Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

2 April 2020*

(Reference for a preliminary ruling — Payment services in the internal market — Directive 2007/64/EC — Material and personal scope — Payment services provided in a currency other than the euro or the currency of a Member State outside the euro area — Payment services provided by a credit institution — Non-execution or defective execution of a payment order — Person liable — Prudential supervision procedure — Complaint procedures — Out-of-court-redress — Competent authorities)

In Case C-480/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākās tiesa (Supreme Court, Latvia), made by decision of 13 July 2018, received at the Court on 23 July 2018, in the proceedings brought by

'PrivatBank' AS

intervener:

Finanšu un kapitāla tirgus komisija,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, K. Jürimäe and N. Piçarra (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Latvian Government, by I. Kucina and J. Davidoviča, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil and L. Dvořáková, acting as Agents,

– the European Commission, by I. Naglis and H. Tserepa-Lacombe, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 November 2019,

gives the following

* Language of the case: Latvian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(2) and Articles 20, 21, 75 and 80 to 82 of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1), as amended by Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 302, p. 97) ('Directive 2007/64').

2 The request has been made in proceedings between 'PrivatBank' AS, a credit institution with its head office in Latvia, concerning the legality of a decision by the Finanšu un kapitāla tirgus komisija (Financial and Capital Markets Commission, Latvia) ('the Markets Commission') to impose on it a fine for failure to execute a payment order.

Legal context

European Union law

3 Directive 2007/64 was repealed and replaced, with effect from 13 January 2018, by Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64 (OJ 2015 L 337, p. 35). However, given the date at which the material facts arose, the dispute in the main proceedings is still governed by Directive 2007/64.

4 Recitals 5, 6, 8, 10, 11, 14, 20, 43, 46 and 50 to 52 of Directive 2007/64 state as follows:

'(5) [The] legal framework [for payment services] should ensure the coordination of national provisions on prudential requirements, the access of new payment service providers to the market, information requirements, and the respective rights and obligations of payment services users and providers. …

(6) However, it is not appropriate for that legal framework to be fully comprehensive. Its application should be confined to payment service providers whose main activity consists in the provision of payment services to payment service users. …

…

(8) It is necessary to specify the categories of payment service providers which may legitimately provide payment services throughout the [European Union], namely, credit institutions which take deposits from users that can be used to fund payment transactions and which should continue to be subject to the prudential requirements under Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions [(OJ 2006 L 177, p. 1)], …

…

(10) … It is appropriate … to introduce a new category of payment service providers, "payment institutions", by providing for the authorisation, subject to a set of strict and comprehensive conditions, of legal persons outside the existing categories to provide payment services throughout the [European Union]. …

(11) … The requirements for the payment institutions should reflect the fact that payment institutions engage in more specialised and limited activities, thus generating risks that are narrower and easier to monitor and control than those that arise across the broader spectrum of activities of credit institutions. …

…

(14) It is necessary for the Member States to designate the authorities responsible for granting authorisations to payment institutions, carrying out controls and deciding on the withdrawal of those authorisations. … However, all decisions made by the competent authorities should be contestable before the courts. …

…

(20) As consumers and enterprises are not in the same position, they do not need the same level of protection. While it is important to guarantee consumers' rights by provisions which cannot be derogated from by contract, it is reasonable to let enterprises and organisations agree otherwise. … In any case, certain core provisions of this Directive should always be applicable irrespective of the status of the user.

…

(43) In order to improve the efficiency of payments throughout the [European Union], all payment orders initiated by the payer and denominated in euro or the currency of a Member State outside the euro area … should be subject to a maximum one-day execution time. … In view of the fact that national payment infrastructures are often highly efficient and in order to prevent any deterioration in current service levels, Member States should be allowed to maintain or set rules specifying an execution time shorter than one business day, where appropriate.

…

(46) … It is entirely appropriate, except under abnormal and unforeseeable circumstances, to impose liability on the payment service provider in respect of execution of a payment transaction accepted from the user, except for the payee's payment service provider's acts and omissions for whose selection solely the payee is responsible. … Whenever the payment amount has been credited to the receiving payment service provider's account, the payee should immediately have a claim against his payment service provider for credit to his account.

…

(50) It is necessary to ensure the effective enforcement of the provisions of national law adopted pursuant to this Directive. Appropriate procedures should therefore be established by means of which it will be possible to pursue complaints against payment service providers which do not comply with those provisions and to ensure that, where appropriate, effective, proportionate and dissuasive penalties are imposed.

(51) Without prejudice to the right of customers to bring action in the courts, Member States should ensure an easily accessible and cost-sensitive out-of-court resolution of conflicts between payment service providers and consumers arising from the rights and obligations set out in this Directive. …

(52) Member States should determine whether the competent authorities designated for granting authorisation to payment institutions might also be the competent authorities with regard to out-of-court complaint and redress procedures.'

