to domestic civil procedural law. Scholars talk about “hybrid proceedings”. In this sense: E. A. ONTANU, “Incorporating European Uniform Procedures into National Procedural Systems and Practice: Best Practices a Solution for Harmonious Application” in B. HESS AND X. E. KRAMER (eds), *From common rules to best practices in European Civil Procedure*, Nomos, 2017, p. 461.

¹¹ Although these kinds of European regulations on civil procedural matters are directly applicable, some authors talk about an implicit obligation to pass domestic legislation to implement them at the domestic level. In this sense, M. Requejo Isidro refers to them as “joint-venture” regulations (M. REQUEJO ISIDRO, “La ejecución sin exequátur. Reflexiones sobre el Reglamento Bruselas I bis, Capítulo III”, *REDI*, vol 62, n° 2, 2015, p. 69); F. Gascón Inchausti uses the expression “directive-regulations” (F. GASCÓN INCHAUSTI, *Derecho europeo y legislación procesal civil nacional: Entre autonomía y armonización*, Marcial Pons, 2018, 43, p. 45).

¹² Act 4/2011, of 24 March, amending the Act 1/2000, of 7 January, of the Civil Procedural Code, in order to facilitate the application in Spanish of the European Payment Order and the European Small Claims Procedure, BOE num. 72, of 25 March 2011.

¹³ Final Disposition 23 Spanish Civil Procedural Code: “The application for a European order for payment shall be made using standard form A in Annex I to Regulation No 1896/2006, without it being mandatory to bring any documents which, where applicable, will be inadmissible”.

the text of the EPO Regulation, though. Following the EPO Regulation, creditors are only required to submit a pre-established standard application form when applying for an EPO.¹⁴ However, the Regulation is silent concerning the *possibility* of submitting additional documentation to the standard form application. The Spanish legislator expressly prohibited such possibility.¹⁵ It may be argued that this prohibition is a consequence of the non-documentary nature of the EPO;¹⁶ however, it does not correspond to the strict and literal reading of its text. In any event, this particular Spanish provision was the one on which by Bondora A.S. grounded the refusal to submit the documents required by the Spanish courts.¹⁷

2. The *ex officio* review of fairness of the contractual terms in the Spanish payment order

9. One of the differences between the Spanish domestic payment order and the EPO concerns the *ex officio* review of the fairness of the contract terms agreed by the parties to the procedure.

10. In the past, whether Directive 93/13/EC imposed on domestic courts an obligation to conduct an *ex officio* review of the contractual terms upon an application for a domestic payment order received different interpretations in Spain.¹⁸ Eventually, a request for a preliminary ruling was referred to the CJEU.¹⁹ In *Banco Español de Crédito*, the CJEU determined that “the court before which an application for order for payment has been brought to assess of its own motion, in *limine litis* or at any other stage during the proceedings, even though it already has all the legal and factual elements necessary for that task available to it, whether terms contained in a contract concluded between a seller or supplier and a consumer are unfair where that consumer has not lodged an objection, is liable to undermine the effectiveness of the protection intended by Directive 93/13”.²⁰

11. Three years after *Banco Español de Crédito*, the Spanish legislator amended the Spanish payment order codifying that judgment to a certain extent.²¹ In stricter terms than in *Banco Español de Crédito*,²² this legislative reform established a compulsory *ex officio* review of the contractual terms upon an application for a payment order in consumer related claims.²³ The controversy regarding the Spanish payment order came to an end. Nevertheless, the question was still unresolved for the EPO Regulation. This disparity between both proceedings was a source of uncertainty for Spanish courts, and eventually triggered the *Bondora* preliminary references. Conversely, from the creditors' side, many of them found in the EPO Regulation an opportunity to avoid the strict review of the fairness of the contractual terms existing in the Spanish domestic payment order.

¹⁴ Article 7 EPO Regulation.

¹⁵ Final Disposition 23(2) Spanish Civil Procedural Code.

¹⁶ L. GÓMEZ AMIGO, "El proceso monitorio europeo", in C. SENÉS MOTILLA and J. VEGAS TORRES, (eds), *Derecho procesal civil europeo*, Pamplona, Thomson Reuters-Aranzadi, 2011, p. 189.

¹⁷ CJEU, 19 December 2019, Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, para. 22.

