



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 26 April 2018¹

Case C-176/17

Profi Credit Polska S.A. w Bielsku Białej
v
Mariusz Wawrzosek

(Request for a preliminary ruling from the Sąd Rejonowy w Siemianowicach Śląskich (District Court, Siemianowice Śląskie, Poland))

(Reference for a preliminary ruling — Consumer protection — Unfair terms in consumer contracts — Consumer credit agreement — Procedure for the issue of an order for payment based on a promissory note which secures claims under a consumer credit agreement — Inability of the court to determine whether the contractual terms are unfair if the consumer does not take any legal action)

I. Introduction

1. The Court of Justice has already emphasised on a number of occasions that national procedural law plays a decisive role in guaranteeing effective consumer protection. In particular, the Court has stated that national courts must assess of their own motion whether a contractual term which falls within the scope of the Unfair Contract Terms Directive² is unfair.³ By this request for a preliminary ruling, the Court is asked for the first time whether the national court is under such a duty even when it is examining an obligation under a bill of exchange or promissory note which secures claims under a consumer credit agreement.

2. A bill of exchange is a time-honoured legal institution which arose from money-changing transactions among merchants in the High Middle Ages.⁴ The great legislative works of the 19th century, in particular the French *Code de commerce* of 1807, liberated the bill of exchange from these profession-based fetters,⁵ and it became *the* instrument which enabled citizens of all classes to access cashless payment transactions.⁶ The majority of the Member States of the European Union are Contracting Parties to the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes of 1930, the objective of which was the international standardisation of the law on bills of exchange and promissory notes.

¹ Original language: German.

² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

³ See, for example, judgments of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, paragraph 49); of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 42); and of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 52).

⁴ See H. Coing, *Europäisches Privatrecht I*, Munich, 1985, p. 543.

⁵ H. Coing, *Europäisches Privatrecht II*, Munich, 1989, p. 570.

⁶ Ch. Bergfeld, 'Preußen und das Allgemeine Deutsche Handelsgesetzbuch', *Ius Commune* 14 (1987), 105 and 106.

3. The use of a promissory note — that is to say, an instrument in the case of which the person by whom it is issued himself undertakes to pay an amount — as a means of providing security in respect of consumer credit agreements is permitted and widespread in Poland, in contrast to the position in some other Member States.⁷ Polish procedural law provides for a swift order for payment procedure in relation to promissory notes which restricts the national courts to a formal examination of the promissory note. If the promissory note is being used as security for a loan agreement, the order for payment procedure thus precludes examination of the underlying loan agreement. This request for a preliminary ruling offers the Court an opportunity to opine on whether this procedure is compatible with the Unfair Contract Terms Directive and the Consumer Credit Directive.⁸

II. Legal context

A. EU law

4. The Unfair Contract Terms Directive relates to unfair terms in consumer contracts. Article 3(1) of that directive reads:

‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.’

5. Article 6(1) of that directive provides:

‘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. ...’

6. Article 7(1) of that directive provides:

‘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.’

7. The Consumer Credit Directive, as provided in Article 2(1) thereof, applies to credit agreements. Article 3(c) defines a credit agreement as ‘an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation’.

8. Article 17(1) of the Consumer Credit Directive provides:

‘In the event of assignment to a third party of the creditor’s rights under a credit agreement or the agreement itself, the consumer shall be entitled to plead against the assignee any defence which was available to him against the original creditor, including set-off where the latter is permitted in the Member State concerned.’

9. Article 22 of that directive provides:

‘1. In so far 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.’

⁷ These include Belgium, Bulgaria, Denmark, Germany, Estonia, Finland, France, Latvia, Luxembourg, the Netherlands, the Slovak Republic, Slovenia, Sweden, the Czech Republic and the United Kingdom.

⁸ 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).

2. Member States shall ensure that consumers may not waive the rights conferred on them by the provisions of national law implementing or corresponding to this Directive.

3. Member States shall further ensure that the provisions they adopt in implementation of this Directive cannot be circumvented as a result of the way in which agreements are formulated, in particular by integrating drawdowns or credit agreements falling within the scope of this Directive into credit agreements the character or purpose of which would make it possible to avoid its application.

...'

B. National law

10. The provisions relating to the order for payment procedure in relation to a promissory note are contained in the Kodeks postępowania cywilnego (Code of Civil Procedure, 'the KPC'). Article 485(2) of the KPC provides:

'The court shall also issue an order for payment against a person bound by obligations under a duly completed promissory note ... where there is no doubt as to its authenticity and content. If the rights arising from the promissory note ... have been transferred to the applicant, an order for payment will be issued only if documents substantiating the claim are submitted, unless the transfer of those rights to the applicant results directly from the promissory note ...'