5 As provided in Article 1(1) of Directive 2007/64:

‘This Directive lays down the rules in accordance with which Member States shall distinguish the following six categories of payment service provider:

(a) credit institutions within the meaning of Article 4(1)(a) of Directive 2006/48/EC, including branches within the meaning of Article 4(3) of that Directive located in the [European Union] of credit institutions having their head offices inside or, in accordance with Article 38 of that Directive, outside the [European Union];

…

(d) payment institutions within the meaning of this Directive;

…’

6 Article 2 of Directive 2007/64, headed ‘scope’, provides:

‘1. This Directive shall apply to payment services provided within the [European Union]. However, with the exception of Article 73 [Value date and availability of funds], Titles III [Transparency of conditions and information requirements for payment services] and IV [Rights and obligations in relation to the provision and use of payment services] shall apply only where both the payer’s payment service provider and the payee’s payment service provider are, or the sole payment service provider in the payment transaction is, located in the [European Union].

2. Titles III and IV shall apply to payment services made in euro or the currency of a Member State outside the euro area.

…’

7 Under Article 4 of that directive:

‘For the purposes of this Directive, the following definitions shall apply:

…

(4) “payment institution” means a legal person that has been granted authorisation in accordance with Article 10 to provide and execute payment services throughout the [European Union];

…

(10) “payment service user” means a natural or legal person making use of a payment service in the capacity of either payer or payee, or both;

(11) “consumer” means a natural person who, in payment service contracts covered by this Directive, is acting for purposes other than his trade, business or profession;

…’

8 Article 20 of Directive 2007/64, headed ‘Designation of competent authorities’, in Title II thereof, headed ‘Payment service providers’, provides:

‘1. Member States shall designate as the competent authorities responsible for the authorisation and prudential supervision of payment institutions which are to carry out the duties provided for under this Title either public authorities, or bodies recognised by national law or by public authorities expressly empowered for that purpose by national law, including national central banks.

…

2. Member States shall ensure that the competent authorities designated under paragraph 1 possess all the powers necessary for the performance of their duties.

…

5. Paragraph 1 shall not imply that the competent authorities are required to supervise business activities of the payment institutions other than the provision of payment services listed in the Annex, …’

9 Article 21 of that directive, headed ‘Supervision’, and which is also in Title II of that directive, states:

‘1. Member States shall ensure that the controls exercised by the competent authorities for checking continued compliance with this Title are proportionate, adequate and responsive to the risks to which payment institutions are exposed.

In order to check compliance with this Title, the competent authorities shall be entitled to take the following steps, in particular:

(a) to require the payment institution to provide any information needed to monitor compliance;

(b) to carry out on-site inspections at the payment institution, at any agent or branch providing payment services under the responsibility of the payment institution, or at any entity to which activities are outsourced;

(c) to issue recommendations, guidelines and, if applicable, binding administrative provisions; …

…

2. Without prejudice to the procedures for the withdrawal of authorisations and the provisions of criminal law, the Member States shall provide that their respective competent authorities, may, as against payment institutions or those who effectively control the business of payment institutions which breach laws, regulations or administrative provisions concerning the supervision or pursuit of their payment service business, adopt or impose in respect of them penalties or measures aimed specifically at ending observed breaches or the causes of such breaches.

…’

10 It is apparent from the first sentence of Article 51(1) of that directive that where the payment service user is not a consumer the parties may agree that inter alia Article 75 of that directive is not to apply in whole or in part.

11 Article 75 of Directive 2007/64, headed ‘Non-execution or defective execution’, provides:

‘1. Where a payment order is initiated by the payer, his payment service provider shall … be liable to the payer for correct execution of the payment transaction, unless he can prove to the payer and, where relevant, to the payee’s payment service provider that the payee’s payment service provider received the amount of the payment transaction in accordance with Article 69(1), in which case, the payee’s payment service provider shall be liable to the payee for the correct execution of the payment transaction.

Where the payer’s payment service provider is liable under the first subparagraph, he shall, without undue delay, refund to the payer the amount of the non-executed or defective payment transaction, and, where applicable, restore the debited payment account to the state in which it would have been had the defective payment transaction not taken place.

Where the payee’s payment service provider is liable under the first subparagraph, he shall immediately place the amount of the payment transaction at the payee’s disposal and, where applicable, credit the corresponding amount to the payee’s payment account.

…

2. …

In the case of a non-executed or defectively executed payment transaction for which the payee’s payment service provider is not liable under the first and second subparagraphs, the payer’s payment service provider shall be liable to the payer. Where the payer’s payment service provider is so liable he shall, as appropriate and without undue delay, refund to the payer the amount of the non-executed or defective payment transaction and restore the debited payment account to the state in which it would have been had the defective payment transaction not taken place.

…’

12 Under Article 80 of that directive, headed ‘Complaints’:

‘1. Member States shall ensure that procedures are set up which allow payment service users and other interested parties, including consumer associations, to submit complaints to the competent authorities with regard to payment service providers’ alleged infringements of the provisions of national law implementing the provisions of this Directive.

2. Where appropriate and without prejudice to the right to bring proceedings before a court in accordance with national procedural law, the reply from the competent authorities shall inform the complainant of the existence of the out-of-court complaint and redress procedures set up in accordance with Article 83.’

