

**Case C-215/21**

**Request for a preliminary ruling**

**Date lodged:**

6 April 2021

**Referring court:**

Juzgado de Primera Instancia No 2 de Las Palmas de Gran Canaria  
(Spain)

**Date of the decision to refer:**

12 March 2021

**Applicant:**

Zulima

**Defendant:**

Servicios Prescriptor y Medios de Pagos E.F.C. S.A.U.

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[...]

**ORDER**

**MAKING A REFERENCE FOR A PRELIMINARY RULING TO THE COURT OF JUSTICE OF THE EUROPEAN UNION**

[...] [Identification of the proceedings, the referring court and the parties]

**FACTS**

**FIRST.** – In this court, Ms Zulima has brought against the commercial company **SERVICIOS PRESCRIPTOR Y MEDIOS DE PAGOS E.F.C. S.A.U.** (formerly **EVOFINANCE E.F.C. S.A.U.**), an application in ordinary proceedings constituting an **ACTION FOR A DECLARATION AS TO THE NULLITY OF A CREDIT FACILITY AGREEMENT AND FOR AN ACTION FOR PAYMENT**, whereby she alleges, on the basis of *Article 2(b) of Council Directive 93/13/EEC*, that she is acting in a context outside her trade, business or profession and is a consumer.

In the application, she sought a judgment DECLARING that the revolving credit agreement which she and the defendant commercial company Servicios Prescriptor y Medios de Pagos E.F.C. S.A.U had entered into on 21 September 2016 was void because the terms were usurious. She sought an ORDER requiring the defendant entity to reimburse the difference between the capital sum genuinely lent and the amount actually paid back [OR.2] in excess of the capital lent under the aforementioned agreement, including both remunerative interest and commission, as well as any such payments as continue to be made, plus statutory interest thereon, the quantum of the entirety of the foregoing to be determined by injunctive relief and award as to costs. She also brings an action for a declaration as to the nullity of the general conditions of contract on the remunerative interest clause, for lack of transparency, under the EU directives and the legislation transposing them.

**SECOND.** – [...] [matters of domestic procedural law]

[...] [The] defendant submitted a document requesting that the proceedings be discontinued on the ground that the heads of claim contained in the application had been settled out of court, in accordance with *Article 22 of the LEC* [*Ley de Enjuiciamiento Civil* (Law of Civil Procedure)]. In it, the defendant argued that it had cancelled/terminated/annulled the agreement, and that the customer cannot carry out any transactions using the [revolving credit] card; it also argued that the debit balance in respect of interest and commission had been cancelled, and noted finally that the refund would be equal to the sum overpaid by the applicant in the amount of [EUR] 326.04; it requested finally that costs not be awarded against it, in accordance with *Article 22 of the LEC*.

**THIRD.** – By measure of organisation of procedure of 11 September 2020, and in accordance with *Article 20(3) of the LEC*, this court decided to notify the applicant of the request to discontinue the proceedings, on the ground that the applicant no longer had a legitimate interest in obtaining effective judicial relief.

The applicant challenged the defendant's contention, made on the basis of the arguments set out in the document it had submitted, that the matter had been settled out of court. In short, the applicant argues that, before bringing the application, she had issued to the defendant a letter of formal notice which went unheeded and did not secure the settlement of her claims. Secondly, she argues [that] the matter has not in fact been settled out of court, since her application contained three heads of claim: a declaration that the agreement is void because its terms are usurious; reimbursement of the sums unduly collected; and payment of the costs [of the proceedings].

In the light of the applicant's challenge, this court, by measure of organisation of procedure of 25 September 2020, summoned the parties to enter an appearance in court for the purposes set out in *Article 22(2) of the LEC*, which it scheduled for 19 November 2020.

**FOURTH.** – Before making this reference for a preliminary ruling in accordance with *Article 19(3)(b) of the Treaty on European Union, Article 267 of the Treaty on the Functioning of the European Union* and Article 4a of the Ley Orgánica del Poder Judicial (Basic Law on the Judiciary), this court, by order of 24 November 2020, decided to grant a hearing to the parties represented, given the impact of EU law on the proceedings concerned, with a view in particular to obtaining their opinion on the interpretation of *Article 6(1) and Article 7(1) of Directive 93/13* in conjunction with *Article 22 of the LEC*, concerning the award of costs in cases in which the matter has been settled out of court or has become devoid of purpose. Counsel for the applicant put forward arguments challenging the making of a reference for a preliminary ruling. Counsel for the defendant did not put forward any arguments.