¹⁸ Spanish courts appeared divided in this particular matter. Some of them considered that Directive 93/13/EC, as interpreted by the CJEU, imposed on domestic courts the obligation to conduct an *ex officio* review upon an application for a domestic payment order. See in this sense: Audiencia Provincial de Madrid (Sección 19ª), Auto de 4 marzo 2013, JUR\2013\128991; Audiencia Provincial de Santa Cruz de Tenerife (Sección 3ª), Auto núm. 221/2008 de 25 septiembre, JUR\2009\135286. On the opposite view see Audiencia Provincial de Barcelona (Sección 14ª), Auto núm. 128/2005 de 22 julio, JUR\2006\222521; Audiencia Provincial de Vizcaya (Sección 3ª), Auto núm. 221/2006 de 29 marzo, JUR\2006\153082).

¹⁹ CJEU, 14 June 2012, C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:349. The preliminary reference made by the Spanish court included a question concerning the EPO Regulation. Nonetheless, the CJEU refused to answer because “the interpretation of Regulation No 1896/2006 is irrelevant with regard to the decision which the referring court is called upon to give in the dispute before it” (para. 79).

²⁰ CJEU, 14 June 2012, C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:349, para. 53.

²¹ Act 42/2015, of 5 October, amending the Act 1/2000, of 7 of January, of Civil Procedural Code, BOE núm. 239, of 6 October 2015.

²² R. PAZOS CASTRO, *El control de las cláusulas abusivas en los contratos con consumidores*, Cizur Menor, Thomson Reuters Aranzadi, 2017, p. 688.

²³ Art. 815(4) Spanish Civil Procedural Code.

3. An abnormal increase in applications for EPOs

12. In 2018 -the year of the *Bondora* preliminary references-, the number of EPOs granted by Spanish courts increased 798.3% compared to the previous year.²⁴

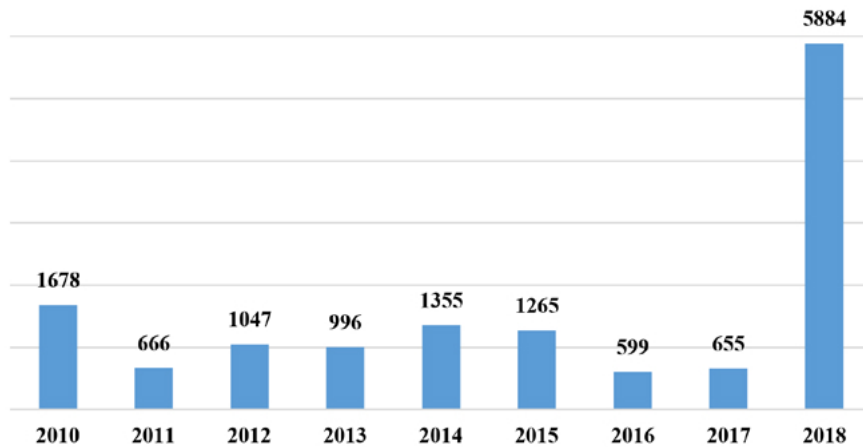


Figure 1. Number of EPOs granted by Spanish courts between 2010 and 2018.

13. Courts across all Spanish regions witnessed an increase in the number of applications for EPOs.²⁵ Before the First Instance court of Vigo - one the courts referring to the CJEU in *Bondora*- the number of EPO applications grew from 38 in 2017 to 223 in 2018.²⁶

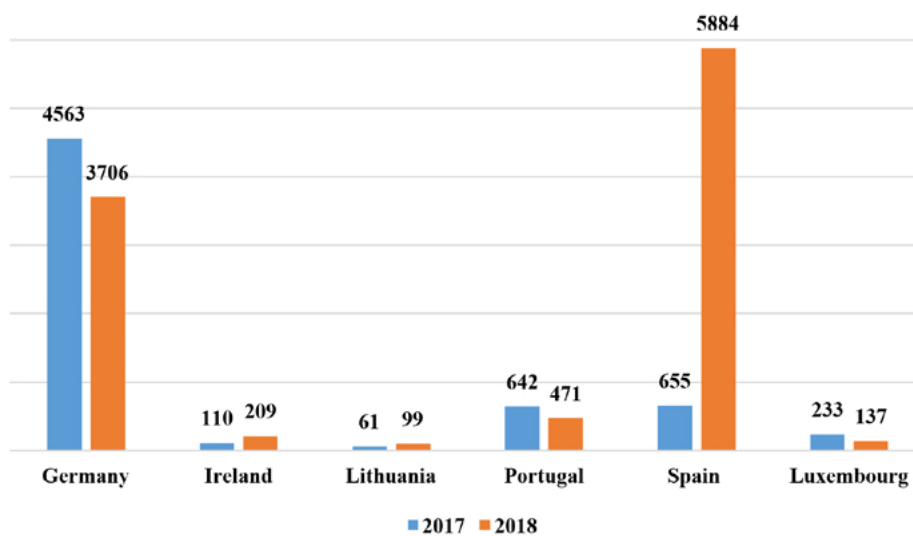


Figure 2. Number of EPOs granted by Irish, Lithuanian, Luxembourgish, Portuguese and Spanish courts and the number of EPOs applications in Germany in 2017 and 2018.