11. Article 486(1) of the KPC adds:

'If there is not sufficient basis for the issue of an order for payment, the President shall set a date for the hearing, unless the case can be examined in chambers.'

12. 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. ...'

13. Article 492 of the KPC provides:

'(1) On being issued, the order for payment shall have the status of a provisional enforcement order that is enforceable without an enforcement clause. ...

(3) An order for payment issued on the basis of a promissory note ... shall be enforceable immediately upon expiry of the period for satisfying the claim. In the event that an objection is raised, the court may, at the request of the defendant, suspend enforcement of the order. ...'

14. Article 493(1) of the KPC states:

'The objection shall be raised before the court which issued the order for payment. The defendant must indicate in the objection whether he disputes the order in whole or in part, set out the complaints, which, if they are not to be precluded, must be asserted prior to any submission on the substance of the matter, and adduce facts and evidence. ...'

15. Article 19(4) of the Ustawa o kosztach sądowych w sprawach cywilnych (Law on Court Costs in Civil Matters) provides that the defendant must bear three quarters of the court fee if he lodges an objection to an order for payment.

16. In respect of provisions in consumer contracts, Article 385 of the Kodeks cywilny (Civil Code, ‘the KC’) states:

‘1. Provisions of a contract concluded with a consumer which have not been agreed individually shall not be binding on the consumer if they define his rights and obligations in a way that is contrary to good practice, grossly infringing his interests (prohibited contractual provisions). This shall not apply to provisions defining the principal obligations of the parties, including price or remuneration, if they are worded explicitly.

2. If a contractual provision is not binding on the consumer pursuant to paragraph 1, the contract shall otherwise continue to be binding on the parties.’

17. With regard to promissory notes, Article 101 of the Ustawa prawo wekslowe (Law on Bills of Exchange and Promissory Notes) provides:

‘A promissory note shall contain: (1) the term “promissory note” in the body of the document, in the language in which it has been issued; (2) an unconditional promise to pay a determinate sum of money; (3) a statement of the time of payment; (4) a statement of the place of payment; (5) the name of the person to whom or to whose order payment is to be made; (6) a statement of the date on which and of the place where the promissory note has been issued; (7) the signature of the person issuing the promissory note.’

18. The provisions of the Consumer Credit Directive were transposed into Polish law by the Ustawa o kredycie konsumenckim (Law on Consumer Credit, ‘the UKK’) of 12 May 2011. Article 41 of the UKK provides:

‘1. A promissory note ... of a consumer submitted to a creditor for the purposes of discharging or securing an obligation under a consumer credit agreement shall contain the clause “not to order” or another clause having the same meaning.

2. If the creditor accepts a promissory note ... that does not contain the clause “not to order” and that promissory note ... is transferred to another person, the creditor shall be obliged to make good the damage caused to the consumer by payment of the promissory note ...

3. Paragraph 2 shall also apply where the promissory note ... comes into the possession of another person against the creditor’s will.’

III. The facts and the main proceedings

19. On 3 December 2015, the applicant in the main proceedings, Profi Credit Polska S.A., established in Bielsko-Biała (‘the Bank’), concluded a loan agreement with the defendant in the main proceedings, Mr Mariusz Wawrzosek. As the referring court is aware from other proceedings which the applicant has brought before it, the agreement in question is a pre-formulated standard contract including a term by virtue of which the borrower is obliged to issue a promissory note as security for the claims accruing to the creditor under the loan agreement. In accordance with this obligation, the defendant gave the applicant a signed blank promissory note.

20. Subsequently, the defendant did not repay the loan. The applicant therefore terminated the loan agreement and entered the amount of PLN 3 268.38 in the blank promissory note.

21. The applicant applied to the referring court for the issue against the defendant of an order for the payment of PLN 3 268.38, on the basis of the promissory note. The applicant enclosed with the application the duly completed and signed promissory note as well as the document terminating the loan agreement, but not this agreement itself.

22. As the referring court states, under the national law the order for payment procedure on the basis of a promissory note comprises two stages. The *first stage* is triggered by the application for the issue of the order for payment. It takes place without the defendant knowing about it. Pursuant to Article 485(2) of the KPC, the court issues an order for payment when a promissory note in due form has been provided and ‘there is no doubt as to its authenticity and content’. According to the referring court, the national case-law interprets this provision as meaning that all that is examined of the court’s own motion at the first stage of the procedure is whether the promissory note submitted by the applicant is authentic and is in the legally required form. If these requirements are met, the court has an obligation to issue the order for payment, and the substance of the underlying relationship is irrelevant. If the promissory note secures a claim under a loan agreement, in the first stage of the procedure the applicant can simply submit the promissory note as evidence. He does not need to provide evidence that the secured claim under the loan agreement exists and is valid.