13 Article 81 of that directive, headed ‘Penalties’, provides, in paragraph 1:

‘Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. Such penalties shall be effective, proportionate and dissuasive.’

14 Article 82 of Directive 2007/64, headed ‘Competent authorities’, provides, in paragraph 1:

‘Member States shall take all the measures necessary to ensure that the complaints procedures and penalties provided for in Articles 80(1) and 81(1) respectively are administered by the authorities empowered to ensure compliance with the provisions of national law adopted pursuant to the requirements laid down in this Section.’

15 Article 83 of that directive, headed ‘Out-of-court redress’, provides, in paragraph 1:

‘Member States shall ensure that adequate and effective out-of-court complaint and redress procedures for the settlement of disputes between payment service users and their payment service providers are put in place for disputes concerning rights and obligations arising under this Directive, using existing bodies where appropriate.’

16 It is apparent from Article 86 of that directive, headed ‘Full harmonisation’, that, without prejudice to the exceptions it lists, in so far as that directive ‘contains harmonised provisions, Member States shall not maintain or introduce provisions other than those laid down in this Directive’.

Latvian law

17 Article 2(3) of the Maksājumu pakalpojumu un elektroniskās naudas likums (Law on payment services and electronic money, *Latvijas Vēstnesis*, 2010, No 43), in the version applicable to the facts in the main proceedings (‘the Law on Payment Services’), provides as follows:

‘The provisions in Articles 57 [to] 96 [and] 98 [to] 104 of this Law shall apply to payment service providers who provide payment services in Latvia, where the payer’s payment service provider and the payee’s payment service provider are located in a Member State and the payment service is executed in euros or in the currency of a Member State.’

18 Article 49 of the Law on Payment Services provides:

‘In order to verify that the activities carried out by institutions comply with the requirements of this Law, the [Markets] Commission shall be authorised to:

(1) ask institutions to provide the information required for supervisory purposes;

(2) carry out inspections of institutions.’

19 According to Article 56(1) and (2) of the Law on Payment Services:

‘(1) If the [Markets] Commission considers that an institution is not complying with the requirements of Chapters II [to] VI of this Law … or with the directly applicable legal acts of the institutions of the European Union, it shall order the institution to adopt immediate measures to remedy the situation.

(2) In addition to the provisions of paragraph (1) of this Article, the [Markets] Commission shall be authorised to adopt one or more of the following measures:

…

(5) the imposition of a fine of up to 100 000 [Latvian lats (LVL) (approximately EUR 140 000)].’

20 As set out in Article 99 of the Law on Payment Services:

'(1) Where a payment order is submitted by the payer, his payment service provider shall be liable to the payer for correct execution of the payment transaction, unless the provider can prove to the payer and, where relevant, to the payee's payment service provider that the payee's payment service provider received the amount of the payment in accordance with Article 94(1) of this Law. Where the payer's payment service provider can prove that the payee's payment service provider received the amount of the payment, the payee's payment service provider shall be liable for the correct execution of the payment transaction.

…

(9) Where the payment is not executed or is executed defectively and the payee's payment service provider is not liable under this Article, the payer's payment service provider shall be liable to the payer.

(10) Where the payer's payment service provider is liable under paragraph 9 of this Article, he shall without delay refund to the payer the amount of the non-executed or defective payment transaction or restore the debited payment account of the payer to the state in which it would have been had the defective payment transaction not taken place.'

21 Article 105 of the Law on Payment Services provides as follows:

'…

(2) In accordance with the relevant legislation, the [Markets] Commission shall examine complaints concerning infringement of the provisions of Chapters VII [to] XIV of this Law submitted by payment service users or electronic money holders who are not consumers within the meaning of the Patērētāju tiesību aizsardzības likums (Consumer Protection Law), where the infringement has caused or may cause significant harm to the interests of groups of the aforesaid payment service users or electronic money holders (collective interests). …

…

(5) Where, as a result of undertaking administrative proceedings, the [Markets] Commission finds that an infringement of the provisions of Chapters VII [to] XIV of this Law has caused or may cause significant harm to the collective interests of payment service users or electronic money holders who are not consumers within the meaning of the Consumer Protection Law, it shall have the power to issue a decision ordering the payment service provider or electronic money issuer to cease the infringement of the provisions of Chapters VII [to] XIV of this Law or to remedy the infringements that have been committed, and it may set a deadline for implementing the necessary measures.

…'

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

22 On 16 November 2011, Forcing Development Limited initiated with PrivatBank, of which it is a customer, a payment order for the transfer of 394 138.12 US dollars (USD) (approximately EUR 347 130) to the account of a third party held by Bankas Snoras AB ('Snoras'), established in Lithuania.

23 On the same day, at 15.08, the Lietuvos bankas (Lithuanian Central Bank) notified Snoras of its decision to impose a moratorium on it and to prevent it from providing financial services of any kind.

24 Also on that day, at 15.24, PrivatBank sent the payment order to Snoras via the SWIFT system, debited USD 394 138.12 (approximately EUR 347 130) from Forcing Development's account and transferred the funds to its correspondent account with Snoras.

