Case C-390/23

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:

27 June 2023

Referring court:

Sąd Najwyższy (Poland)

Date of the decision to refer:

13 June 2023

Applicant:

Rzecznik Finansowy

Defendant:

Bank AG S.A.

Subject matter of the main proceedings

Order-for-payment proceedings relating to a bill of exchange – Extraordinary appeal against an order for payment – Infringement of the rule of law, the principle that international law is binding, and the principle of consumer protection, by a court's failure to examine of its own motion the unfairness of the contractual terms contained in a credit agreement and failure to examine whether a credit agreement is valid following the elimination from it of unfair contractual terms

Subject matter and legal basis of the request

Interpretation of the second subparagraph of Article 19(1) TEU, in conjunction with the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('Charter of Fundamental Rights') – Involvement of lay judges in a judgment of the court of last instance (Sąd Najwyższy (Supreme Court)) relating to an extraordinary appeal (extraordinary action)

Questions referred for a preliminary ruling

Does the second paragraph of Article 19(1) of the Treaty on European Union, in conjunction with the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, preclude national legislation which provides that a court of last instance (the Sąd Najwyższy) hearing an extraordinary appeal (extraordinary action) against a final judgment of an ordinary court is to sit in a panel which includes a person (a lay judge of the Sąd Najwyższy) who:

1. is not a judge of the Sąd Najwyższy;

2. has been appointed to perform his or her function:

(a) directly by the legislature – by a simple majority,

(b) on the basis of general and unverifiable selection criteria,

(c) in a procedure which does not allow judicial review of the appointment,

(d) for a term of four years;

3. and may be dismissed by the legislature, which is also not subject to judicial review[?]

Provisions of European Union law relied on

Treaty on European Union, second paragraph of Article 19(1);

Charter of Fundamental Rights of the European Union, second paragraph of Article 47;

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

Provisions of national law relied on

Constitution of the Republic of Poland, Articles 178, 179, 180, 182, and 183;

Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym (Law of 8 December 2017 on the Supreme Court), Articles 1, 59 to 62, 64(1) and (2), 65, 67(1), 71, 77(1), 89, 91(1), and 94(1);

Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the system of ordinary courts), Article 166;

Uchwała Senatu Rzeczypospolitej Polskiej z dnia 23 listopada 1990 r. – Regulamin Senatu (Resolution of the Senate of the Republic of Poland of

23 November 1990 laying down the Rules of Procedure of the Senate), Articles 92(2a), 96c(1), and 96f.

Succinct presentation of the facts and procedure in the main proceedings

1 On 2 August 2005, the defendants placed at the disposal of the applicant's legal predecessor a blank promissory note with a 'without protest' clause as security for the bank's claims arising from the mortgage agreement of 2 August 2005. If the defendants failed to comply with the terms of the agreement, the applicant was entitled to fill out the promissory note for a sum corresponding to the applicant's claims, plus interest, and to enter a payment date as it so wished. The applicant was obliged to notify the issuers that the promissory note had been filled out, by registered letter sent at least seven days before the payment date, and an advice note, at the last address known to the applicant, was to signify effective delivery of the letter giving notice that the promissory note had been filled out. The promissory note was transferable by endorsement with a 'no obligation' clause. On 20 November 2018, the applicant filled out the blank promissory note, which it held, for an amount of CHF 24 844.96, stating a payment date of 4 December 2018. By letters of 20 November 2018, the applicant requested the defendants to redeem the promissory note with a payment date of 4 December 2018. A.K. received the request to redeem the promissory note on 27 November 2018, while the correspondence addressed to M.S. was returned to the applicant – because the defendant failed to take delivery thereof.

2 By order for payment of 30 April 2019, issued in order-for-payment proceedings relating to a promissory note, as a result of an action brought on 11 February 2019 by Bank AG (Spółka Akcyjna) Oddział w Polsce (Bank AG (Public Limited Company) Branch in Poland) the Sąd Okręgowy w Legnicy (Regional Court, Legnica) ordered the defendants – M.S. and A.K. – to pay jointly and severally to the applicant an amount of CHF 24 844.96, plus statutory default interest, calculated from 5 December 2018 to the date of payment, and an amount of PLN 4 800 as costs of the proceedings, within two weeks of the order for payment being served.

