Case C-409/22

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:

21 June 2022

Referring court:

Apelativen sad Sofia (Bulgaria)

Date of the decision to refer:

9 June 2022

Applicant in the proceedings at first instance:

UA

Defendant in the proceedings at first instance:

EUROBANK BULGARIA AD

Subject matter of the main proceedings

Appeal brought before an appellate court against the judgment of a court of first instance upholding the claim against a bank for payment of (1) EUR 982 000, representing the total amount of the sums from unauthorised payment transactions made with the funds in a bank account; (2) EUR 1 182.40, representing compensation for the material damage suffered as a result of the culpable failure to fulfil a contractual obligation; and (3) EUR 74 521 in default interest at the statutory rate

Subject matter and legal basis of the request

Request for a preliminary ruling under Article 267 TFEU on the interpretation of Article 4(19) of Directive 2007/64/EC, in conjunction with Article 59(1) thereof, and of Article 4(23) thereof

Questions referred for a preliminary ruling

1. Does a power of attorney by which the agent makes a disposal of assets on behalf of the payer by means of a payment order constitute a payment instrument within the meaning of Article 4(23) of [Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC]?

2. Does the 'apostille' certificate placed on a document by the competent foreign authority in accordance with the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents form part of the authentication procedure for both the payment instrument and the payment transaction within the meaning of Article 4(19) of that directive, in conjunction with Article 59(1) thereof?

3. If the payment instrument (including one authorising a third person to make disposals on behalf of the payer) is formally (*prima facie*) regular, can the national court assume that the payment transaction is authorised, that is to say, that the payer has consented to its execution?

Provisions of international law

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (done at The Hague on 5 October 1961) – Article 2.

Provisions of European Union law and case-law

Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC ('the Directive') – recitals 1 and 60, Article 4(19) and (23) and Articles 54, 59 and 86.

Judgment of the Court of Justice of 2 September 2021, *CRCAM*, C-337/20, EU:C:2021:671.

Provisions of national law

Grazhdanski protsesualen kodeks (Code of Civil Procedure) – Article 591(1), Article 596

Zakon za zadalzheniata i dogovorite (Law on obligations and contracts; 'the ZZD') – Articles 75, 79(1), 82 and 86.

'Article 75. …

2) The debtor shall be discharged of his or her debt where he or she has fulfilled, in good faith, an obligation vis-à-vis a person who, on the basis of clear circumstances, appears to be entitled to receive performance. ….'

Zakon za platezhnite uslugi i platezhnite sistemi (Law on payment services and payment systems) of 2009 (repealed with effect from 6 March 2018, but applicable in the present case) – Article 51(1) and (2), Article 56(1) and (2), Article 57 and Article 58

'Article 57. (1) In the event of an unauthorised payment transaction, the payment service provider shall immediately refund to the payer the amount of the unauthorised payment transaction and, if necessary, restore the payer's payment account to the state in which it was prior to the execution of the unauthorised payment transaction.'

Targovski zakon (Law on commerce) – Article 422(3)

Succinct presentation of the facts and procedure in the main proceedings

1 UA (the applicant in the proceedings at first instance; 'the applicant'), in his capacity as the depositor (principal) and Eurobank EFG Bulgaria AD (the defendant in the proceedings at first instance; 'the bank'), in its capacity as the depositary (agent), concluded a current account agreement in Sofia on 22 November 2017. By the agreement, the bank undertook to open and maintain an open-ended current account in euros in the applicant's name in order to provide payment services for him.

2 In connection with his investment plans, the applicant transferred a total of EUR 999 860 to the account.

3 On 6 February 2018, the applicant visited the bank to make a banking transaction with the funds in his account, but an employee of the bank informed him that his account balance was only EUR 16 000.

4 The applicant states that he was astonished by this. He submits that, after requesting an explanation from the employee, the latter provided him with a bank statement showing the movements on the account for the period from the opening of the account on 22 November 2017 to 6 February 2018.