25 As the funds transferred by PrivatBank were received by Snoras at 16.20, the latter credited PrivatBank's correspondent account. However, on account of the moratorium imposed on it by the Lithuanian Central Bank, Snoras blocked the funds on that correspondent account and neither credited the account of the third party nor returned the funds to PrivatBank.

26 PrivatBank asserted a claim of USD 394 138.12 (approximately EUR 347 130) against Snoras.

27 On 25 October 2012, Forcing Development made a complaint against PrivatBank to the Markets Commission, claiming that PrivatBank had not returned the amount made available to it for the purpose of executing the payment order.

28 By decision of 4 July 2013, the Markets Commission (i) found that, under Article 99(9) of the Law on Payment Services, PrivatBank was liable for the execution of the payment order initiated by Forcing Development, (ii) ordered PrivatBank to assess whether it was necessary to make changes to its internal control systems and procedures and to inform it of the results of that assessment by 30 August 2013 at the latest, and (iii) imposed on PrivatBank a fine of LVL 100 000 (approximately EUR 140 000).

29 That decision was upheld by the Markets Commission's decision of 17 October 2013. In that decision, the Markets Commission once again stated that PrivatBank was liable under Article 99(1) and (9) of the Law on Payment Services, since it had been unable to demonstrate that Snoras had received the payment within the requisite timescale. It added that it had not been established that PrivatBank and Forcing Development had agreed alternative arrangements to govern their relationship between them.

30 In November 2013, relying on the current account management contract that it had entered into with PrivatBank, Forcing Development sought to recover, by means of arbitration, the amount made available to PrivatBank for the purpose of executing the payment order.

31 On 4 February 2014, the arbitration tribunal refused Forcing Development's request. It found that PrivatBank had complied with its obligations under Article 99(1) of the Law on Payment Services and under Directive 2007/64, since Snoras had received from PrivatBank the amount necessary to execute the payment order at issue. According to the arbitration tribunal, the Law on Payment Services does not impose on the payer's payment service provider the obligation to have available on its bank accounts sufficient sums to be able to execute immediately any payment orders that may be initiated by all its customers. That law merely imposes on the payment service providers a time limit — at the latest the end of the working day following that on which the payment orders initiated by its users was issued — within which to execute those orders and, accordingly, to credit the bank account of the payee or the payee's service provider with the amount required.

32 PrivatBank brought an action before the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) seeking the annulment of the decision of 17 October 2013, referred to in paragraph 29 above, and the award of compensation for the material damage allegedly suffered. In support of its action, PrivatBank claimed that Snoras had not informed it of the non-execution of the payment within the time limit laid down in the contract which governed their relations with each other. It included the arbitration ruling of 4 February 2014 with its application as evidence.

33 By judgment of 5 August 2015, the Administratīvā apgabaltiesa (Regional Administrative Court) dismissed the action. That court found, first, that it was owing to the fact that PrivatBank had failed to ensure that there were sufficient funds in its account with Snoras that the payment order initiated by Forcing Development could not be executed in time and, second, that under Article 99 of the Law

on Payment Services Snoras was not liable for the non-execution of the payment order since it did not have the funds to execute such an order. As for the claim that PrivatBank holds against Snoras, that court found that the amount in question was legally held by PrivatBank, even though it could not, as things stood, access it. That court concluded that, notwithstanding the arbitration ruling of 4 February 2014, the Markets Commission was right to find that PrivatBank had infringed Article 99(9) of the Law on Payment Services, to require it to assess the need to make changes to its internal control systems and procedures and to impose on it a fine of LVL 100 000 (approximately EUR 140 000), in order to prevent such a situation arising again. The Administratīvā apgabaltiesa (Regional Administrative Court) did not take into consideration the arbitration ruling of 4 February 2014.

34 PrivatBank brought an appeal on a point of law against the judgment of the Administratīvā apgabaltiesa (Regional Administrative Court) before the referring court.

35 PrivatBank claims, first of all, that in finding it liable under Article 99(9) of the Law on Payment Services, the court of first instance went beyond its jurisdiction. Since its liability as regards Forcing Development, so far as concerns the execution of the payment order at issue in the main proceedings, is governed by civil law, not administrative law, that court was bound by the arbitration ruling of 4 February 2014 delivered by the arbitration tribunal, which has jurisdiction regarding civil law relationships. Moreover, since the arbitration tribunal found that PrivatBank was not liable for the non-execution of the payment order, PrivatBank could not be required, by the Markets Commission, to make changes to its internal control system. In those circumstances, PrivatBank contends that there is no justification for imposing a fine.

36 PrivatBank claims, in addition, that Article 99 of the Law on Payment Services allows a service provider to be exempted from all liability in respect of the user of its services if they agreed as such. Since PrivatBank and Forcing Development entered into a current account management contract under which the former would not be liable for funds during transfer between banking systems, its liability should have been assessed in the light of the terms of that contract and not Article 99 of the Law on Payment Services.