3 The Sąd Okręgowy held that when issuing the order for payment, the court does not examine whether the promissory note was completed in accordance with the content of the promissory note declaration. A plea alleging that the content of the completed promissory note is not consistent with the content of the promissory note agreement, and the authorisation contained therein for the recipient of the blank promissory note to complete the promissory note, is examined only at the second stage of order-for-payment proceedings as a result of a possible plea raised by the promissory note debtor, who also bears the burden of demonstrating that fact.

4 On that basis, the Sąd Okręgowy ruled that the conditions for issuing an order for payment in order-for-payment proceedings had been satisfied in this case.

5 In the order-for-payment proceedings, the defendants lodged no objections to the order for payment and therefore it acquired the force of *res judicata* on 1 June 2019.

6 An extraordinary action against that judgment was brought by the Rzecznik Finansowy (Financial Ombudsman). He claimed that that judgment, on the one hand, infringes the principles and freedoms and rights of a human being and a citizen laid down in the Constitution, which have a significant impact on the outcome of the case, including infringement of the duty of State authorities to act in accordance with and within the limits of the law, fails to fulfil the obligation to take account of EU law when interpreting national law, in particular Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), and infringes the principle of the protection of consumers as the weaker party to a civil-law relationship with a trader, understood as a duty of the State laid down in Article 76 of the Constitution.

7 On the other hand, the Financial Ombudsman claimed that that judgment constitutes a flagrant infringement of substantive law by the refusal to apply in this case Article 385^1(1) of the Civil Code, in conjunction with Article 385^1(3) thereof, and, consequently, by the court's failure to examine of its motion the unfair nature of the terms contained in a credit agreement, ultimately leading to a refusal to grant protection to entitled consumers, and by failure to apply Article 58(1) of the Civil Code expressed in the failure to examine whether the credit agreement would have been valid if the prohibited contractual terms had been eliminated from it.

8 On the basis of the foregoing, the Ombudsman requested that the contested judgment be set aside in its entirety and the case be referred back to the Sąd Okręgowy w Legnicy. In response to the extraordinary action, the applicant contended that it should be dismissed.

Succinct presentation of the reasoning in the request for a preliminary ruling

9 Proceedings before the Sąd Najwyższy are under way because an extraordinary action, that is to say an extraordinary appeal against final court judgments, has been brought. The institution of an extraordinary action serves to set aside final court judgments vitiated by specific – qualified – defects. Those defects must be of fundamental importance in the light of the principle of a democratic state ruled by law implementing the principles of social justice.

10 In judgment I NSNc 260/21 of 17 November 2021, the Sąd Najwyższy referred questions to the Court of Justice for a preliminary ruling on the permissibility of setting aside final judgments using an extraordinary action in order to ensure the effectiveness of EU law (Case C-720/21). However, the Sąd Najwyższy sees the need for further clarification as to whether, in the light of the requirements of the Treaty, the mechanism for reviewing final judgments in a Member State may be shaped in such a way that the court of last instance hearing such cases includes

persons who are not professional judges (or even lawyers), whose method of appointment differs from that of judges, and who do not benefit from all the guarantees of independence provided for in respect of judges.

11 Dispelling the doubts set out here will have a direct impact on the composition of the court hearing the present case. An answer in the affirmative would make it necessary to disregard the provisions which determine the composition in which the Sąd Najwyższy hears extraordinary actions, thus ensuring that only professional judges are included therein.

12 The need to dispel doubts arises from the constitutional position of the Sąd Najwyższy. The Sąd Najwyższy is a court within the meaning of Article 267 T[F]EU, that is to say a court against whose decisions there is no judicial remedy under national law. Under Article 183(1) of the Constitution of the Republic of Poland, the fundamental task of the Sąd Najwyższy is to supervise the judicial activity of the ordinary courts and military courts. In that respect, the 'typical' activities of the Sąd Najwyższy are those undertaken in connection with ruling on appeals and adopting resolutions concerning questions of law. Conversely, ruling on extraordinary actions is a special type of activity of the Sąd Najwyższy, which at the same time constitutes administration of justice.

