

Case C-904/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

10 December 2019

Referring court:

Sąd Rejonowy dla Warszawy-Woli w Warszawie (Poland)

Date of the decision to refer:

25 November 2019

Applicant:

E. Sp. z o.o.

Defendant:

K.S.

Subject matter of the case in the main proceedings

- 1 The subject matter of the case in the main proceedings is the repayment of consumer credit. The applicant sought an order requiring the defendant to pay PLN 835.05, with statutory interest for late payment, from the date on which the action was lodged until the date of payment.

Subject matter and legal basis of the reference

The referring court essentially seeks to establish the following:

- first, whether it is permissible to deliver a default judgment in a case concerning repayment of consumer credit, accepting that the applicant's statement of facts is correct, where the credit agreement is not attached to the application and the defendant remains entirely inactive;
- secondly, whether it is permissible to deliver a default judgment in a case concerning repayment of consumer credit, accepting that the applicant's statement

of facts is correct, without examining the agreement submitted, where the defendant remains entirely inactive.

Questions referred

1. Must Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ... and the recitals thereof [the twentieth and twenty-fourth, under which] contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail [and] the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts, in conjunction with Article 10(1) and (2) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC ..., and recital 31 thereof, be interpreted as precluding Article 339(2) of the Polish Code of Civil Procedure, construed in such a way that it permits the delivery of a default judgment in a case ... concerning the repayment of consumer credit ... including where the applicant has failed to submit ... the consumer credit agreement ..., and consequently no examination of the agreement was carried out from the point of view of potentially unfair terms contained in the agreement and no checks were made on whether the agreement contained all the elements required by law, and at the same time requires, when delivering a default judgment, that the applicant's statement of facts alone be relied on, with no analysis of the evidence from the point of view of 'reasonable doubts' within the meaning of that provision? In the light of the judgments of the Court of Justice of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 62); of 10 September 2014, *Kušionová* [Or. 1] (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), is it also permissible to interpret Article 339(2) of the Polish Code of Civil Procedure as meaning that a default judgment may be delivered in a case [concerning a consumer credit agreement] ... in which the applicant failed to attach the agreement to the application, and consequently with no examination of the agreement from the point of view of potentially unfair terms contained therein, and also no checks on whether the agreement contained all the elements required by law, relying solely on the applicant's statement of facts?
2. Must Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ... and the recitals thereof [the twentieth and twenty-fourth, under which] contracts should be drafted

in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail [and] the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts, in conjunction with Article 10(1) and (2) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC ..., and recital 31 thereof, be interpreted as precluding Article 339(2) of the Polish Code of Civil Procedure, construed in such a way that it prevents a national court from examining an agreement ... on consumer credit attached by the applicant ... from the point of view of potentially unfair terms contained therein and examining whether the agreement contained all the elements required by law and at the same time requires, when delivering a default judgment, that the applicant's statement of facts alone be relied on, with no analysis of the evidence from the point of view of 'reasonable doubt' within the meaning of that provision? In the light of the judgments of the Court of Justice 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), is it possibly also permissible to interpret Article 339(2) of the Polish Code of Civil Procedure as meaning that a default judgment may be delivered in a case [concerning a consumer credit agreement] ... with no examination of the agreement submitted by the applicant and attached to the application from the point of view of potentially unfair terms contained therein, and also no checks on whether the agreement contained all the elements required by law, relying solely on the applicant's statement of facts?

Provisions of EU law relied on

1. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: twentieth and twenty-fourth recitals, Article 7(1).
2. 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: recital 31, Article 10(1) and (2).

Provisions of national law relied on

1. The Code of Civil Procedure of 17 November 1964 ('the KPC'): Articles 139(1), 333(1)(3), 339(1) and (2), 343, 344(1) to (3), 346(1), 346(1¹), 346(2), and 348.

Article 339(1) of the KPC: ‘Where the defendant was not present at the hearing set or despite being present does not take part in the hearing, the court shall deliver a default judgment’.

Article 339(2) of the KPC: ‘In this case, the applicant’s statement of the facts set out in the application or in the pleadings served on the defendant prior to the hearing is to be accepted as correct, unless the facts raise reasonable doubts or are regarded as intended to circumvent the law.’