²⁴ Consejo General del Poder Judicial, *Panorámica de la Justicia en el 2018*, p. 16, available at: <http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estudios-e-Informes/Panoramica-de-la-Justicia/> (accessed on 9 June 2020).

²⁵ Although there was a general increase, this increase varied from one region to another: Andalusia (931.7%); Aragón (1076.9%); Asturias (1,900.0%); Balearic Islands (310.5%); Basque Country (855.0%); Canary Islands (2605.0%); Cantabria (1,100.0%); Castile and Leon (1323.1%); Castilla-La Mancha (1,150.0%); Catalonia (938.3%); Extremadura (700.0%); Galicia (1,150.0%); Madrid (593.6%); Murcia (855.0%); Navarra (1,575.0%); La Rioja (275.0%).

²⁶ E. V. PITA, "Europa avala a un juez de Vigo contra fondos buitres que reclaman desde paraísos fiscales", *La Voz de Galicia* (12/19/2019). Available at: https://www.lavozdeg Galicia.es/noticia/vigo/vigo/2019/12/19/europa-avala-juez-vigo-contra-fondos-buitres-reclaman-para-isos-fiscales/0003_201912V19C1995.htm (accessed on 9 June 2020).

14. This phenomenon seems to be limited to Spain. In other Member States where the EPO Regulation applies, the number of EPOs even decreased (Germany, Lithuania, Luxembourg);²⁷ or did not increase as dramatically as in Spain (Ireland, Lithuania).²⁸

15. The impressive increase in EPOs in Spain is explained by the more lenient regime the EPO Regulation offers in comparison to the Spanish payment order, in case where the debtor is a consumer. Creditors seeking to circumvent the compulsory *ex officio* review of the fairness of contract terms under the Spanish payment order opted for the alternative proceeding: the EPO regulation. The statistics evidence the material impact of the divergences between the EPO and the domestic payment order in this regard.

16. Although the EPO Regulation is only applicable in cross-border claims, in many of the above-seen EPO applications the debt had a purely national origin.²⁹ The cross-border condition is met if either the creditor or the debtor have their habitual residence or domicile in a Member State other than the Member State of the court seized.³⁰ This was the case in *Bondora*: Bondora AS was a company registered in Estonia; both debtors were domiciled in Spain. In other occasions the parties' domiciles were initially in Spain. In order to satisfy the cross-border requirement, the creditor (often a bank) assigned the debt to new creditor (often vulture funds or companies specialized in debt-recovery) domiciled in other Member States, and therefore, apply for an EPO and benefit from the more lenient EPO regime for consumer protection.

IV. Analysis of the judgement

17. The two following sections analyse the *Bondora* judgment. The first focuses on the Court's reasoning and the immediate impact of *Bondora* on the functioning and structure of EPO proceedings. The second section explores the potentially far-reaching consequences of *Bondora*, given that the judgment might be interpreted differently from one Member State to another.

1. Striking a balance between the rights of claimants and defendants

18. The scheme of reasoning in the *Bondora* judgment is similar to the one the CJEU followed in previous judgments concerning the EPO Regulation, where it tried to strike a balance between the rights of defendants and claimants.³¹ On the creditors' side, the CJEU aimed at ensuring that the EPO

²⁷ All the statistical information in these Member States is publicly available. See, for Germany: <https://www.destatis.de/DE/Themen/Staat/JustizRechtspflege/_inhalt.html;jsessionid=EB8B9F54C80C398E5046CBB3B0928274.internet742> (accessed on 9 June 2020). For Luxembourg, see: <<https://justice.public.lu/fr/publications.html>> (accessed on 9 June 2020). For Portugal, see: <<https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Indicadores-de-desempenho-dos-tribunais-judiciais-de-1-instancia.aspx>> (accessed on 9 June 2020).

²⁸ For Ireland, see: <<http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/D171C224DF0083D180257FB10043BD33?opendocument&l=en>> (accessed on 9 June 2020); and for Lithuania, see: <<https://www.teismai.lt/lt/visuomenei-ir-ziniasklaidai/statistika/106>> (accessed on 9 June 2020).

²⁹ In the Commission Proposal for the EPO Regulation, there was no mention of the cross-border element. The Commission intended to apply the EPO Regulation to purely internal cases as well, but Member States objected during the review of the Commission Proposal by the European legislator. In this sense: X. E. KRAMER, "Enhancing Enforcement in the European Union. The European Order for Payment Procedure and Its Implementation in the Member States, Particularly in Germany, the Netherlands, and England", in C. H. VAN RHEE AND ALAN UZELAC (eds), *Enforcement and enforceability: Tradition and reform*, Antwerp, Intersentia, 2010, p. 22.