23. The order for payment is served upon the defendant together with the applicant’s notice initiating proceedings and a notification relating to the lodging of an objection. The period for lodging the objection is two weeks from service of the order for payment. At the request of the defendant, the court may then suspend enforcement of the order for payment pursuant to Article 492(3) of the KPC. According to the referring court, in this *second stage* of the procedure the defendant can raise not only objections against the obligation under the promissory note but also objections against claims arising from the relationship underlying it, for example the unfairness of a term of the underlying consumer credit agreement. If, on the other hand, the defendant does not lodge any objection, pursuant to Article 492(1) of the KPC the order for payment has the status of a provisional enforcement order which is enforceable without an enforcement clause. The order for payment has the force of *res judicata* in respect of the obligation under the promissory note, but not in respect of the claim arising from the relationship underlying it.

IV. Request for a preliminary ruling and proceedings before the Court of Justice

24. By order of 17 February 2017, which was received on 6 April 2017, the Sąd Rejonowy w Siemianowicach Śląskich (District Court, Siemianowice Śląskie, Poland) referred the following question to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU:

Must the provisions of the Unfair Contract Terms Directive, in particular Articles 6(1) and 7(1), and the provisions of the Consumer Credit Directive, in particular Articles 17(1) and 22(1), be construed as precluding the assertion of a claim, established by means of a duly completed bill of exchange or promissory note, by a seller or supplier (the creditor) against a consumer (the debtor) in the course of order for payment proceedings pursuant to Article 485(2) et seq. of the KPC, in conjunction with Article 41 of the UKK, under which the national court may examine the effectiveness of the claim arising from the bill of exchange or promissory note exclusively from the point of view of compliance with the formal requirements applicable to the bill of exchange or promissory note, without examining the relationship underlying it?

25. In the proceedings before the Court, the Republic of Poland and the European Commission submitted written observations and also attended the hearing on 1 March 2018.

V. Legal assessment

26. In what follows, I will initially deal with the interpretation and admissibility of the request for a preliminary ruling and will subsequently discuss the Consumer Credit Directive and then the Unfair Contract Terms Directive.

A. Interpretation of the question asked and admissibility of the reference

27. By its question, the referring court essentially wishes to ascertain whether the Unfair Contract Terms Directive and the Consumer Credit Directive should be interpreted as precluding national legislation which, in an order for payment procedure based on a promissory note, restricts the national court to examining compliance with the formal requirements applicable to the promissory note and rules out an examination of the loan agreement secured by the promissory note.

28. In its reference, the referring court explains that this examination of the underlying relationship does not take place until the consumer lodges an objection to the order for payment. In my opinion, the procedure in question must be considered in its entirety, that is to say both the first stage before the objection is lodged and the subsequent second stage.

29. Furthermore, I understand the question submitted by the referring court as relating to the possibility of examination of the underlying relationship, that is to say, of the loan agreement, is possible. It is therefore irrelevant whether the promissory note, when considered in isolation, constitutes an agreement which falls within the scope of the Unfair Contract Terms Directive.

30. It is true that in the first stage the subject matter in dispute before the national court is the promissory note alone. The underlying relationship does not become part of the subject matter in dispute until the second stage, on the basis of the consumer's objection. This does not mean, however, that it is obvious that the requested interpretation of EU law bears no relation to the subject matter of the main action and is therefore inadmissible.⁹ This is because the question asked is essentially concerned with whether it is compatible with EU law for Polish law to require an intervention from the consumer in order to make the loan agreement part of the subject matter in dispute and enable the national court to carry out its examination, or whether EU law should be interpreted as meaning that this examination must already take place in the first stage.

B. The Consumer Credit Directive

31. The purpose of the Consumer Credit Directive is to harmonise fully certain aspects of the Member States' rules concerning consumer credit agreements. Among other things, it imposes various information obligations on the creditor for the purpose of protecting consumers.

32. In relation to credit sureties, the Consumer Credit Directive provides that pre-contractual information must specify any sureties that are required.¹⁰ The sureties required are also among the items of information which must be specified in the credit agreement.¹¹ The Consumer Credit Directive does not contain any other provisions about sureties, and in particular does not contain any provisions about promissory notes which secure a claim arising from a consumer credit agreement.

⁹ See judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25).

¹⁰ Article 5(1), second subparagraph, point (n).

¹¹ Article 10(2)(o).

33. However, the Consumer Credit Directive's predecessor legislation did mention promissory notes. It provided that Member States which permitted the consumer to give security by means of bills of exchange including promissory notes and cheques had to ensure that the consumer was suitably protected when using these means of providing security.¹²

34. That provision was not included in the new Consumer Credit Directive. Even though the Commission's first proposal to amend the predecessor directive even contained a strict prohibition on the creditor requiring the consumer to provide a bill of exchange or promissory note as security for the consumer credit or on inviting him to do so,¹³ there is no provision relating to bills of exchange or promissory notes in the final text of the Consumer Credit Directive.

