



Reports of Cases

ORDER OF THE COURT (Seventh Chamber)

28 November 2018*

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court of Justice — Consumer protection — Directive 93/13/EEC — Unfair terms in consumer contracts — Directive 2008/48/EC — Order for payment procedure based on bank ledger excerpts — Impossible for the court, in the absence of an action brought by a consumer, to examine the unfairness of the contractual terms)

In Case C-632/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy w Siemianowicach Śląskich (District Court, Siemianowice Śląskie, Poland), made by decision of 4 October 2017, received at the Court on 9 November 2017, in the proceedings

Powszechna Kasa Oszczędności (PKO) Bank Polski S.A.

v

Jacek Michalski,

THE COURT (Seventh Chamber),

composed of A. Prechal, President of the Third Chamber, acting as President of the Seventh Chamber, C. Toader (Rapporteur) and A. Rosas, Judge,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Powszechna Kasa Oszczędności (PKO) Bank Polski S.A., by W. Sadowski, adwokat, and by E. Buczkowska, radca prawny,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by K. Herbout-Borcza and by N. Ruiz García, acting as Agents,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

* Language of the case: Polish.

makes the following

Order

- 1 This request for a preliminary ruling concerns the interpretation of Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) and of Articles 10 and 22(1) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66, and corrigenda at OJ 2009 L 207, p. 14, OJ 2010 L 199, p. 40, and OJ 2011 L 234, p. 46).
- 2 That request has been made in proceedings between Powszechna Kasa Oszczędności Bank Polski S.A. ('PKO'), a bank established in Warsaw (Poland) and Mr Jacek Michalski concerning an order for payment based on a banking ledger excerpt from PKO and issue on account of Mr Michalski's default on payment of money borrowed on a credit card issued by PKO.

Legal context

European Union law

Directive 93/13

- 3 The 24th recital of Directive 93/13 states that 'the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts'.
- 4 Article 6(1) of Directive 93/13 states:

'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.'
- 5 Under Article 7(1) of the directive:

'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.'

Directive 2008/48

- 6 Recital 31 of Directive 2008/48 states:

'In order to enable the consumer to know his rights and obligations under the credit agreement, it should contain all necessary information in a clear and concise manner.'
- 7 Article 10 of Directive 2008/48 lists, inter alia, the information to be included in a clear and concise manner in credit agreements.

8 Article 22(1) of that directive provides:

‘Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive.’

Polish law

9 The kodeks postępowania cywilnego (Civil Procedure Code) in the version applicable to the main proceedings (‘the KPC’), governs the order for payment procedure.

10 Under Article 485(2) and (3) of the KPC:

‘2. The court shall decide a case under the order for payment procedure upon a written request by the applicant set out in the application initiating proceedings.

3. Examination of the case shall take place in chambers ...’

11 Article 484(1) and (3) of the KPC provides:

‘1. The court shall issue an order for payment if the claimant is pursuing a financial claim ... and proof is provided in respect of the circumstances justifying the claim pursued using [the documents] appended to the claim.

...

3. The court may issue an order for payment if a bank is pursuing a claim on the basis of a banking ledger excerpt, signed by persons authorised to make statements regarding the bank’s property rights and obligations and bearing the bank’s stamp, and proof that a request for payment has been submitted to the debtor in writing.’

12 In accordance with Article 486(1) of the KPC:

‘If there are no grounds on the basis of which to issue an order for payment, the president shall order a hearing unless the case may be heard in chambers.’

13 Article 491(1) of the KPC provides:

‘By the order for payment, the court shall instruct the defendant to settle the claim in full, plus costs, within two weeks of service of the order for payment, or to lodge an objection within that period. ...’

14 Article 492(1) of the KPC states:

‘On being issued, the order for payment shall have the status of a provisional enforcement order that is enforceable without an enforcement clause. ...’

15 Under Article 493(1) of the KPC:

‘A notice of objections shall be filed with the court which issued the order for payment. The defendant must specify in the notice whether he is appealing the order in part or in full, while also presenting his objections thereto, which shall be reported before defending on the merits of the case or else be forfeited, as well as facts and evidence. The court shall disregard late allegations and evidence, unless

the party proves that he failed to report them in the objections due to no fault of his own, or that taking the late allegations and evidence into consideration will not delay the examination of the case, or that there are other exceptional circumstances. ...’

16 In accordance with Article 494(1) of the KPC:

‘The court shall reject any objections not filed within the time limit, in respect of which a fee has not been paid, or which are otherwise inadmissible, as well as objections the defects in which are not corrected by the defendant within the time limit prescribed.’