37 The Markets Commission, in its comments relating to the appeal on a point of law, stated from the outset that Article 105(2) of the Law on Payment Services gives it jurisdiction to assess complaints brought by users of payment services who are not to be considered consumers. It notes, in addition, that, since PrivatBank is a credit institution and not a payment institution within the meaning of Article 4(4) of Directive 2007/64, the decision of 17 October 2013 was taken on the basis of Article 113 of the Kredītiestāžu likums (Law on Credit Institutions), which gives the Markets Commission jurisdiction to take decisions with respect to credit institutions that do not comply with the legislation applicable to them. In those circumstances the Markets Commission takes the view that PrivatBank, as a payment services provider, is subject to its supervision, including as regards its liability under Article 99 of the Law on Payment Services, which implements Article 75 of Directive 2007/64.

38 In response to a question asked by the referring court regarding the applicability of the Law on Payment Services to a dispute concerning the provision of payment services in US dollars, the Markets Commission submitted that a credit institution may choose to make its services which are not provided in euros or in a currency of a Member State outside the euro area subject to the requirements of that law if it considers itself able to meet those requirements for those services. The Markets Commission, relying on PrivatBank's internal rules, concluded that that is what PrivatBank had decided to do and, as a result, assessed its activities in the light of the relevant provisions of the Law on Payment Services.

39 In that regard, the Markets Commission contends that, even though the Law on Payment Services, in accordance with Article 51 of Directive 2007/64, allows certain derogations from the provisions of the directive to be agreed to where the payment services user is not a consumer, such an option may not be used in bad faith, by abusing the position of strength in which the credit institution finds itself, to

agree on rules establishing liability that seek to circumvent the rules laid down in Article 99 of the Law on Payment Services and to transfer to the client full liability for non-execution of a payment order. It is therefore in the light of this consideration that the current account management contract concluded between PrivatBank and Forcing Development on 11 April 2005 must be assessed. However, that contract does not merely derogate from the application of certain provisions of Directive 2007/64, but goes entirely against it.

40 The referring court is uncertain, first, whether the complaints procedure provided for by the Law on Payment Services where those services are not provided in euros or a currency of a Member State outside the euro area is compatible with Directive 2007/64. It is also uncertain whether the powers conferred by that law on the Markets Commission in connection with such a procedure are compatible with that directive.

41 In that regard, the referring court states that the Law on Payment Services gives the Markets Commission the power to assess not only complaints concerning payment services provided in euros or in the currency of a Member State outside the euro area, but also complaints concerning payment services provided in any other currency, while Article 2(2) of Directive 2007/64 limits the applicability of the complaint procedures provided for in Articles 80 to 82 of that directive to payment services provided in euros or in the currency of a Member State outside the euro area.

42 By contrast, according to the referring court, the scope of Articles 20 and 21 of Directive 2007/64 is not limited to payment services provided in euros or in the currency of a Member State outside the euro area. It can therefore be inferred from those provisions, particularly Article 20(5) of that directive, that the authorities which the Member States are required to designate pursuant to those provisions have the power to ensure compliance not only with the provisions of Title II of that directive but also the provisions of Titles III and IV of the directive, in respect of the provision of payment services in currencies other than the euro or the currencies of Member States outside the euro area.

43 The referring court considers, lastly, that if the power that Directive 2007/64 confers on national authorities, such as the Markets Commission, also covers payment services provided in the currencies of third countries, it will be necessary to clarify the limits of the powers enjoyed by those authorities when applying Article 75 of that directive.

44 In that regard, the referring court states that the Law on Payment Services does not give the Markets Commission power to resolve disputes between providers and users of payment services, since such power lies, rather, with the participants in the transaction (Article 104), with the ombudsman of the Commercial Banks Association of Latvia or with the courts (Article 106). In those circumstances, it must be clarified whether, under the prudential supervision procedure provided for in Articles 20 and 21 of Directive 2007/64, or the complaints procedure provided for in Article 80 of that directive, the Markets Commission has the power to resolve disputes between a payer and a payment service provider arising from the legal relationship referred to in Article 75 of that directive, by determining who is liable for non-execution or defective execution of a payment transaction. If that question is answered in the affirmative, it will be necessary to determine the probative value of an arbitration ruling resolving a dispute between a payer and a payment services provider.

45 In the light of the foregoing, the Augstākās tiesa (Supreme Court, Latvia) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is national legislation that confers on the Markets Commission powers to examine complaints made by payment service users including in relation to payment services not made in euros or in the national currency of a Member State [outside the euro area], and thus to find infringements of the Law [on Payment Services] and to impose penalties, compatible with Article 2(2) of Directive [2007/64]?

(2) Must Article 20(1) and (5) and Article 21(2) of [Directive 2007/64] be interpreted as allowing the competent authority to supervise and impose penalties also in respect of payment services not executed in euros or the currency of a [Member] State outside the euro area?

(3) For the purposes of carrying out the supervisory functions provided for in Articles 20 and 21 of [Directive 2007/64] or implementing the complaints procedure provided for in Articles 80 to 82 of [Directive 2007/64], does the competent authority have the power to resolve disputes between a payer and a payment service provider arising from the legal relationship referred to in Article 75 of [that directive], by determining which party is liable for the non-execution or defective execution of a transaction?