35. It can only be inferred from this that it was the intention of the EU legislature that it should be left to the Member States to decide on whether a bill of exchange or promissory note may be used to secure a consumer loan. The Member States' room for manoeuvre even increased in comparison with the predecessor directive. Whereas, under the predecessor directive, the Member States still had to ensure that the consumer was sufficiently protected when using a bill of exchange or promissory note,¹⁴ the Consumer Credit Directive no longer contains any corresponding provision which imposes such an obligation on the Member States.

No infringement of Article 22(1) of the Consumer Credit Directive

36. Nevertheless, the referring court wishes to ascertain whether the Polish legislation infringes Article 22(1) of the Consumer Credit Directive. Article 22(1) prohibits Member States from maintaining or introducing in their national law provisions diverging from those laid down in the directive *in so far as* that directive contains harmonised provisions. However, this question does not affect promissory notes because, as has just been shown, the directive has in fact not brought about any harmonisation in relation to bills of exchange or promissory notes as a means of providing security for a consumer loan. Nor, moreover, can it be ascertained from the circumstances of the main proceedings whether national provisions that are divergent have been maintained or introduced in the matters *specifically* covered by the harmonisation.¹⁵ Therefore, no infringement of Article 22(1) of the directive is apparent.

No infringement of Article 22(2) of the Consumer Credit Directive

37. However, the Commission is of the view that there is an infringement of Article 22(2) of the Consumer Credit Directive. Article 22(2) requires Member States to ensure that consumers may not waive the rights conferred on them by the provisions of national law implementing the directive.

38. However, it is not evident that Mr Wawrzosek has waived his rights under the provisions of Polish law by providing a promissory note. This is because a waiver within the meaning of Article 22(2) of the Consumer Credit Directive requires the consumer to extinguish, wholly or in part, by means of an express declaration or by conclusive actions, an existing right which he possesses on the basis of the national provisions implementing the directive. However, the request for a preliminary ruling contains no indications that such rights existed that were waived by Mr Wawrzosek in connection with the promissory note or in any other form.

¹² Article 10 of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48).

¹³ Article 18 of the Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, COM(2002) 443 final (OJ 2002 C 331E, p. 200). Not significantly amended by COM(2004) 747 final.

¹⁴ See point 33 above.

¹⁵ See judgment of 12 July 2012, *SC Volksbank România* (C-602/10, EU:C:2012:443, paragraph 38), and order of 12 October 2016, *Horžić and Pušić* (C-511/15 and C-512/15, EU:C:2016:787, paragraph 26).

No circumvention within the meaning of Article 22(3) of the Consumer Credit Directive

39. Contrary to the view taken by the referring court and the Commission, securing the claims against the consumer under a consumer credit agreement by means of a promissory note also does not constitute a circumvention of the national provisions implementing the directive, which would not be permitted under Article 22(3) of the Consumer Credit Directive.

40. It is true that one advantage of a promissory note for the creditor is that in the first stage of the order for payment procedure he benefits from an easing of the burden of proof since he only has to prove the authenticity and formal validity of the promissory note. This does not, however, result in a reversal of the burden of proving the performance of the creditor's obligations to provide information, which would constitute a circumvention within the meaning of Article 22(3) of the Consumer Credit Directive.

41. As the Court has already held, the Consumer Credit Directive does not contain any express provision in relation to the burden of proving that the creditor has performed his obligations to provide information under the directive.¹⁶ However, the Court has inferred from Article 22(3) that a contractual term may not result in a reversal of the burden of proving the performance of the creditor's obligations to provide information.¹⁷

42. If the underlying relationship is not examined at the first stage of the national procedure, this does not entail a provision relating to allocating the burden of proof, but merely a limitation of the subject matter of the proceedings. On the other hand, the creditor unreservedly bears the burden of proving the authenticity and formal validity of the promissory note in the first stage.

43. As soon as the consumer triggers the second stage of the procedure by his objection to the order for payment, the underlying relationship also becomes part of the subject matter of the proceedings. From this point in time onwards, the creditor bears the burden of proving that he has performed his obligations to provide information.

44. Therefore, the Polish legislation that is in question does not result in a change in the allocation of the burden of proof. The term of the loan agreement which requires Mr Wawrzosek to provide the promissory note accordingly does not constitute a contractual arrangement which infringes the prohibition on circumvention of Article 22(3) of the Consumer Credit Directive.