³⁰ Article 3 EPO Regulation.

³¹ This attempt at an equilibrium can be also observed in prior judgements: CJEU, 4 September 2014, Joined cases C-119/13 and C-120/13, *eco cosmetics and Raiffeisenbank St. Georgen*, ECLI:EU:C:2014:2144 (para. 37: "the balance between the objectives pursued by Regulation No 1896/2006 of speed and efficiency, on one hand, and respect of the rights of defence, on the other hand, would be undermined"); CJEU, 22 October 2015, C-245/14, *Thomas Cook Belgium*, ECLI:EU:C:2015:715 (para. 41: "Since the purpose of the procedure established by Regulation No 1896/2006 is to reconcile the swiftness and efficiency of

is an efficient procedure capable of “simplifying, speeding up and reducing the costs of the litigation in cross-border cases”.³² This pursuit of efficiency is implicit in the payment order model chosen by European legislator for the EPO Regulation: a non-documentary type in which creditors merely have to indicate and describe the evidence supporting the claim. Furthermore, in the *Syroka* judgment, the CJEU stated that the EPO Regulation “governs exhaustively the conditions to be met by the application for a European order for payment”.³³

19. Nonetheless, efficiency cannot be to the detriment of the defendant within the EPO proceeding. Debtors and creditors must be on an equal footing. Ensuring this balance is even more necessary in claims when one of the parties is a consumer, as in *Bondora*. Consumers have a special protection under EU law: one that requires the pro-active intervention of the courts in order to safeguard consumers' substantive rights acknowledged under EU law.³⁴

A) A familiar question for the CJEU

20. Before *Bondora*, the CJEU had already dealt with preliminary references on the national courts' obligation, under Directive 93/13/EC, to carry out an *ex officio* fairness review of the contract claims in domestic payment orders applications.³⁵ The CJEU had already acknowledged that domestic courts are compelled to carry out an *ex officio* review of the fairness of the contractual in the context of a domestic payment order, as long as the court had access to the legal and factual elements necessary for examining on its own motion whether a contractual term is unfair.³⁶ The defendant has the possibility to contest the payment order; however, in consumer cases the statement of opposition is considered an insufficient remedy. According to the CJEU, there would be “significant risk that the consumer concerned will not lodge the objection required, either because of the particularly short period provided for that purpose, or because they might be dissuaded from defending themselves in view of the costs which legal proceedings would entail in relation to the amount of the disputed debt, or because the national legislation does not lay down the obligation that all the information must be communicated to them which is necessary to enable them to determine the extent of their rights”.³⁷ For that reason, domestic courts shall review the fairness of the contract terms on their own motion.

court proceedings, whilst observing the rights of the defence”); CJEU, 9 April 2014, Opinion AG Bot in Joined cases C-119/13 to C-121/13, *eco cosmetics and Raiffeisenbank St. Georgen*, ECLI:EU:C:2014:248 (para. 41: “is of prime importance in maintaining a balance between the different objectives pursued by that regulation”); CJEU, 29 May 2018, Opinion AG Wathelet in C-21/17, *Catlin Europe*, ECLI:EU:C:2018:341 (para. 44: “the purpose of Regulations No 1896/2006 and No 1393/2007 is to ensure a fair balance between the applicant's interests and those of the defendant, by reconciling the aims of efficient and rapid transmission of procedural documents with the need to ensure appropriate protection for the rights of defence of the addressee of those documents”). The balance between these opposing interests is not exclusive to the EPO Regulation. The CJEU followed a similar reasoning concerning the EAPO Regulation (CJEU, 7 November 2019, C-555/18, *K.H.K. (Saisie conservatoire des comptes bancaires)*, ECLI:EU:C:2019:937).

³² CJEU, 19 December 2019, Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, para. 36; CJEU, 13 December 2012, C-215/11, *Szyrocka*, ECLI:EU:C:2012:794, para. 30.

³³ CJEU, 13 December 2012, C-215/11, *Szyrocka*, ECLI:EU:C:2012:794, para. 32.

³⁴ Through the principle of effectiveness, the CJEU has ‘proceduralized’ consumer substantive rights acknowledged in articles 6 and 7 of Directive 93/13/EC. Based on those provisions, the CJEU has ruled on several occasions that certain domestic civil proceedings do not provide an effective protection for consumers. For a broader overview on this phenomenon, see: M. TULIBACKA, “Proceduralization of EU Consumer Law and Its Impact on European Consumers”, *Review of European Administrative Law*, 2015, p. 51.