13 The inclusion of lay judges, that is to say non-professional representatives of society, in panels adjudicating in cases relating to an extraordinary action raises doubts in the context of the scope of procedural activities which the Sąd Najwyższy performs in this type of proceedings. Performing such activities certainly requires not only legal training, but also considerable knowledge of the law. However, lay judges not only do not have to be distinguished by an outstanding level of legal knowledge and do not even have to be lawyers or even to have completed any higher education. The approach taken appears *prima facie* to be not only irrational, but even systemically inconsistent. That is because it introduces a social (non-professional) factor where neither evidence is taken nor an assessment of evidence is carried out, but only the correctness of the application of the substantive and procedural law is examined, making a specific assessment of the constitutionality of the court's judgment. The ineffectiveness or inadequacy of the legal measures does not in itself result in an infringement of the Treaty provisions, but the creation of the institution of lay judges of the Sąd Najwyższy raises doubts in the context of the features which a court within the meaning of the second paragraph of Article 19(1) TEU, in conjunction with the second paragraph of Article 47 of the Charter of Fundamental Rights, must have.

14 As the case-law of the Court of Justice reiterates, to ensure that a court is in a position to provide the effective legal protection required by the provisions referred to, maintaining its independence is essential. The Sąd Najwyższy refers in that regard to the judgments of: 24 June 2019, *Commission* v *Poland* (Independence of the Sąd Najwyższy) (C-619/18, EU:C:2019:531, paragraphs 109 and 111); 6 October 2021, *W.Ż.* (Izba Kontroli Nadzwyczajnej i Spraw Publicznych Sądu Najwyższego (Chamber of Extraordinary Control and Public

Affairs of the Supreme Court) – Appointment) (C-487/19, EU:C:2021:798, paragraph 110); and 19 November 2019, *A.K. and Others* (Independence of the Izba Dyscyplinarnej Sądu Najwyższego (Disciplinary Chamber of the Supreme Court)) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 127 to 129).

15 The non-professional nature of lay judges of the Sąd Najwyższy does not preclude their independence from also being examined in relation to them. It is crucial that the entity in question adjudicates – which non-professional judges undoubtedly do – in order to be regarded as a 'court or tribunal' within the meaning of the second subparagraph of Article 19(1) TEU [see judgment of 16 July 2020, *Governo della Repubblica italiana* (Status of Italian magistrates), C-658/18, EU:C:2020:572, paragraph 76].

16 The Sąd Najwyższy is uncertain whether the lay judges of the Sąd Najwyższy satisfy the above criteria and, consequently, whether a body including them can be regarded as a 'court of tribunal' within the meaning of the Treaty. The uncertainty in that regard arises from a number of circumstances considered together, which will be set out below.

17 First, the procedure for selecting lay judges of the Sąd Najwyższy differs significantly from the procedures applied to professional judges. Judges are appointed for an indefinite period, by the President of the Republic of Poland, on a prior proposal of the Krajowa Rada Sądownictwa (National Council of the Judiciary; 'the KRS'). By contrast, lay judges of the Sąd Najwyższy are appointed directly by a branch of the legislature, namely the Senate. In the context of the procedure for selecting judges, the Court of Justice held, in its judgment of 2 March 2021, *A.B. and Others* (Appointment of judges of the Sąd Najwyższy – Appeal), C-824/18 (EU:C:2021:148, paragraphs 43 and 131 to 137), that the fact that the judges put forward for appointment to the President of the Republic of Poland are selected by the KRS consisting of judges selected not by their peers but by the Lower Chamber of the Polish Parliament – the other branch of the legislative power in Poland – cannot offer sufficient guarantees of independence as it creates a risk that members of the KRS might be subject to influence from the political forces represented in the Lower Chamber of the Polish Parliament. Those remarks apply much more clearly to the procedure for selecting lay judges of the Sąd Najwyższy, and the uncertainty in that respect appears *a minori ad maius* all the more serious. The Senate makes the selection entirely autonomously, that is, its selection is not preceded by any separate proceedings before any other constitutional public authority. No judges are involved (directly or indirectly) at any stage of the procedure. The selection is made directly by politicians.

18 Second, the selection of lay judges by the Senate is not subject to any review by the judiciary. This is significant as in its judgment of 2 March 2021, *A.B. and Others* (Appointment of judges of the Sąd Najwyższy – Appeal), C-824/18, EU:C:2021:148, paragraph 156), the Court of Justice held that while the fact that it may not be possible to exercise a legal remedy in the context of a process of

appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic in the light of the requirements arising from EU law, in particular the second subparagraph of Article 19(1) TEU, the position may be different where provisions undermining the effectiveness of judicial remedies of that kind which previously existed. The introduction of the institution of lay judges of the Sąd Najwyższy (in the 2017 Law on the Supreme Court), selected directly by the legislature, without allowing judicial review of such appointment, is a regression from the previous state of affairs, in which such review was ensured vis-à-vis all members of panels of the court hearing cases ('professional judges').