17 Under Article 19(4) of the of the ustawa o kosztach sądowych w sprawach cywilnych (Law on court costs in civil matters) of 28 July 2005 (Dz. U. 2005, No 167, heading 1398 (‘Law on court costs’):

‘Where an objection is lodged against an order for payment issued under the order for payment procedure, three quarters of the court fee shall be payable by the defendant.’

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

18 On 21 December 2015, PKO concluded an agreement with Mr Michalski for the issue and use of a credit card.

19 On 29 March 2017, PKO sent Mr Michalski formal notice to pay the sums estimated to be owed to it. As Mr Michalski did not pay those sums, on 26 May 2017, PKO lodged an application under Article 485(3) of the KPC before the Sąd Rejonowy w Siemianowicach Śląskich (District Court, Siemianowicach Śląskich) seeking an order for payment of 6 788.21 Polish zlotys (PLN) (approximately EUR 1 580) plus contractual interest. That application was accompanied by a banking ledger excerpt from PKO, signed by a person authorised to represent the bank, bearing its stamp and accompanied by evidence that the formal notice to pay had been served on Mr Michalski.

20 The referring court states that the order for payment procedure based on such a banking ledger excerpt is often used by Polish banks in order to recover their debts. That practice consists in attaching the bank ledger excerpt to the application, in accordance with Article 485(3) of the KPC, without producing any other documents attesting to the existence of a consumer credit agreement and its conditions.

21 The referring court also states that, under Polish law, the order for payment procedure consists of two stages. In the first stage, where the bank submits a claim, in order to issue an order for payment, the court of its own motion examines only whether the formal requirements relating to the bank ledger excerpt submitted have been met, which is the fundamental basis for the issue of such an order. The criteria justifying a refusal to issue that order derive exclusively from the wording of Article 485(3) of the KPC. Therefore, the creditor is not required to set out in detail the basis for the claim relied on, inter alia, by producing the consumer credit agreement.

22 The second stage of the procedure is optional. It is initiated by the filing of objections to the order for payment by the person indebted to the bank who may raise objections concerning the agreement with the bank. According to Article 493(1) of the KPC, read together with Article 491(1) thereof, the consumer who objects to that order must file the objections within a period of two weeks and must comply with the formalities required in order to file objections. Furthermore, according to Article 19(4) of the Law on court costs, the consumer is required to pay three quarter of those costs.

23 The referring court also notes that once an order for payment becomes final it is *res judicata* and that, pursuant to Article 492(1) of the KPC, the order for payment, upon being issued, has the status of a provisional enforcement order that is enforceable without an enforcement clause.

- 24 According to the referring court, the present case differs from the cases which gave rise to the judgments of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349), and of 18 February 2016, *Finanmadrid EFC* (C-49/14, EU:C:2016:98), in which the national courts had before them the contractual documents establishing the rights and obligations of the contracting parties, and were therefore able to exclude the application of the unfair terms contained in those documents.
- 25 The referring court, by citing the judgment of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 50), expresses doubts as to whether the order for payment procedure enforced on the basis of a banking ledger excerpt makes it excessively difficult or impossible for the consumer to exercise his rights conferred by the consumer protection regime, inter alia, under Directives 93/13 and 2008/48, first, by reason of the fact that evidence of the legal relationship between the consumer and the bank is not communicated to the court, and second, that the burden of proof is shifted wholly onto the consumer.
- 26 In those circumstances, the Sąd Rejonowy w Siemianowicach Śląskich (District Court, Siemianowicach Śląskich) decided to stay its proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must the provisions of Directive [93/13], and in particular Article 6(1) and Article 7(1) thereof, and the provisions of Directive [2008/48], and in particular Article 10 and Article 22(1) thereof, be interpreted as precluding the pursuit of a claim by a bank (the creditor) against a consumer (the debtor) on the basis of a banking ledger excerpt, signed by persons authorised to make statements regarding the bank’s property rights and obligations and bearing the bank’s stamp, and on the basis of proof that a request for payment had been submitted to the debtor in writing, in the context of an order-for-payment procedure as defined in Article 485(3) et seq. of the KPC?’