2. Ustawa o kosztach sądowych w sprawach cywilnych (Law on court costs in civil matters) of 28 July 2005: Articles 3(2)(4), 13(1), 19(1) and 28.

Succinct presentation of the facts and the main proceedings

- 2 The claim relied on in the application arises from a consumer credit agreement concluded on 10 June 2015 for PLN 400, for a period of 30 days.
- 3 Under the agreement, in the event of failure to repay the credit and the administration costs by 10 July 2015, the lender had the right to charge the borrower the costs of reminders and a ‘final penalty’ fee. The request for payment of the ‘final penalty’ was sent to the defendant in the form of a message to the email address provided by him and in paper form on 10 August 2015. The lender sent the defendant three reminders and a document entitled ‘final penalty’, which, pursuant to the agreement, resulted in the defendant being charged additional costs in the amount of PLN 200.
- 4 On 3 August 2017, an agreement for the sale of the defendant’s debt to the lender was concluded, under which the applicant acquired the claim against the defendant. The defendant was notified of the change of creditor in correspondence sent to his address on 9 August 2017. That notification, which at the same time contained a request for payment of the debt, went unanswered. In addition, the applicant sent the defendant on 18 December 2017 a final request for payment, which also went unanswered.
- 5 The defendant adopted no position on the matter. The package sent to him containing the application, a letter from the applicant dated 21 September 2018 and notification of the date of the hearing was not physically collected by him. That package was deemed to have been effectively served after being notified twice pursuant to Article 139(1) of the KPC.

Brief statement of the reasons for the reference

- 6 The referring court is uncertain whether Article 339(2) of the KPC, interpreted as it is for the most part in Polish academic writings and case-law, that is to say as

not permitting a consumer credit agreement to be examined, is compatible with the above provisions of Directives 93/13 and 2008/48.

- 7 The Polish legislature assumed that a default judgment can be delivered only as a consequence of the defendant's inaction (failure to appear at and participate in the hearing) solely on the basis of statements of fact by one party, which remains active, that is to say the applicant, with no verification of the evidence.
- 8 The assumptions underlying the proceedings and the delivery of default judgments mean that this instrument contains, in terms of its structure, elements which are also characteristic of order for payment proceedings and enforcement order proceedings. The main point is that a default judgment is delivered on the basis of a statement of facts by only one of the parties, namely the applicant. In default proceedings it is not, in principle, verified during the taking of evidence, in order for payment proceedings it is verified only on the basis of evidence in the form of strictly defined documents, and in enforcement order proceedings the accuracy thereof as evidence is not verified at all. However, whilst in default proceedings the one-sidedness of the factual basis for the decision is a result of the defendant's inaction, in order for payment proceedings and enforcement order proceedings it arises from the *a priori* assumption that prior to the issue of a payment order both types of proceedings are *ex parte*.
- 9 On the other hand, default proceedings, like enforcement order proceedings are — where the conditions laid down in the code are fulfilled — mandatory in nature, whilst order for payment proceedings are optional. The delivery of a default judgment is not subject to the applications of the parties in this regard. Where there are grounds such as those defined in the provision, the court must, of its own motion, deliver a judgment, the default nature of which arises from the law and lies outside the court's discretion.
- 10 Therefore, if the defendant remains passive — after being served a copy of the application and possibly other pleadings, or after acknowledging that the application and other documents were effectively served pursuant to Article 139(1) of the KPC (after notification of the package twice and its non-acceptance by the addressee) — the national court is required to deliver a default judgment.
- 11 According to one of the views on the interpretation of Article 339(2) of the KPC which exists in Polish academic legal literature and case-law, the national court must issue a payment order even if the applicant failed to attach any evidence to the application and the court in principle accepts that the applicant's statement of facts is correct.
- 12 According to another view on the interpretation of Article 339(2) of the KPC, even if documents are attached to the application by the applicant and an inactive defendant failed to submit any evidence, the national court, when delivering a default judgment, cannot have recourse to those documents because it merely

examines the applicant's statement (and not the evidence) and in principle accepts that the applicant's statement of facts is correct.