45. Moreover, the Commission's argument that an agreed promissory note would constitute a contravention of the Consumer Credit Directive because this would create a risk that compliance by the creditor with his obligations to provide information would not be examined by the courts must also be rejected. The reason for this is that this approach would result in the promissory note becoming practically impermissible as a means of providing security in relation to consumer credit agreements. However, this would conflict with the intention of the EU legislature, which leaves to the Member States the question of whether they permit this instrument as a means of providing security in relation to consumer credit agreements.¹⁸

The question of an infringement of Article 17(1) of the Consumer Credit Directive

46. The request for a preliminary ruling also raises the question of whether Article 17(1) of the Consumer Credit Directive precludes reliance on a promissory note issued for the purpose of securing credit in accordance with Polish law.

¹⁶ Judgment of 18 December 2014, *CA Consumer Finance* (C-449/13, EU:C:2014:2464, paragraph 22).

¹⁷ Judgment of 18 December 2014, *CA Consumer Finance* (C-449/13, EU:C:2014:2464, paragraphs 30 and 31).

¹⁸ See point 35 above.

47. However, Article 17(1) of the Consumer Credit Directive relates to a situation in which a third party who is different from the original parties to the Consumer Credit Agreement has become the holder of the claims against the consumer. By contrast, Mr Wawrzosek entered into the original loan agreement with the applicant. Accordingly, the beneficiary of the promissory note is identical to the lender. The Bank has neither assigned its rights arising from the loan agreement to third parties nor endorsed the promissory note. Consequently, Article 17(1) is irrelevant for the purposes of the decision in the main proceedings and the Court of Justice does not need to address this provision.

48. It is only for the sake of completeness that it should be mentioned that Article 41 of the UKK states that a promissory note which is provided by a consumer as security for the creditor's claim under a consumer credit agreement must necessarily contain a clause which prevents an assignment by endorsement. If the creditor accepts a promissory note from the consumer without this clause and if the promissory note is passed to a third party — it being irrelevant whether this happens in accordance with or contrary to the intention of the creditor — the creditor must compensate the consumer for the damage suffered as a consequence.

Interim conclusion

49. It can therefore be concluded that the provisions of the Consumer Credit Directive do not preclude legislation such as that in question here.

C. The Unfair Contract Terms Directive

Basic principles of the Unfair Contract Terms Directive

50. The purpose of the Unfair Contract Terms Directive is to prevent the use of unfair terms in contracts concluded between a seller or supplier and a consumer.

51. Article 6(1) of the Unfair Contract Terms Directive provides that unfair terms used in a contract concluded with a consumer by a seller or supplier are not to be binding on the consumer. Under Article 7(1) of the directive, Member States must 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 a consumer by sellers or suppliers.

52. This legislation is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.¹⁹

53. Accordingly, national law must guarantee effective judicial protection for consumers by making it possible for them to bring legal proceedings against the disputed contract under reasonable procedural conditions, so that the exercise of their rights is not subject to conditions, in particular time limits or costs, which make it excessively difficult or practically impossible to exercise the rights guaranteed by the Unfair Contract Terms Directive.²⁰

¹⁹ Judgments of 7 December 2017, *Banco Santander* (C-598/15, EU:C:2017:945, paragraph 36 and the case-law cited); of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 39); and of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 25).

²⁰ Judgments of 7 December 2017, *Banco Santander* (C-598/15, EU:C:2017:945, paragraph 38), and of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 59).

54. The Court has repeatedly held that, in the absence of harmonisation of the law of civil procedure, regulation of the enforcement of civil-law claims is a matter for the national legal systems of the Member States, in accordance with the principle of procedural autonomy. In undertaking this, the Member States must ensure that the national rules are no less favourable than those governing similar domestic actions (principle of equivalence) and that they do not make it excessively difficult or practically impossible to exercise the rights guaranteed to consumers by EU law (principle of effectiveness).²¹

55. Since there are no indications in the present case which could give rise to any doubt about compatibility with the principle of equivalence, all that has to be examined is whether the Polish legislation infringes the principle of effectiveness. According to the Court's case-law, this question must be analysed by reference to the role of the provision in question in the procedure as a whole, the procedure's conduct and its special features.²²

56. According to the Court's settled case-law — which has been pronounced *inter alia* in relation to the order for payment procedure — the principle of effectiveness requires the national court to assess, of its own motion, whether a contractual term is unfair *where it has available to it the legal and factual elements necessary for that task*.²³

Application to the enforcement of a promissory note under Polish law

57. On the basis of *this* criterion, the Polish legislation is compatible with Articles 6(1) and 7(1) of the Unfair Contract Terms Directive. This is because, in the *first stage* of the order for payment procedure, the court has before it only the promissory note whose authenticity and formal validity it is examining. The loan agreement underlying the promissory note is not presented to the court. The court therefore does not have the legal and factual elements necessary for assessing whether the loan agreement contains an unfair term.