(4) In carrying out the supervisory functions provided for in Articles 20 and 21 of [Directive 2007/64] or implementing the complaints procedure established in Articles 80 to 82 of [that directive], must the competent authority take account of an arbitration ruling settling a dispute between a payment service provider and a payment service user?'

Consideration of the questions referred

The first question

46 By its first question, the referring court asks, in essence, whether Article 2(2) of Directive 2007/64 must be interpreted as not precluding national legislation under which the authority referred to in Article 82 of that directive has the power to examine complaints and impose penalties in the case of payment services provided in the currency of a third State.

47 In that regard, it should be borne in mind from the outset that Titles III and IV of Directive 2007/64, referred to in Article 2(2) of that directive, concern transparency of conditions and information requirements for payment services provided by all the categories of service providers listed in Article 1 of that directive, and rights and obligations in relation to the provision and use of those services, respectively. Those titles apply to payment services provided in euros or the currency of a Member State outside the euro area, on the condition, set out in Article 2(1) of that directive, that both the payer's payment service provider and the payee's payment service provider are, or the sole payment service provider in the payment transaction is, located in the European Union.

48 It is also important to note that, under Article 86 of Directive 2007/64, in so far as it contains harmonised provisions, the Member States are not to maintain or introduce provisions different from those laid down in that directive.

49 As the Advocate General stated in point 37 of his Opinion, given that the present case concerns an area of shared competence within the meaning of the combined provisions of Article 2(2) and Article 4(2)(a) TFEU, and since the European Union did not, by means of Directive 2007/64, exercise its legislative powers in order to harmonise the sector relating to payment services provided in the currency of a third State in the internal market, Member States are free to make applicable to that category of payment services, inter alia, Titles III and IV of that directive, which it established for payment services made in euros or in the currency of a Member State outside the euro area.

50 In the light of the foregoing, the answer to the first question is that Article 2(2) of Directive 2007/64 must be interpreted as not precluding national legislation under which the authority referred to in Article 82 of that directive has the power to examine complaints and impose penalties in the case of payment services provided in the currency of a third State.

The second question

51 By its second question, the referring court asks, in essence, whether Article 20(5) and Article 21(2) of Directive 2007/64 must be interpreted as meaning that the authority referred to in Article 20(1) of that directive has the power to carry out supervision and impose penalties in the event of infringement of the national legislation transposing the provisions of Titles III and IV of that directive in the case of payment services provided in the currency of a third State.

52 The referring court bases this question, first, on the finding that the material scope of Title II of Directive 2007/64, which includes, inter alia, Articles 20 and 21 of that directive, is not subject to the same exception as that established in Article 2(2) of that directive and, as a result, that the provisions of that title also apply to payment services provided in a currency other than euros or that of a Member State outside the euro area. Second, it infers from Article 20(5) of Directive 2007/64 that the competent authorities for the purposes of that provision also have the power to carry out controls in order to check compliance with the provisions of Titles III and IV of that directive and to impose penalties in the event of infringement of those provisions.

53 In that regard, it should be noted, in the first place, that the competent authorities for the purposes of Article 20 of Directive 2007/64 are entrusted with the task of supervising payment institutions in order to monitor compliance with the provisions of Title II of that directive (see, to that effect, judgment of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraphs 91 and 93).

54 In the second place, as the Advocate General stated in point 46 of his Opinion, in addition to the fact that Articles 20 and 21 of Directive 2007/64 are in Chapter 1, headed 'Payment institutions', of Title II of that directive, it is apparent from those provisions that they apply only to payment institutions, as defined in Article 4(4) of the directive. The personal scope of those provisions is therefore limited to the category of payment service providers consisting of such payment institutions, with the result that credit institutions fall outside that scope.

55 The exclusion of credit institutions from the personal scope of Title II of Directive 2007/64 is confirmed by recitals 8 and 11 of that directive. It is apparent from those recitals that credit institutions, which take deposits from users that can be used to fund payment transactions, are to continue to be subject to the prudential requirements under Directive 2006/48, while payment institutions, whose activities, being more specialised and limited, generate risks that are narrower and easier to monitor and control than those that arise in the activities of credit institutions, are subject to the requirements set out in that directive.

56 It is apparent from the file before the Court that PrivatBank is a credit institution within the meaning of Article 1(1)(a) of Directive 2007/64, which refers to Article 4(1)(a) of Directive 2006/48, and not a payment institution.

57 Since Articles 20 and 21 of Directive 2007/64 are not applicable *ratione personae* to credit institutions, it is not necessary to answer the second question submitted by the referring court.

The third question

58 By its third question, the referring court asks, in essence, whether Articles 20 and 21 of Directive 2007/64, or Articles 80 to 82 thereof, must be interpreted as precluding national legislation under which the authorities to which those articles refer have the power, when exercising their respective competencies, to resolve disputes between a payer and a payment services provider, arising from the non-execution or defective execution of a payment transaction, by determining who is liable for that non-execution or defective execution in accordance with Article 75 of that directive.