## LAW

### [OR.3] **FIRST.** – Subject matter of the dispute in the main proceedings

- 1 The application originating the proceedings sought a judgment DECLARING the revolving credit agreement entered into by the parties on 21 September 2016 to be void because the interest agreed under the loan was usurious. In her application, the consumer brings, principally, an action under Spanish law for a declaration that the credit agreement is void because the interest rate is usurious.
- 2 At the same time, the applicant brought an action for a declaration as to the failure to include, and/or the nullity of, certain general conditions of contract (the remunerative interest clause, for lack of information and transparency) under the EU Directives and the legislation transposing them.
- 3 [...] [Reiteration that the applicant has the status of consumer]
- 4 Within the time limit for lodging a defence, the defendant submitted a document contending that the matter has been settled out of court and stating that the heads of claim raised by the applicant have been met, in accordance with Article 22 of the Ley de Enjuiciamiento Civil (Law of Civil Procedure). The applicant challenged the request to settle the matter out of court and the parties were summoned to enter an appearance in court, as provided for in such circumstances in the LEC, at which the parties each put forward their arguments.
- 5 It would appear to follow from the purport of the arguments which have been put forward and the evidence which has been furnished in the present proceedings that an out-of-court offer to settle has indeed been made, the defendant having agreed to cancel the agreement at issue and reimburse the sums unduly received. The documents before this court attest to the existence of letters of formal notice sent by Burofax declaring the agreement signed to be void and seeking reimbursement of the sums unduly collected; the defendant responded to the letters of formal

notice by refusing to desist from applying remunerative interest and to reimburse the sums unduly collected.

**SECOND. – Matters at issue in the main proceedings**

- 6 In the event that the matter is found to have been settled out of court, inasmuch as the consumer's claims have been met in full, *Article 22 of the LEC* provides that neither of the parties is to be ordered to pay the costs.
- 7 It is therefore necessary to seek a preliminary ruling on the question of whether the national rule, laid down in *Article 22 of the LEC*, as to the non-award of costs in cases of out-of-court settlement of a matter relating to a consumer constitutes an infringement of *Article 6(1) in conjunction with Article 7(1) of Directive 93/13*, in the context of proceedings in which a consumer brings actions for a declaration as to the nullity of unfair terms (in particular, the nullity of remunerative interest on the ground of lack of transparency), and whether the out-of-court settlement must be consistent with the principle that consumers are not bound by unfair terms and the principle that sellers and suppliers must be deterred from using such terms, and must therefore entail an award of costs against the seller or supplier.
- 8 Account must also be taken of the fact that the regime laid down in the LEC does not make it possible for the court to assess the existence of letters of formal notice [OR.4] or bad faith on the part of the defendant seller or supplier as a basis for awarding costs against the seller or supplier in cases of out-of-court settlement.

**THIRD. – European Union law.**

- 9 **Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.**

Article 6

1. Member States shall lay down that unfair terms in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

Article 7

[1.] 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.

- 10 **Twenty fourth recital of Directive 93/13:** '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’.

### **11 Judgment of the Court of Justice of 21 December 2016 (Case C-154/15)**

‘... 53. Under Article 6(1) of Directive 93/13, Member States are to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier are, as provided for under their national law, not to be binding on the consumer’.

‘54. That provision must be regarded as a provision of equal standing to that of national rules that have, within the domestic legal system, the character of rules of public policy to that effect, *judgment of 30 May 2013, Asbeek Brusse and de Man Garabito, C-488/11, EU:C:2013:341*, paragraph 44’.

‘56. Given the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness vis-à-vis sellers or suppliers, Directive 93/13, as is apparent from Article 7(1) thereof, read in conjunction with its twenty-fourth recital, obliges the Member States to provide for adequate and effective means “to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers” (*judgment of 30 April, Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282*, paragraph 78)’.