³⁵ See: CJEU, 14 June 2012, C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:349; CJEU, 18 February 2016, C-49/14, *Finanmadrid*, ECLI:EU:C:2016:98; CJEU, 13 September 2018, C-176/17, *Profi Credit Polska*, ECLI:EU:C:2018:711; CJEU, 20 September 2018, C-448/17, *EOS KSI Slovensko*, ECLI:EU:C:2018:745; CJEU, 28 November 2018, C-632/17, *PKO Bank Polski*, ECLI:EU:C:2018:963; CJEU, 7 November 2019, Joined Cases C-419/18 and C-483/18, *Profi Credit Polska*, ECLI:EU:C:2019:930.

³⁶ CJEU, 13 September 2018, C-176/17, *Profi Credit Polska*, ECLI:EU:C:2018:711, para. 47; CJEU, 28 November 2018, C-632/17, *PKO Bank Polski*, ECLI:EU:C:2018:963, para. 38.

³⁷ CJEU, 20 September 2018, C-448/17, *EOS KSI Slovensko*, ECLI:EU:C:2018:745, para. 46.

21. A problem arises with non-documentary payment orders because domestic courts have at their disposal very limited information concerning the claim. The claimant is allowed to provide almost no-information concerning the substance of the claim and the court makes only a very formalistic review of the application.³⁸ Therefore, courts usually lack the legal and factual elements necessary for examining on their own motion whether contractual terms are unfair. Nonetheless, in another recent judgment concerning a Polish payment order, the CJEU, referring to a domestic court, found that “Articles 6(1) and 7(1) of Directive 93/13 require that that court be able to demand the production of the documents on which that application is based”.³⁹ This possibility would not collude with the principle “that the subject matter of an action is to be defined by the parties”.⁴⁰

22. Therefore, according to the CJEU's interpretation of EU consumer's rights under the Directive 93/13, domestic courts are empowered to review the fairness of the contractual terms in the context of the domestic payment orders.

B) Consumer protection as a prevailing interest

23. The CJEU has analysed the EPO Regulation having in mind its previous judgments on the fairness of contract terms in the context of domestic payment orders. It has concluded that, while the EPO seeks to achieve inexpensive and fast proceedings, such objective cannot come at the expense of consumer protection.⁴¹ Consumers are always at a disadvantage whenever their counterparty is a seller or a supplier.⁴² Even if a debtor-consumer has the possibility to lodge a statement of opposition against an EPO, this would be insufficient to ensure effective protection of the consumer's rights under Directive 93/13/EC.⁴³ The only possible manner to achieve an effective protection is by enabling domestic courts to request claimants to produce the terms of the contract in order to review their fairness.⁴⁴

24. Interestingly, the CJEU has integrated the possibility of requesting additional documentation within the text of the EPO Regulation. Article 9 of the EPO Regulation permits courts to request the claimant “to complete or rectify” an EPO application if “the prerequisites of Article 7 are not met and the application is not clearly unfounded”.⁴⁵ In the Court's view, this provision can also be used to request “the production of a copy thereof, in order to be able to examine the possible unfairness of such terms”. Through an extensive interpretation of Article 9(1), the Court has thus been able to integrate this solution within the text of the EPO Regulation.

25. Simultaneously, the CJEU has acknowledged that creditors may submit additional documentation with an EPO application on their own motion. This possibility is foreseen as well in the standard application form annexed to the EPO Regulation.⁴⁶ Section 11 of the standard application form allows claimants to write down “additional statements and further information” apart from the compulsory information of Article 7(2). The CJEU has determined that this additional information could include the contractual terms or a reproduction of the contractual terms.

³⁸ CJEU, 31 October 2019, Opinion AG Sharpston in Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:921, footnote 24.

³⁹ CJEU, 7 November 2019, Joined Cases C-419/18 and C-483/18, *Profi Credit Polska*, ECLI:EU:C:2019:930, para. 67.

⁴⁰ CJEU, 7 November 2019, Joined Cases C-419/18 and C-483/18, *Profi Credit Polska*, ECLI:EU:C:2019:930, para. 68.

⁴¹ CJEU, 19 December 2019, Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, para. 42.

⁴² CJEU, 19 December 2019, Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, para. 43.

⁴³ CJEU, 19 December 2019, Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, para. 45.

⁴⁴ CJEU, 19 December 2019, Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, para. 51.

⁴⁵ Article 9(1) EPO Regulation.

⁴⁶ Annex I, Section 11 EPO Regulation.