Consideration of the question referred

- 27 Pursuant to Article 99 of the Rules of Procedure of the Court, where, inter alia, the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, give its decision by reasoned order.
- 28 In that connection, it must be held that in the judgment of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711), the Court was required to answer questions similar to those referred by the same national court. The interpretation of EU law adopted in that judgment is also relevant for the purpose of the answer to the question referred in this case.
- 29 Although the dispute in the main proceedings differs from that which gave rise to the judgment of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711), in so far as the order for payment at issue in the main proceedings was issued on the basis of the bank ledger excerpt in accordance with Article 485(3) of the KPC, and not on the basis of a promissory note under Article 485(2) thereof, those two cases concern the same procedural rules relating to the order for payment procedure.
- 30 In those circumstances, Article 99 of the Rules of Procedure of the Court of Justice applies to the present case.
- 31 As Directive 2008/48 did not effect harmonisation in the field of bank ledger excerpts as evidence authorising the recovery of a debt arising from a consumer credit agreement, Article 22(1) thereof is not applicable either in circumstances such as those at issue in the main proceedings (see, by analogy, judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 36).

- 32 Therefore, the questions referred will be answered only with regard to Article 6(1) and Article 7(1) of Directive 93/13 and Article 10 of Directive 2008/48.
- 33 By its question, the referring court asks essentially whether Article 6 and Article 7(1) of Directive 93/13 and Article 10 of Directive 2008/48 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, authorising the issue of an order for payment based on a bank ledger excerpt as evidence of the existence of a debt arising from a consumer credit agreement, where the court dealing with an application for an order for payment does not have the power to examine the unfairness of the terms of that agreement or to satisfy itself that, in the latter case, the information referred to in Article 10 was available.
- 34 As a preliminary point, it must be recalled that Article 6(1) of Directive 93/13 requires Member States to provide that unfair terms in an agreement concluded with a consumer, as laid down in their national law, are not to be binding on the consumer.
- 35 Given the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness vis-à-vis sellers or suppliers, Directive 93/13, as is apparent from Article 7(1) thereof, read in conjunction with its 24th recital, obliges the Member States to provide for adequate and effective means ‘to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’ (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 40 and the case-law cited).
- 36 In that context, it must be borne in mind that, in accordance with the settled case-law of the Court, the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary to that end (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 42 and the case-law cited).
- 37 In the present case, the referring court states that, in the first stage of the order for payment procedure, its review is limited to an examination of the formal validity of the bank ledger excerpt. Thus, that court states that it does not have available to it all the elements of fact and law arising from the credit agreement at issue.
- 38 It follows that, in circumstances such as those at issue in the main proceedings, a national court is not in a position to examine whether a contractual term is unfair so long as it does not have available to it all the factual and legal elements for that purpose (see, to that effect, judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 47).
- 39 Furthermore, even though, as the Polish Government observes in its observations before the Court, it is clear from Article 486(1) of the KPC that the president of the court hearing the case may fix a date for a hearing, unless the case can nevertheless be heard in chambers, so that the consumer credit agreement may be examined, the power of the president of the chamber is subject to the condition that there is not ‘sufficient basis for the issue of an order for payment’. According to the information provided by the referring court, such a condition is not satisfied in the case in the main proceedings (see, by analogy, judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraphs 48 to 50).
- 40 In any event, whilst, under Article 267 TFEU, the Court has jurisdiction to draw from Article 7 of Directive 93/13 the criteria which define the framework for a court to assess of its own motion whether the obligations resulting from that directive have been complied with, it is the referring court which must determine whether a provision such as Article 486(1) of the KPC is capable of providing it, where appropriate, with such a framework (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 52).