58. By contrast, in the *second stage* of the procedure, which is triggered by the consumer's objection to the order for payment, the court examines objections arising from the underlying relationship. It is only in this part of the procedure that the court has the legal and factual elements necessary for this purpose, since the facts and evidence which are necessary for assessing the unfairness of the loan agreement are presented to it pursuant to Article 493(1) of the KPC.

59. It should be pointed out that, in the first stage of the procedure, Polish procedural law sets stricter requirements for the issue of an order for payment than Regulation (EC) No 1896/2006 concerning the European order for payment procedure²⁴ requires for the issue of a European order for payment, which can be used for the enforcement of claims against consumers. Specifically, under Polish law the applicant must submit the promissory note, and thus a piece of evidence, in the first stage of the procedure. By contrast, under Article 7(2)(e) of Regulation No 1896/2006, the evidence supporting the claim asserted must only be described, and not presented to the court.

21 Judgments of 7 December 2017, *Banco Santander* (C-598/15, EU:C:2017:945, paragraph 38); of 18 February 2016, *Finanmadrid EFC* (C-49/14, EU:C:2016:98 paragraph 40); and of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 46).

22 Judgments of 18 February 2016, *Finanmadrid EFC* (C-49/14, EU:C:2016:98, paragraph 43), and of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 49).

23 Judgments of 18 February 2016, *Finanmadrid EFC* (C-49/14, EU:C:2016:98, paragraph 36); of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 57); and of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 35).

24 Regulation of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1).

Distinction from the previous case-law on incompatibility with the Unfair Contract Terms Directive

60. The facts underlying the main proceedings differ in the following ways from those of the cases in which the Court has established incompatibility with the Unfair Contract Terms Directive. In the *Banco Español de Crédito* case, from the very beginning of the order for payment procedure the national court already had the legal and factual elements necessary for assessing the unfairness of the contractual term. However, it was prevented from assessing of its own motion whether the term was unfair by a provision of national procedural law, which was why the Court declared this provision to be incompatible with the Unfair Contract Terms Directive.²⁵ In the *Finanmadrid EFC* case, both the order for payment procedure and the subsequent enforcement procedure concluded without a court assessing of its own motion whether a term of the agreement which was to be enforced in the procedure was unfair, even though both the ‘Secretario judicial’ dealing with the order for payment procedure and the court seised in the enforcement procedure had the legal and factual elements necessary for assessing the unfairness of the contractual term.²⁶

61. Nor is the legislation of relevance in the main proceedings inconsistent with the principles which the Court developed in the *Aziz* case. In so far as enforcement measures involving the eviction of the consumer and his family from the dwelling that serves as their main residence are imminent or have already been taken, the Court ruled that the national court which has to decide whether a term of a consumer contract is unfair must have the power to order interim measures for the prevention or suspension of an unlawful enforcement procedure pertaining to immovable property so as to ensure that the protection envisaged by the Unfair Contract Terms Directive is fully effective.²⁷ Merely granting the consumer a right to compensation for the damage which has arisen as a consequence of the enforcement measures involving eviction from the dwelling falls below the level of protection required by the Unfair Contract Terms Directive.²⁸

62. It must first be noted that the Court developed these principles for the purpose of legal protection against enforcement measures which are directed against a property that the consumer uses as a family home. As the Court specified in the *Kušionová* case, it is in particular the right to respect for the home, enshrined in Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 7 of the Charter of Fundamental Rights, which is a ground for incompatibility with the Unfair Contract Terms Directive.²⁹ On the other hand, the procedure for the issue of an order for payment based on a promissory note is significantly less sensitive.

63. Furthermore, while it is the case that under Polish law an order for payment constitutes a provisional enforcement order that is enforceable without an enforcement clause, the second sentence of Article 492(3) of the KPC provides that the court may suspend enforcement upon request after an objection has been raised. It can therefore order interim measures for the prevention or suspension of an unlawful enforcement procedure, with the consequence that the consumer is not limited to a claim for damages.

64. It is only for the purposes of completeness that it should be noted that, pursuant to Article 23 of Regulation No 1896/2006, enforcement on the basis of a European order for payment may be stayed or limited only upon application by the defendant. Accordingly, the requirements laid down by the Polish provision are no greater than those of the European order for payment procedure.

25 Judgment of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraphs 52 and 53).

26 Judgment of 18 February 2016, *Finanmadrid EFC* (C-49/14, EU:C:2016:98, paragraphs 45, 46, 50).

27 Judgments of 7 December 2017, *Banco Santander* (C-598/15, EU:C:2017:945, paragraph 49); of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 66); and of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 59).