C) Altering the nature and structure of the EPO Regulation in consumer claims

26. Taking into consideration the previous CJEU judgments, it is difficult to envisage a different outcome from the one that the CJEU reached.⁴⁷ The CJEU has held tight to its previous rulings concerning the power of examination of contractual clauses in consumer claims. We do not disagree with the reasoning of the CJEU. However, the *Bondora* judgment may be criticized in that it might jeopardise the principles and structure underpinning the EPO Regulation.⁴⁸

27. The possibility for claimants to submit additional documentation, or for the deciding authority to request additional documentation, *de facto* transforms the EPO into a documentary-type payment order. The EPO was conceived of as a hybrid-type payment order.⁴⁹ Creditors are not supposed to provide documentation supporting an EPO application. According to the text of the EPO Regulation, creditors only have to describe “the circumstances invoked as the basis of the claim” as well as “the evidence supporting the claim”.⁵⁰

28. Secondly, after *Bondora* the examination of the application of the standard form will no longer be a *prima facie* one. The documentation that the claimants might be requested to provide could lead to a thorough review of the contract on which the claim might be based. This might also affect the type of authorities which might review the application. Whereas the EPO Regulation states that the examination of the application does not need to be carried out by a judge⁵¹, this would not be longer possible if there is a review of the fairness of the contractual terms.⁵²

29. Furthermore, if upon the review of the contractual terms, the court finds one or more of the terms to be unfair, a mandatory hearing of both parties will follow. In *Banif Plus Bank*, the CJEU considered that “where the national court, after establishing, on the basis of the matters of fact and law at its disposal, or which were communicated to it following the measures of inquiry which it undertook of its own motion, that a term comes within the scope of the Directive, finds, following an assessment made of its own motion, that that term is unfair, it is, as a general rule, required to inform the parties to the dispute of that fact and to invite each of them to set out their views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure”.⁵³ The hearing of both parties would take place before the EPO is granted. Consequently, the principle of *inversion du contentieux* on which the EPO proceeding is based will be partially undermined, since the debtor will be aware of the EPO before it is rendered by the court.

30. It follows that on the occasions where an EPO application involves a consumer and the court seized conducts an *ex officio* examination of the fairness of the contract terms, the EPO procedure will experience relevant changes on its original structure and governing principles. These modifications may

⁴⁷ Nonetheless, before the *Bondora* ruling was rendered, Prof. Gómez Amigo considered that the EPO Regulation itself provides sufficient safeguards to make the introduction of an *ex officio* review of the contractual terms unnecessary. In his view, the debtor has enough information and time to oppose the EPO. Furthermore, the EPO Regulation does not require the creditor to state any particular reason in the statement of opposition. The jurisdictional protection that consumers enjoy within the EPO Regulation, which establishes that the application has to be filed with the courts of the consumer's domicile, should also be taken into consideration. In this sense: L. GÓMEZ AMIGO (n 16), pp. 13 – 14.

⁴⁸ In this sense also: F. ESTEBAN DE LA ROSA, "La sentencia Bondora o la prueba del algodón del proceso monitorio europeo: novedades en el control de oficio de las cláusulas abusivas y reformas en ciernes", LA LEY Unión Europea, 2020, p.11; F. RIELÄNDER, "Amtswegige Klauselkontrolle im Europäischen Mahnverfahren: Zugleich Anmerkung zu EuGH, Urt. v. 19.12.2019 – C-453/18, C-494/18, Bondora", Zeitschrift für das Privatrecht der Europäischen Union 2020, p. 61.

⁴⁹ CJEU, 31 October 2019, Opinion AG Sharpston in Joined Cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:921, para. 90.

⁵⁰ Article 7(2) EPO Regulation.

⁵¹ Recital 16 EPO Regulation.

⁵² RIELÄNDER (n 48), p. 61.

⁵³ CJEU, 21 February 2013, C-472/11, *Banif Plus Bank*, ECLI:EU:C:2013:88, para. 31.

put at a risk the efficiency of the payment order.⁵⁴ At this point, it is worth recalling the words of Advocate General Trstenjakin in the opinion delivered in *Banco Español de Crédito*: “the imposition of a duty to undertake a thorough investigation in the context of the order for payment procedure and to give a ruling in *limine litis* on whether a term concerning interest on late payments in a consumer credit agreement would result in a fundamental modification of the operation of that procedure, which would eliminate an important efficiency benefit of the order for payment procedure, namely the quick enforcement of uncontested pecuniary claims”.⁵⁵

2. A more fragmented EPO Regulation in a post-*Bondora* scenario?

31. When the CJEU ruled that domestic courts are allowed to request additional information about the terms of the agreement between the parties, it was merely acknowledging that domestic courts have a discretionary power to investigate. How will domestic courts employ it? Will courts request claimants to provide additional documentation on every occasion the debtor is a consumer? Alternatively, will courts decide on a case by case basis whether or not they will request additional documentation? If so, which facts or circumstances will the courts take into consideration in requesting the additional documentation?