- 41 The referring court also states that the legal relationship resulting from the consumer credit agreement is examined only if the consumer lodges an objection against the order for payment.
- 42 In that regard, whilst the proceedings before the referring court relate only to the first stage of the procedure, that procedure must nevertheless be examined in its entirety, including both the first stage before the objection is lodged and the subsequent second stage (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 54).
- 43 In the absence of harmonisation by EU law of the procedures applicable to examining whether a contractual term is unfair, those procedures accordingly fall within the domestic legal system of the Member States, on condition, however, that the principle of equivalence and the right to an effective remedy, as required by Article 47 of the Charter of Fundamental Rights of the European Union, are observed (see, to that effect, judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 57).
- 44 As regards the principle of equivalence, the Court does not have anything before it that is capable of giving rise to doubt as to the compliance of the legislation at issue in the main proceedings with that principle (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 58).
- 45 So far as concerns the right to an effective remedy, the obligation resulting from Article 7(1) of Directive 93/13 to lay down detailed procedural rules that ensure observance of the rights which individuals derive from Directive 93/13 combating the use of unfair terms implies a requirement that there be a right to an effective remedy, a requirement also enshrined in Article 47 of the Charter of Fundamental Rights. The right to an effective remedy must apply both as regards the designation of courts having jurisdiction to hear and determine actions based on EU law and as regards the detailed procedural rules relating to such actions. In order to determine whether a procedure, such as that at issue in the main proceedings, infringes a right to an effective remedy, the referring court must determine whether the detailed rules of the opposition procedure which national law lays down give rise to a significant risk that the consumers concerned will not lodge the objection required (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraphs 59 and 61).
- 46 In the present case, it is evident from Article 491(1) of the KPC that the time limit for lodging an objection is two weeks. Furthermore, under Article 493(1) of the KPC, the defendant must indicate in the objection whether he disputes the order in whole or in part, set out the complaints on pain of inadmissibility and adduce facts and evidence. Such procedural requirements in so brief a period give rise to a significant risk that the consumer will not lodge an objection or that it will be inadmissible (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraphs 65 and 66).
- 47 Furthermore, it is apparent from Article 19(4) of the Law on court costs that the defendant must pay three quarters of the court fee where he lodges an objection against the order for payment, so that the seller or supplier has to pay only one quarter of that fee. Such fees are in themselves capable of deterring a consumer from lodging an objection. The consumer is penalised all the more if he must, in any event, pay costs three times greater than the opposing party (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraphs 67 and 68).
- 48 Therefore, detailed procedural rules, such as those at issue in the main proceedings, to the extent that, on one hand, they require consumers to adduce, within two weeks of service of the order for payment, the factual and legal elements that enable the court to carry out the assessment and, on the other hand, penalise them in the way in which the legal costs are calculated, give rise to a significant risk that the consumers concerned will not lodge the objection required (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraphs 69 and 70).

- 49 It follows from all of the foregoing considerations, that Article 7(1) of Directive 93/13 must be interpreted as precluding a procedure which authorises the issue of an order for payment where the court dealing with an application for an order for payment does not have the power to examine whether the terms of that agreement are unfair, if the detailed rules for exercising the right to lodge an objection against such an order do not enable observance of the rights which the consumer derives from that directive to be ensured (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 71).
- 50 As regards Article 10 of Directive 2008/48, it must be recalled that that provision lists the information to be mentioned in credit agreements so that the consumer is able to take an informed decision.
- 51 In that regard, the Court has held that the examination by a national court, of its own motion, of compliance with the requirements which flow from Directive 2008/48 constitutes an appropriate means of achieving the result sought by Article 10 of that directive and of contributing to achieving the aims set out in recital 31 thereto (see, to that effect, judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 68, and, by analogy, order of 16 November 2010, *Pohotovost'*, C-76/10, EU:C:2010:685, paragraph 41 and the case-law cited). According to settled case-law, the national court's obligation to examine of its own motion compliance with the requirements deriving from Directive 2008/48 requires that it has available to it the legal and factual elements necessary for that task (see, to that effect, judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 70, and, by analogy, judgment of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 32).
- 52 Therefore, in the first stage of the procedure, the national court does not have available to it the information to ensure that the obligations concerning the information to be provided to consumers, within the meaning of Article 10 of Directive 2008/48, have been met, since the order for payment is issued solely on the basis of the examination of the formal validity of the bank ledger excerpt and, as the detailed rules for exercising the right to lodge objections against such an order do not, for the same reasons as those set out in paragraphs 46 to 48 of the present order, ensure compliance with the rights accorded to consumers by that directive, Article 10 of Directive 2008/48 must be interpreted as precluding national legislation such as that at issue in the main proceedings.
- 53 Having regard to all of the foregoing, the answer to the question referred is that Article 7(1) of Directive 93/13 and Article 10 of Directive 2008/48 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits the issue of an order for payment, based on a bank ledger excerpt, as evidence of the existence of a debt arising from a consumer credit agreement, where the court dealing with an application for an order for payment does not have the power to examine whether the terms of that agreement are unfair or to ensure that, in that examination, the information referred to in Article 10 is made available, if the detailed rules for exercising the right to lodge an objection against such an order do not enable observance of the rights which the consumer derives from that directive to be ensured.

Costs

- 54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and Article 10 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive

87/102/EEC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits the issue of an order for payment, based on a bank ledger excerpt, as evidence of the existence of a debt arising from a consumer credit agreement, where the court dealing with an application for an order for payment does not have the power to examine whether the terms of that agreement are unfair and to ensure that, in that examination, the information referred to in Article 10 is made available, if the detailed rules for exercising the right to lodge an objection against such an order do not enable observance of the rights which the consumer derives from that directive to be ensured.

[Signatures]