19 Third, in selecting lay judges of the Sąd Najwyższy, the Senate is guided exclusively by selection criteria known only to itself, which also leads to the conclusion that the selection in that respect is fully discretionary. The statutory selection criteria are very general and discretionary. The requirements laid down in Article 60 of the Law on the Supreme Court, which a candidate for lay judge of the Sąd Najwyższy must meet, are only the absolute minimum required of candidates for that post. They are met by the majority of citizens of the Republic of Poland. However, there is no provision which specifies those general formal requirements. The Rules of Procedure of the Senate, which specify the procedure for selecting lay judges of the Sąd Najwyższy, are also silent on the matter. The Senate's resolution on the selection of lay judges of the Sąd Najwyższy need not be accompanied by a statement of grounds. All this makes the selection lay judges of the Sąd Najwyższy a fully discretionary power, based on the will of the political majority.

20 Fourth, additional uncertainty as to the independence of the lay judges of the Sąd Najwyższy is also raised by their term of office and the possibility of re-selection. The term of office of lay judges of the Sąd Najwyższy is four years. There are no legislative provisions which prohibit a person from applying again or which limit the number of terms in office. That, together with the Senate's almost complete discretion in the selection of lay judges of the Sąd Najwyższy, may lead to a weakening of their independence.

21 Fifth, the Senate also has the right to dismiss a lay judge of the Sąd Najwyższy. While it is true that the Senate may take such action only at the request of the First President of the Sąd Najwyższy and only in the situation specified in the relevant provisions, the circumstance allowing for that – 'conduct incompatible with the dignity of the court' – is so vague that it creates a risk of abuse in that regard. Uncertainty as to the compliance of the above rules with the provisions of the TEU is further exacerbated by an analysis of the Rules of Procedure of the Senate. They specify the procedure for dismissing a lay judge the Sąd Najwyższy, but do not refer at all to the circumstances (reasons) justifying his or her dismissal. They merely state that dismissal 'shall take place exclusively in the cases specified in the Law on the system of ordinary courts'. The above assessment is not altered by the procedure accompanying the dismissal of a lay judge of the Sąd Najwyższy which is laid down in that law, in conjunction with the Rules of Procedure of the

Senate. It does limit considerably the freedom of action of the authorities in that respect, including guaranteeing a hearing for a dismissed lay judge of the Sąd Najwyższy, but a dismissed lay judge of the Sąd Najwyższy has no possibility of challenging the above actions in court. In that context, there is also no restrictions whatsoever on the admissibility of initiating the procedure for dismissing a lay judge of the Sąd Najwyższy, for example on account of cases under way in which he or she is involved. Theoretically, that makes it possible – in an indirect manner – to influence the dynamics of the process for hearing extraordinary actions. A resolution dismissing a lay judge of the Sąd Najwyższy is not subject to any verification procedure – either before the Senate (for example, as part of an application for the case to be reheard) or an independent court. The resolution is adopted by a simple majority and therefore the dismissal of lay judge of the Sąd Najwyższy, in principle, does not require broader political consensus.

22 The arbitrariness of that action by the Senate should be assessed in the light of the judgment of the Court of Justice of 24 June 2019, *Commission* v *Poland* (Independence of the Sąd Najwyższy) (C-619/18, EU:C:2019:531, paragraphs 75 and 77), which states that the freedom of the judges from all external intervention or pressure requires certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office. In the light of the case-law of the Court of Justice, rules which define, in particular, conduct amounting to disciplinary offences, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (judgment of 25 July 2018, *Minister for Justice and Equality* (Deficiencies in the system of justice) (C-216/18 PPU, EU:C:2018:586, paragraph 67). The guarantees of the independence and impartiality of judges require that the authority in question exercise its functions wholly autonomously, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. There are certainly no such guarantees as regards lay judges of the Sąd Najwyższy.

23 Having regard to the uncertainties set out above, and also the role of lay judges of the Sąd Najwyższy who, when adjudicating in cases relating to extraordinary actions, have the power to review and set aside final judgments of ordinary courts, the Sąd Najwyższy has ruled as in the operative part of the order.