32. The answer to these questions is likely to be different depending on the domestic procedural system considered. It has already been explained that the EPO relies largely on the domestic procedural systems of the Member States.⁵⁶ In addition, domestic courts tend to understand the EPO in the light of the equivalent domestic payment orders,⁵⁷ even concerning aspects that should be applied uniformly.⁵⁸ For instance, in Spain domestic courts have refused to grant an EPO because the claimants had not provided documentation that would have been required for a domestic payment order.⁵⁹ The preliminary references in *Bondora* originate as well in the Spanish courts' attempt to conduct a review of the fairness of the contract terms: a review they would have made for a Spanish payment order. Therefore, it seems very likely that the power to request additional documentation will have different readings depending on the domestic procedural system at stake.

A) Two approaches towards *Bondora*

33. The following two hypothetical scenarios are examples of how the *Bondora* judgment might have different “national” expressions.

34. The first scenario happens in Spain. As has already been explained,⁶⁰ in the Spanish payment order, courts always conduct a systematic review of the fairness of the contractual terms in consumer

⁵⁴ Something that has been also adverted to with regards to the impact of the CJEU rules on the Spanish payment order. See in this sense: J. PICÓ I JUNOY, “Requiem por el proceso monitorio”, *Justicia*, 2015, p. 525.

⁵⁵ CJEU, 14 February 2012, Opinion AG Trstenjak in C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:74, para. 56.

⁵⁶ *Supra*, p. 1195.

⁵⁷ In an extensive empirical study on the application of EPO and ESCP proceedings in France, England and Wales; Italy; and Romania carried out by Elena A Onțanu, this phenomenon was found in the four jurisdictions examined. See: E. A. ONȚANU, *Cross-border debt recovery in the EU: A comparative and empirical study on the use of the European uniform procedures*, Intersentia, 2017, p. 373.

⁵⁸ One good example is case *Szyrocka*, (CJEU, 13 December 2012, C-215/11, *Szyrocka*, ECLI:EU:C:2012:794), where a Polish court attempted to apply domestic national prerequisites to an application for an EPO. The CJEU ruled that introducing an additional national prerequisite would collude with the uniform application of the EPO Regulation at European level. On that basis, the CJEU concluded that the prerequisites established on Article 7 are exhaustive.

⁵⁹ See: Auto Audiencia Provincial de Barcelona (Sec. 11.a) de 21 de noviembre 2012 (Auto núm. 212/2012, ECLI:ES:AP-B:2012:7729A; Auto Audiencia Provincial de Barcelona (Sección 17ª) de 28 de septiembre (Auto núm. 171/2012) ECLI:ES:AP-B:2012:8088A.

⁶⁰ *Supra*, p. 1196.

claims.⁶¹ Judicial clerks are in charge of handling the applications for domestic payment orders. If the judicial clerk finds out that the debtor is a consumer, the application for the domestic payment order is referred automatically to the judge, who will examine the fairness of the contractual terms.⁶² Bearing in mind the manner in which domestic courts proceed with the Spanish payment order in consumer claims, it seems likely that they will proceed in a similar manner concerning EPO applications in consumer claims - as it happened in *Bondora*. *Bondora* has also given support for Spanish courts to proceed in this way.

35. The situation might be very different in Germany, where the approach towards the domestic payment orders is radically different from the Spanish one. The German payment order is a non-documentary payment order which is often rendered through a computer-based system without direct human involvement.⁶³ Creditors simply fill out a standard online form, which is submitted and read by a computer. This automatic processing has remained unaffected by the CJEU judgments concerning consumer protection with regards to domestic payment orders.⁶⁴

36. The German legislator seems to have followed this approach regarding the implementation of the EPO Regulation.⁶⁵ Article 1088 German Civil Procedural establishes that “the petition for issuance of the European payment order and the statement of opposition may be transmitted in a form that is only machine-readable if the court deems this format to be suited for its automatic processing systems”.⁶⁶ In the district court of Berlin Wedding, the sole court in charge of all EPO applications in Germany,⁶⁷ EPO applications are pro forma verified by a judicial clerk, who simply checks that the standard form has been properly completed.⁶⁸ Therefore, considering that *Bondora* merely acknowledges the power of review but does not establish an obligation to conduct any examination, it seems unlikely that the Berlin Wedding court will handle EPO applications any differently in a post-*Bondora* scenario.