59 In that regard, it is necessary to bear in mind, first of all, that, as stated in paragraphs 54 and 55 above, Articles 20 and 21 of Directive 2007/64 do not apply where, as in the case in the main proceedings, one of the parties to the dispute is a credit institution, within the meaning of Article 1(1)(a) of that directive, and not a payment institution, within the meaning of Article 4(4) of the directive. It is therefore not necessary to answer the third question in so far as it concerns Articles 20 and 21 of that directive.

60 Next, as regards Articles 80 to 82 of Directive 2007/64, even though those provisions are not applicable, under Article 2(2) of that directive, to payment services provided in the currency of a third State, the fact nevertheless remains that, in the present case, since the national legislature made those provisions applicable to such payment services, the Court has jurisdiction to interpret those provisions for the purpose of a preliminary ruling (see, by analogy, judgments of 21 December 2011, *Cicala*, C-482/10, EU:C:2011:868, paragraph 17, and of 13 March 2019, *E.*, C-635/17, EU:C:2019:192, paragraph 35).

61 Consequently, it must be noted, first, that, as stated in recital 50 of Directive 2007/64, the procedures provided for in Articles 80 to 82 of that directive are intended to make possible the pursuit of complaints against payment service providers that do not comply with the provisions they are required to observe, including the provisions of Titles III and IV of the directive, and to ensure that, where appropriate, effective, proportionate and dissuasive penalties are imposed.

62 It must be noted, second, that in parallel with the obligation on Member States under Articles 80 to 82 of Directive 2007/64 to establish complaints and penalty procedures for the purposes set out in those provisions, Article 83 of that directive also requires them to establish out-of-court redress procedures in order to resolve disputes between payment service users and payment service providers concerning rights and obligations arising under the directive, using existing bodies where appropriate. As specified by recital 51 of the directive, that easily accessible and cost-sensitive out-of-court resolution of conflicts is without prejudice to the right of customers to bring actions in the courts.

63 It follows from the foregoing that the out-of-court redress procedures for the resolution of disputes between providers and users of payment services provided for in Article 83 of Directive 2007/64 pursue a different objective from that pursued by the complaints procedures provided for in Article 80 of that directive. Indeed, the objective of the latter is neither to resolve disputes between providers and users of the payment services in question nor to establish the civil liability for the harm suffered in that regard. However, that fact does not prevent the competent authority, for the purposes of Article 82 of Directive 2007/64, from applying the national provisions implementing Article 75 of that directive in order to assess whether a complaint lodged under Article 80 of the directive is well founded, and to impose penalties in respect of infringements of those provisions pursuant to Article 81 of the directive.

64 Accordingly, the authority competent for assessing complaints and imposing penalties under Articles 80 to 82 of Directive 2007/64 is not entitled, in the context of the powers conferred on it by those provisions, to resolve disputes between providers and users of payment services. That conclusion is confirmed, inter alia, by Article 80(2) of that directive, which requires that authority, when it takes a decision on a complaint from a payment services user, to inform the complainant, where appropriate, of the existence of the out-of-court redress procedures set up in accordance with Article 83 of the directive.

65 It is true that the powers provided for by Articles 80 to 82 of Directive 2007/64 and those provided for by Article 83 of that directive may be exercised by the same national authority, as Article 83(1) of that directive, read in the light of recital 52 thereof, expressly states. However, the fact remains that, even in such a situation, the complaints and penalty procedures referred to in Articles 80 to 82 of Directive 2007/64 and the out-of-court redress procedures referred to in Article 83 of that directive are separate

and independent, with the result that the powers conferred on the national authority as regards complaints and penalty procedures cannot be exercised in the context of out-of-court redress procedures, and vice versa.

66 It should be noted, third, that under Article 51 of Directive 2007/64, where the payment service user is not a consumer, the parties may agree that, inter alia, Article 75 of that directive is not to apply in whole or in part. Recital 20 of the directive, in the light of which Article 51 must be read, states that, since consumers and enterprises are not in the same position, they do not need the same level of protection. Recital 20 also states that, while it is important to guarantee consumers' rights by means of provisions which cannot be derogated from by contract, it is reasonable to let enterprises and organisations agree otherwise. That recital adds, however, that, in any event, certain core provisions of Directive 2007/64 should always be applicable, irrespective of the status of the user.

67 In the present case, it is apparent from the file before the Court that Forcing Development, which is an enterprise and not a consumer within the meaning of Article 4(11) of Directive 2007/64, agreed with PrivatBank, by means of a current account management contract entered into on 11 April 2005, to exclude the application to their dealings as user and provider of payment services of the provisions of national law implementing Article 75 of that directive.

68 In those circumstances, and as the Advocate General noted in point 103 of his Opinion, it is for the referring court to assess whether that current account management contract complies with the national provisions implementing Directive 2007/64, read in the light of recital 20 thereof.

69 In the light of the foregoing, the answer to the third question is that Articles 80 to 82 of Directive 2007/64 must be interpreted as not conferring power on the competent authority, for the purposes of those provisions, to resolve, by applying the criteria established in Article 75 of that directive, disputes between users and providers of payment services arising from non-execution or defective execution of a payment transaction, where that authority exercises its powers to assess complaints lodged by payment services users and to impose penalties on payment service providers in the event of infringement of the applicable provisions. Such disputes must be resolved through the out-of-court redress procedures referred to in Article 83 of Directive 2007/64, without prejudice to the right to bring proceedings before a court in accordance with national procedural law. If the national legislature opted to concentrate the powers conferred in Articles 80 to 82 and those conferred in Article 83 of the directive in the hands of the same authority, that authority must exercise each of those categories of powers independently, applying only the relevant respective procedures.