28 Judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 60).

29 Judgment of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraphs 64 and 65).

65. Finally, as the Polish Government argues, the lodging of the objection prevents the order for payment from acquiring the force of *res judicata*. In the *Finanmadrid EFC* case, the Court ruled that it is not compatible with the Unfair Contract Terms Directive if a decision's acquisition of the force of *res judicata* makes it impossible for the consumer to invoke the unfairness of a term of the loan agreement in response to an action brought by the seller or supplier on the basis of the loan agreement.³⁰ When the consumer lodges an objection, under the national procedural law he prevents the order for payment from acquiring the force of *res judicata*. In addition, he can rely on the unfairness of a term of the loan agreement in the second stage of the procedure. If the consumer lodges an objection, no conflict exists with the principles which the Court developed in the *Finanmadrid EFC* case.

66. Even if the consumer does not lodge an objection and the order for payment acquires the force of *res judicata*, the principles of the *Finanmadrid EFC* case cannot be applied. Since the issue of the order for payment was based only on the promissory note, the *res judicata* effect of the order for payment covers only the obligation under the promissory note, but not the loan agreement.

67. In that respect, the facts on which the main proceedings are based differ from those in the *Finanmadrid EFC* case. As the Polish Government sets out, the consumer can still rely on the unfairness of a term of the loan agreement in a subsequent set of proceedings with the seller or supplier, with the national court having to assess the unfairness of its own motion.

68. If the seller or supplier has carried out enforcement on the basis of the order for payment, the consumer can demand the return of that which the seller or supplier has acquired by virtue of the enforcement measures, in particular under the principles of unjust enrichment or of compensatory damages. The consumer can then justify his claim for unjust enrichment or damages on the basis that the loan agreement contains an unfair term. The *res judicata* effect of the order for payment does not preclude the bringing of such an action by the consumer because it does not cover objections arising from the loan agreement.

69. It is true that in the *Aziz* case the Court ruled, in relation to enforcement measures pertaining to eviction from a dwelling, that it is incompatible with the Unfair Contract Terms Directive for the consumer to be offered only a claim for compensation for the damage which has been suffered as a consequence of his eviction from the dwelling.³¹ As has already been mentioned, however, for the purposes of that decision it was decisive that the enforcement measure would have resulted in the loss of the home of the consumer and his family.³²

70. However, the referring court's request for a preliminary ruling contains no indication that in the main proceedings there is any threat of eviction from Mr Wawrzosek's family home or of comparable detriment.

71. It is therefore compatible with the Unfair Contract Terms Directive if the consumer is able to prevent the order for payment from acquiring *res judicata* effect by lodging an objection and, otherwise, can invoke the unfairness of the loan agreement in a claim for unjust enrichment or damages.

30 Judgment of 18 February 2016, *Finanmadrid EFC* (C-49/14, EU:C:2016:98, paragraphs 47 and 51); see also order of 21 June 2016, *Aktiv Kapital Portfolio* (C-122/14, not published, EU:C:2016:486, paragraphs 29 and 36).

31 Judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 60).

32 Judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 61).

The significance of the objection to the order for payment

72. It follows from what has just stated above that the consumer's objection to the order for payment is of central importance in order for the purposes of the consumer protection under the Unfair Contract Terms Directive to have practical effect. The consumer can reasonably be expected to take this step in order to assert his rights.

73. It is true that, in disputes in which a seller or supplier and a consumer are involved, the Unfair Contract Terms Directive requires positive action unconnected with the parties to the contract to be taken by the national court which hears such disputes.³³ However, at the same time the need to comply with the principle of effectiveness cannot be stretched so far as to make up fully for total inertia on the part of the consumer concerned, as the Court has held on a number of occasions.³⁴ It is therefore not problematic that the consumer has to lodge an objection to the order for payment in order to trigger the second stage of the procedure, in which the court assesses the unfairness of the clause of its own motion.

74. This is apparent in particular from the fact that the European legislature set out similar requirements in laying down the European order for payment procedure. As a matter of principle the defendant must lodge an objection to the European order for payment in order for the merits of the claim asserted to be examined in court proceedings pursuant to Article 17 of Regulation No 1896/2006.

75. The Commission refers, however, to the fact that, pursuant to the second sentence of Article 493(1) of the KPC, when lodging the objection the consumer must raise his complaints and adduce facts and evidence. In addition, he must bear court costs.

76. Nevertheless, contrary to the view taken by the Commission, this does not result in the order for payment procedure on the basis of a promissory note per se being incompatible with the Unfair Contract Terms Directive. This is because, first, such an interpretation of the directive would conflict with the intention of the EU legislature, which leaves room to manoeuvre to the Member States in relation to the use of promissory notes as a means of providing security in relation to consumer credit agreements.³⁵ Secondly, such an interpretation would be an excessive intrusion into the procedural autonomy of the Member States.