B) Need for an integrated solution within the EPO Regulation

37. The two examples above illustrate how *Bondora* may lead to an even more fragmented application of the EPO Regulation across Europe. However, *Bondora* would not be the first case in which a CJEU judgment has led to different solutions in the application of the EPO Regulation. In Joined Cases C-119/13 and C-120/13, *eco cosmetics and Raiffeisenbank St. Georgen*,⁶⁹ the CJEU was requested to determine whether the EPO mechanism of review (Article 20) would apply to EPOs not properly served on the debtors, but which had already become enforceable because the debtor had not lodged a statement of opposition within the thirty days prescribed by the EPO Regulation. The CJEU ruled that the review mechanism did not apply in such cases since it can only be used in exceptional circumstances.⁷⁰ Instead, the CJEU found that such procedural issue was governed by national law.⁷¹ The ruling left the door ajar

⁶¹ Art. 815(4) Spanish Civil Procedural Code.

⁶² Art. 815(4) Spanish Civil Procedural Code.

⁶³ B. SUJECKI, "The German electronic payment procedure", Digital, Evidence and Electronic Signature Law Review, 2007, p. 53.

⁶⁴ RIELÄNDER (n 48), p. 62.

⁶⁵ At the same time, the EPO Regulation is largely inspired by the German payment order. In this sense: X. E. KRAMER, *Procedure matters: Construction and deconstructivism in European civil procedure*, Eleven international Publishing 2013, p. 26.

⁶⁶ This possibility is envisaged in Article 8 of the EPO Regulation (“This examination may take the form of an automated procedure”).

⁶⁷ Art. 1087 German Civil Procedural Code.

⁶⁸ Email from the *Rechtfliegerin* of the Berlin Wedding Court (12 June 2020).

⁶⁹ CJEU, 4 September 2014, Joined Cases C-119/13 and C-120/13, *eco cosmetics and Raiffeisenbank St. Georgen*, ECLI:EU:C:2014:2144.

⁷⁰ CJEU, 4 September 2014, Joined Cases C-119/13 and C-120/13, *eco cosmetics and Raiffeisenbank St. Georgen*, ECLI:EU:C:2014:2144, para. 40.

⁷¹ CJEU, 4 September 2014, Joined Cases C-119/13 and C-120/13, *eco cosmetics and Raiffeisenbank St. Georgen*, ECLI:EU:C:2014:2144, para. 47.

to different solutions at the domestic level.⁷² For instance, in Germany, the civil procedural code was amended introducing an *ad hoc* solution for this kind of case,⁷³ whereas in Luxembourg, it has already been decided that the regular appeal applies.⁷⁴

38. We might wonder whether, eventually, it may be necessary to amend the EPO Regulation in order to accommodate those judgments. More precisely, concerning *Bondora*, a solution could be the introduction of a compulsory review of the contractual terms when an EPO is requested against a consumer. In consumer claims, creditors would be obliged to submit the contractual terms along with the standard form of the payment order on which the claim is based with the application for the EPO. While the EPO would be transformed into a documentary-type payment order in consumer claims, this would also ensure adequate respect for consumer rights according to the standards developed by the CJEU. It would equally ensure a more uniform application of the standard of consumer protection in all EU Member States bound by the EPO Regulation.

V. Conclusion

39. *Bondora* illustrates (once more) the difficulties experienced by the CJUE to make two different objectives work together within the European civil procedural system: achieving swift and efficient proceedings along with giving adequate protection to consumers. While not always incompatible, these two purposes seem to collide within the EPO Regulation. According to the CJEU, consumer protection eventually prevails over the efficiency of the EPO proceedings. Considering the capital importance of consumer protection within the European legal order, it would have been difficult to expect a different outcome in *Bondora*. The EPO has thus become another procedural track affected by the progressive intrusion of European consumer substantive rights into civil proceedings. But this strict protection of consumer rights disregards the original nature and the structure of the EPO proceeding, perhaps making it also less attractive for prospective claimants seeking to recover cross-border debts from consumers.

⁷² B. HESS AND K. RAFFELSIEPER, "Schuldnerschutz bei fehlender Zustellung eines EUMahnbescheids: Regelungslücken der EuMahnVO", IPRax, 2015, p. 403.

⁷³ Article 1092a German Civil Procedural Code. Before the amendment, the Berlin Wedding Court applied by analogy Article 735 of the German Civil Procedural Code. See: AG Berlin-Wedding, 22.10.2014 – 70b C 17/14, IPRax 2015, 420; 30.5.2016 – 70b C 4/11, BeckRS 2016, 10935.

⁷⁴ Tribunal d'arrondissement de Luxembourg (14e ch.), 21 mars 2017, Jugement commercial, XIVe ch., n° 78/2017, n° 178460 du rôle).