The fourth question

70 By its fourth question, the referring court asks, in essence, whether the authorities responsible for (i) prudential supervision under Articles 20 and 21 of Directive 2007/64 and (ii) assessing complaints and imposing penalties under Articles 80 to 82 of that directive, respectively, must take into consideration an arbitration ruling given in a dispute between a user and a provider of payment services.

71 It should be noted first of all that the observations made in paragraphs 59 to 60 above also apply to the answer to be given to the fourth question. First, Articles 20 and 21 of Directive 2007/64 do not apply to a case such as that in the main proceedings, and there is therefore no need to answer the part of the question concerning the interpretation of those provisions. Second, the national legislature made Articles 80 to 82 of the directive applicable to payment services not coming within the scope of that directive, thus giving the Court jurisdiction to answer that part of the question.

72 In that regard, it must be noted, first of all, that Directive 2007/64 contains no provision concerning the probative value, in the complaints and penalty procedures set out in Articles 80 to 82 of that directive, of an arbitration ruling.

73 However, it is apparent from the Court's settled case-law that, in the absence of EU rules governing the matter, it is for each Member State to prescribe detailed rules in respect of administrative and judicial procedures, which cover the probative value of a document, intended to safeguard the rights which individuals derive from EU law, in accordance with the principles of equivalence and effectiveness (see, to that effect, judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188, paragraph 5, and of 26 June 2019, *Craeynest and Others*, C-723/17, EU:C:2019:533, paragraph 54), without undermining the effectiveness of EU law (see, to that effect, judgments of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 50, and of 27 June 2018, *Diallo*, C-246/17, EU:C:2018:499, paragraph 46).

74 Next, it is necessary to bear in mind that the complaints and penalty procedures under Articles 80 to 82 of Directive 2007/64, and the out-of-court redress procedures under Article 83 of that directive, which include arbitration procedures, have different purposes and objectives, as stated in paragraph 63 above.

75 It follows that the possibility of taking into account, in complaints and penalty procedures under Articles 80 to 82 of Directive 2007/64, a document produced in the context of an out-of-court redress procedure under Article 83 of that directive, is therefore limited on the basis of the specific purposes of those complaints and penalty procedures and the individual rights which must be guaranteed in that connection.

76 In the light of the foregoing, the answer to the fourth question is that, in accordance with the principle of the procedural autonomy of the Member States, the national legislature may give the competent authority, in the complaints and penalty procedures referred to in Articles 80 to 82 of Directive 2007/64, the power to take into account an arbitration ruling settling a dispute between a user and provider of payment services concerned by those procedures, provided that the probative value given to that ruling in those procedures is not liable to undermine the purpose or specific objectives of the procedures, the rights of defence of the persons concerned or the independent exercise of the powers and competencies conferred on that authority, which is a matter for the referring court to ascertain.

Costs

77 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 (Ninth Chamber) hereby rules:

1. **Article 2(2) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, as amended by Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009, must be interpreted as not precluding national legislation under which the authority referred to in Article 82 of that directive has the power to examine complaints and impose penalties in the case of payment services provided in the currency of a third State.**

2. **Articles 20 and 21 of Directive 2007/64, as amended by Directive 2009/111, are not applicable *ratione personae* to credit institutions.**

3. **Articles 80 to 82 of Directive 2007/64, as amended by Directive 2009/111, must be interpreted as not conferring power on the competent authority, for the purposes of those provisions, to resolve, by applying the criteria established in Article 75 of that directive,**

disputes between users and providers of payment services arising from non-execution or defective execution of a payment transaction, where that authority exercises its powers to assess complaints lodged by payment services users and to impose penalties on payment service providers in the event of infringement of the applicable provisions. Such disputes must be resolved through the out-of-court redress procedures referred to in Article 83 of Directive 2007/64, as amended by Directive 2009/111, without prejudice to the right to bring proceedings before a court in accordance with national procedural law. If the national legislature opted to concentrate the powers conferred in Articles 80 to 82 and those conferred in Article 83 of the directive in the hands of the same authority, that authority must exercise each of those powers independently, applying only the relevant respective procedures.

4. **In accordance with the principle of the procedural autonomy of the Member States, the national legislature may give the competent authority, in the complaints and penalty procedures referred to in Articles 80 to 82 of Directive 2007/64, as amended by Directive 2009/111, the power to take into account the existence and contents of an arbitration ruling settling a dispute between a user and provider of payment services concerned by those procedures, provided that the probative value given to that ruling in those procedures is not liable to undermine the purpose or specific objectives of the procedures, the rights of defence of the persons concerned or the independent exercise of the powers and competencies conferred on that authority, which is a matter for the referring court to ascertain.**

[Signatures]