### **12 Judgment of the Court of Justice (Third Chamber) of 5 December 2013 (Case C-413/12)**

‘... 30. In the absence of harmonised legal procedural means available to consumer protection associations to prevent the continued use of unfair terms [...] in the interests of both consumers and competitors, it is for the internal legal order of each Member State, under the principle of procedural autonomy, to establish such [OR.5] rules, provided however that they are not less favourable than those governing similar situations subject to domestic law (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred by European Union law on consumer protection associations (principle of effectiveness) (see, by analogy, *Case C-415/11 Aziz [2013] ECR*, paragraph 50, and *Case C-565/11 Irimie [2013] ECR*, paragraph 23 and the case-law cited) [...]’.

### **13 Judgment of the Court of Justice (Fourth Chamber) of 16 July 2020 in Joined Cases C-224/19 and C-259/19**

‘96. [...] Nonetheless, it is necessary to rule on the question of whether it is compatible with the principle of effectiveness for the consumer to be made to bear the costs of proceedings depending on the sums reimbursed to him, even if he has been successful in his claim in relation to the unfairness of the contested term’.

‘98. In this case, Directive 93/13 confers on a consumer the right to apply to a court to have a contractual term declared unfair and to have it disapplied. However, making the outcome of the apportionment of the costs of such

proceedings conditional only upon the sums unduly paid and ordered to be refunded may dissuade consumers from exercising that right in view of the costs which legal proceedings would entail (see, to that effect, the *judgment of 13 September 2018, Profi Credit Polska, C-176/17, EU:C:2018:711, paragraph 69*)’.

‘99. [...] *Article 6(1) and Article 7(1) of Directive 93/13* and the principle of effectiveness must be interpreted as meaning that they preclude a system whereby the consumer may be made to bear part of the costs of proceedings depending on the level of the unduly paid sums which are refunded to him following a finding that a contractual term is void for being unfair, given that such a system creates a substantial obstacle that is likely to discourage consumers from exercising the right to an effective judicial review of the potential unfairness of contractual terms such as that conferred by Directive 93/13’.

**FOURTH. – National legal framework applicable to the dispute in the main proceedings.**

**14 Article 22 of the Ley de Enjuiciamiento Civil (Law of Civil Procedure)**

[...] Article 22. Termination of the proceedings because the matter has been settled out of court or has become devoid of purpose.

1. Where, on account of circumstances arising after the application and the counterapplication have been made, there ceases to be a legitimate interest in obtaining the judicial relief sought, because the heads of claim raised by the applicant and, where appropriate, the defendant bringing the counterapplication have been met of court or for any other reason, this fact shall be disclosed and, with the parties’ consent, the Registrar shall order the termination of the proceedings, without any award of costs.

2. Should either party submit that a legitimate interest remains, by giving a reasoned rebuttal of the assertion that his claims have been met, or by relying on other arguments, the Registrar shall, within ten days, summon the parties to enter an appearance in court for the sole purpose of debating this issue.

[OR.6] Following that appearance, the court shall, within the following ten days, decide whether or not the proceedings should be continued, the costs of such proceedings being awarded against the party whose claim is dismissed.

3. An order for the continuation of proceedings shall not be open to appeal. An order for the termination of proceedings shall be open to appeal to a higher court.

**15 Article 394 of the Law of Civil Procedure**

1. In proceedings for declaratory relief, costs at first instance shall be awarded against the party all of whose claims have been dismissed, unless the court finds, and gives reasons for finding, that the case exhibited serious doubts of fact or law.

**FIFTH. – Problems relating to interpretation and the consistency of national law with EU law which are relevant to the judgment to be given in the dispute in the main proceedings. The request for a preliminary ruling.**