77. As the Court has ruled, however, the general configuration, the course and the special features of the procedure cannot be allowed to result in there being a significant risk that the consumer will not take the legal action required.³⁶

78. The Commission is therefore right to make the criticism that, pursuant to the second sentence of Article 493(1) of the KPC, the consumer must already raise all of his complaints and adduce facts and evidence when lodging the objection. In the oral procedure, there was disagreement between the parties as to whether Polish procedural law permits the courts to examine the underlying loan agreement in the second stage of the order for payment procedure only if the consumer raises this complaint when lodging the objection and adduces facts and evidence in connection with it. However, according to settled case-law the national courts must assess of their own motion whether a

³³ Judgments of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 41), and of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 27).

³⁴ Judgments of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 62); of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 56); and of 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 47). See Opinion of Advocate General Szpunar in the *Finanmadrid EFC* case (C-49/14, EU:C:2015:746, point 43) and my Opinion in the *Aziz* case (C-415/11, EU:C:2012:700, point 55).

³⁵ See point 34 above.

³⁶ Judgments of 18 February 2016, *Finanmadrid EFC* (C-49/14, EU:C:2016:98, paragraph 52); of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 58); and of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 54).

contractual term is unfair. Thus, a limitation of the scope of the assessment to the complaints raised by the consumer is incompatible with the Unfair Contract Terms Directive. It is the duty of the referring court to ensure, by way of an interpretation which is in accordance with the directive, that the national procedural law does not contain such a limitation or to refrain from applying this law if an interpretation in conformity with the directive is not possible.

79. In this context, it is also necessary to take into account the Commission's criticism that the period of two weeks for lodging objections results in a significant risk that the consumer will not take the legal action required. This argument would appear to be correct with regard to the facts and evidence which the consumer has to submit within this period. However, a period of two weeks is not too short for the consumer to have to take some action. Accordingly, the Polish provision according to which the consumer must lodge the objection within two weeks of service of the order for payment is only compatible with the principle of effectiveness if he does not have to adduce the facts and evidence which form the basis for the assessment of the unfairness of the terms of the loan agreement within this period.

80. Finally, the Commission is justified in its complaint that the court costs levied prejudice the consumer. Article 19(4) of the Law on Court Costs in Civil Matters provides that the defendant must bear three quarters of the court fee laid down by statute when he lodges the objection. On the other hand, the applicant has to pay only a quarter of the court fee when he requests the issue of an order for payment. Thus, if the consumer lodges an objection to the order for payment, he must pay a fee which is three times as high in order to assert his rights under the Unfair Contract Terms Directive. I assume that the payments in question here are advance payments of court costs and that a final decision on the allocation of these costs is taken only after the proceedings have concluded. Nevertheless, the levying of such an advance payment of court costs is itself capable of deterring a consumer from lodging an objection. It would of course be all the greater a prejudice to the consumer if he had to pay a fee which was three times as high in any event, irrespective of the outcome of the proceedings.

81. These three requirements for an objection that are provided in Polish law are therefore, on their own, capable of making it excessively difficult to exercise the rights guaranteed to the consumer by the Unfair Contract Terms Directive, and they therefore infringe the principle of effectiveness.

Interim conclusion

82. It has therefore been established that a procedure such as the Polish procedure is incompatible with the Unfair Contract Terms Directive in so far as it makes it excessively difficult for the consumer to lodge an objection to an order for payment issued on the basis of a promissory note by permitting the courts to assess the unfairness only when a corresponding complaint has been made by the consumer, by requiring the consumer to adduce the facts and evidence which enable the court to make this assessment within two weeks of service of the order for payment, and by prejudicing the consumer as far as his bearing of court costs is concerned.

VI. Conclusion

83. In the light of the foregoing considerations, I propose that the Court answer the request for a preliminary ruling from the Sąd Rejonowy w Siemianowicach Śląskich (District Court, Siemianowice Śląskie, Poland) as follows:

The provisions of the Unfair Contract Terms Directive must be interpreted as precluding national legislation, such as that in question in the main proceedings, in so far as the latter provides that an order for payment based on a formally valid promissory note which secures claims of a seller or

supplier against a consumer under a loan agreement is issued without any assessment of whether the terms of that loan agreement are unfair and it makes it excessively difficult for the consumer to lodge an objection to an order for payment by permitting the courts to assess the unfairness only when a corresponding complaint has been made by the consumer, by requiring the consumer to adduce the facts and evidence which enable the court to make this assessment within two weeks of service of the order for payment, and by prejudicing the consumer as far as his bearing of court costs is concerned.