- 13 Article 339(2) of the KPC does lay down exceptions. Acceptance of the applicant's statement of the facts set out in the application or in other pleadings served on the defendant prior to the hearing as correct is not possible where the facts (i) raise reasonable doubts or (ii) are regarded as intended to circumvent the law.
- 14 However, it would appear that the dominant view on the interpretation of this provision requires an assumption that the point of reference for the assessment as to whether or not the above conditions are fulfilled, is the content of the application or other pleadings served on the defendant prior to the hearing. There are no grounds for the court possibly relying on evidence which was attached to the application or other pleadings served on the defendant prior to the hearing. The contents of the applicant's statement of the facts raise reasonable doubts where they are mutually contradictory or inconsistent or mutually exclusive, or are inherent incredible or contrary to facts which are generally known (Article 228(1) of the KPC) or known officially to the court (Article 228(2) of the KPC). Statements of facts intended to circumvent the law occur in situations where the aim is for the judgment to result in such circumvention, for example to seek an above-average amount of maintenance so as to enjoy a priority claim in the distribution of an amount attained from enforcement in respect of the defendant's assets.
- 15 In the view of the national court, this interpretation of Article 339(2) of the KPC may impede attainment of the aims pursued by the above directives since it would essentially prevent the court, in the event that the defendant remains inactive, from verifying whether the consumer credit agreement contains all the required elements and whether or not it contains unfair terms which could be regarded as non-binding on the consumer.
- 16 The national court has been unable to find in the case-law of the Court of Justice any judgments which relate directly to the compatibility of default proceedings conducted in a Member State with the consumer directives. However, the Court of Justice has expressed its view on several occasions on order for payment proceedings, which display certain similarities with default proceedings.
- 17 This relates in particular to the judgment of the Court of Justice of 13 September 2018, C-176/17 in *Profi Credit Polska S.A.* and the Opinion of the Advocate General in that case and the judgments of the Court of Justice of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349), of 18 February 2016, *Finanmadrid EFC* (C-49/14, EU:C:2016:98), and of 21 June 2016, *Aktiv Kapital Portfolio* (C-122/14, EU:C:2016:486) cited therein.
- 18 The national court drew particular attention to paragraphs 42 and 44 of the judgment in case C-176/17, pointing out that whilst, in accordance with settled

case-law, a national court is bound to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair and by so doing to compensate for the imbalance existing between the consumer and the seller or supplier, that is so only if the national court has available to it the legal and factual elements necessary for that task. Indeed, effective protection of the rights conferred on the consumer by Directive 93/13 can be guaranteed only if the national procedural system allows the court, during the order for payment proceedings or the enforcement proceedings concerning an order for payment, to ascertain of its own motion whether terms of the contract concerned are unfair.

- 19 This would suggest that the national court must also examine the potential unfairness of terms in contracts in a default situation.
- 20 However, as the Court of Justice noted at paragraph 55 of the judgment in Case C-176/17, every case in which the question arises as to whether a national procedural provision affects the right to an effective remedy must be analysed by reference to the role of that provision in the procedure as a whole before the various national bodies, the procedure's conduct and its special features.
- 21 It should be noted in this context that default proceedings differ significantly from order for payment proceedings.
- 22 Firstly, in order for payment proceedings the defendant may not express his view prior to the issue of the order for payment and the service thereof, but does have an opportunity to do so in default proceedings.
- 23 Secondly, in order for payment proceedings the defendant must pay a fee of 3/4 of the fee for issuing the application to lodge an objection and the applicant bears 1/4 of the fee for issuing the application. In default proceedings, on the other hand, the applicant pays the entire fee for issuing the application, whilst the defendant pays 1/2 the fee for issuing the application from the time of the objection (and if he has not been inactive, pays no fee until the proceedings are terminated).
- 24 Thirdly, the conditions relating to the lodging of an objection to a default judgment are less restrictive than for objections to an order for payment and, furthermore, if the defendant was active there is no need to lodge an objection at all.
- 25 Fourthly, an order for payment issued in order for payment proceedings has the status of an enforcement order that is enforceable without an enforcement clause (Article 492(1) of the KPC), whilst a default judgment, although immediately enforceable automatically, requires an enforcement clause to have the status of an enforcement order.
- 26 In addition, and possibly even more relevant, the Court of Justice has repeatedly noted in its judgments [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 November 2009, *Asturcom*

Telecomunicaciones (C-40/08, EU:C:2009:615, paragraph 47)], as correctly noted by the Advocate General in her Opinion in C-176/17 (EU:C:2018:293 paragraph 73), that 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; 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.

WORKING DOCUMENT