- 16 It is necessary to determine whether the limitation which domestic procedural law permits in connection with the non-award of costs in cases of out-of-court settlement is compatible with the principle of effectiveness. In other words, it must be determined whether the [contested] provision itself makes it impossible or excessively difficult to exercise before the courts the rights which EU law confers on consumers, inasmuch as the fact that a consumer should have to bear the economic cost of proceedings triggered by unlawful conduct on the part of the seller or supplier imposes a limitation on that consumer – particularly in situations such as that in the present case, where the consumer issued letters of formal notice to the seller or supplier but those letters went unheeded when first issued – by compelling him or her to bear his or her own procedural costs, which does not seem reasonable.
- 17 Directive 93/13 confers on a consumer the right to apply to a court to have a contractual term declared unfair and disapplied. However, making the outcome of the apportionment of the costs of such proceedings conditional upon the particular procedural conduct of the defendant, irrespective of the existence of letters of formal notice that were issued by the consumer but went unheeded, may dissuade the consumer from exercising that right in view of the costs which legal proceedings would entail (see, to that effect, *the judgment of 13 September 2018, Profi Credit Polska, C-176/17, EU:C:2018:711*, paragraph 69).
- 18 It follows from the case-law of the Court of Justice that the apportionment of the costs of legal proceedings brought before the courts falls within the sphere of the procedural autonomy of the Member States, provided that the principles of equivalence and effectiveness are observed.
- A ruling is therefore required on the question of whether it is compatible with the principle of effectiveness for the consumer to be made to bear the costs of proceedings in cases of out-of-court settlement, as provided for in *Article 22 of the LEC*, in particular in situations where letters of formal notice have been issued but gone unheeded and the consumer has therefore had to apply to the courts and bear the costs attendant upon doing so, regard being had to the fact that an out-of-court settlement assumes in essence that all of the consumer's claims as to the unfairness of the term introduced by the seller or supplier have been upheld.
- [OR.7]
- 19 Accordingly, in a situation in which a matter has been settled out of court or become devoid of purpose within the meaning of *Article 22 of the LEC*, and in

which, following the entry of an appearance in court as provided for in that article, the consumer's case is found to have indeed been settled, inasmuch as the seller or supplier recognises the nullity of the contested term, the procedural rules state that there is to be no award of costs, meaning that the consumer will have had to bear the costs of the proceedings. Is it necessary in such circumstances, in order not to deter the consumer, to ensure that the consumer does not suffer loss and infringe *Article 22 of the LEC*, inasmuch as it provides that no party is to incur procedural costs in cases of out-of-court settlement, even if the issue of letters of formal notice by the consumer shows the seller or supplier to have acted in bad faith, and in any event to award the costs of the proceedings against the defendant financial institution?

- 20 The question, in essence, is whether, in the light of the principle that unfair terms are non-binding and the principle that sellers or suppliers must be deterred from using them, laid down in *Directive 93/13, Article 6(1) and Article 7(1) of Directive 93/13* are to be interpreted as meaning that they preclude a regime which allows a consumer to bear the costs of proceedings in cases of out-of-court settlement in which the seller or supplier recognises that a contractual term is void because it is unfair. It follows from the documents before this court, after all, that the effect of applying *Article 22 of the LEC* might be that the seller or supplier is not ordered to pay the full costs [of the proceedings] in a situation in which: an action for a declaration as to the nullity of a contractual term brought by a consumer is effectively upheld because the seller or supplier fully recognises the unfairness of that term; there is evidence of the consumer having issued letters of formal notice to the same effect that went unheeded by the seller or supplier; and the consumer is compelled to apply to the courts but the latter do not thereafter recognise his right to have his costs paid in the event of an out-of-court settlement.
- 21 Finally, the rules on costs laid down in *Article 22 of the LEC* would seem, according to the interpretation which the national courts have been adopting of them and in the absence of any indication of the presence of special circumstances that might justify an award of costs against the defendant, to be capable of deterring the consumer from bringing an action for a declaration of nullity if he or she must bear the costs of legal proceedings by virtue of the seller's or supplier's conduct in choosing to settle the consumer's claims out of court.

On the basis of the arguments set out above,

[...]

## **I ORDER**

That the proceedings be stayed at this stage, which is crucial to the outcome of the dispute, and that a reference be made to the Court of Justice for a preliminary ruling on the following:

**QUESTION:**

Where a consumer raises a complaint against an unfair term under Directive 93/13/EC and an out-of-court offer to settle is made, *Article 22 of the Ley de Enjuiciamiento Civil* (Law of Civil Procedure) has the effect of compelling the consumer to bear the costs of the proceedings without regard to the seller's or supplier's prior conduct in having failed to heed the letters of formal notice [issued to him]. Do those Spanish rules of procedure constitute a significant obstacle capable of dissuading a consumer from exercising the right to effective judicial review of the potentially unfair nature of a contractual term [**OR.8**] contrary to the principle of effectiveness and *Article[s] 6(1) and 7(1) of Directive 93/13*?

[...] [Closing procedural formulae]

WORKING DOCUMENT