5 On the basis of the bank statement, the applicant established that a person not known to him, named MK, without valid authorisation from the account holder, since the latter had not issued him with any power of attorney whatsoever, had made disposals with the funds in the account by means of six individual transfer orders having a total value of EUR 982 000.

6 According to the applicant, the employee of the bank explained to him that those unilateral dispositive transactions were carried out by MK, who had presented

himself to the bank as the applicant's agent and submitted a power of attorney dated 1 December 2017, which had been certified by an Italian notary ('the notary').

7 The applicant states that the 'power of attorney' presented to him did not contain any signature of the principal, for which reason he (1) reported the unlawful disposal of his funds to the bank on 6 March 2018 and requested that the amount be reimbursed; (2) sent a copy of the report to the Central Bank of the Republic of Bulgaria on 8 March 2018; and (3) sent a written enquiry to the notary.

8 The notary replied to him by stating that he had neither drawn up nor certified a power of attorney by which the applicant had authorised MK, that the power of attorney was certainly 'a forgery' and that he had informed the bank of this in response to its enquiry of 20 February 2018.

9 On 4 February 2019, the applicant brought an action against the bank before the Sofiyski gradski sad (Sofia City Court), which, by judgment of 13 May 2021, upheld the action and ordered the bank to reimburse the applicant EUR 982 000 for the unauthorised payment transactions and to pay him EUR 1 182.40 in compensation for material damage and EUR 74 521 in interest.

10 One of the grounds on which the Sofia City Court based its decision was that, due to the existing special provisions governing the bank's liability for unauthorised payment transactions, the general rule of Article 75(2) of the ZZD is not applicable, with the result that it is irrelevant for the bank's liability whether it made the payments (executed the orders) on the basis of clear circumstances confirming the entitlement of the principal. That court stated that liability for the unauthorised payment transactions in question is usually borne by the bank (Article 57 of the repealed Law on payment services and payment systems of 2009), unless the execution of such transactions is based on wilful misconduct or gross negligence on the part of the account holder, in which case the payment transaction, irrespective of its amount, is not reimbursed to him or her. The referring court takes the view that the bank did not allege or prove any such conduct on the part of the applicant that was causally linked to the transactions at issue.

11 The bank brought an appeal against the judgment of the Sofia City Court before the referring court.

The essential arguments of the parties in the main proceedings

12 The applicant submits that the bank's employees acted imprudently and with gross negligence by allowing a person without power of representation to dispose of the funds in the bank account. According to the applicant, the bank was presented with a power of attorney which was *prima facie* irregular and should not have been accepted as regular authorisation, since an essential requirement, namely the

'signature' of the 'principal', was not met, with the result that the bank should have refused to execute the six bank transactions in question.

13 The bank concedes that the applicant visited its branch on 22 November 2017. It submits that, during the conversation, the employee of the bank understood that the applicant intended to use an agent to operate the current account to be opened. In view of the international transactions expected to be made on the account, and in order to enable the applicant to access and control movements on the account remotely, he was offered online banking, SMS notifications and a bank card, but he declined all three.

14 The bank does not dispute the submission regarding the banking operations carried out on the applicant's account and submits that his agent MK visited its branch for the first time on 15 December 2017. During that visit, MK presented the employee of the bank with the original of a copy, notarised by the Italian notary on 5 December 2017, of the power of attorney dated 1 December 2017. According to the bank, the authenticity of that copy had been certified by means of an 'apostille' and all documents had been translated from Italian into Bulgarian by a sworn translator. The power of attorney was specific (express) and authorised the agent to dispose of the funds in the applicant's account held with the bank.

15 The bank states that, in the case of each transfer order, MK presented the original of that notarised copy of the power of attorney to the respective employees of the bank.

16 The bank contests the applicant's submission that he was astonished when he was informed on 6 February 2018 that the money transfers at issue had been made by an agent. Rather, upon being presented with a statement of his bank account, the applicant replied to the bank employee's question as to who had ordered the transfers from his account by stating that they had been made by his agent, MK. The applicant calmly accepted the information provided to him and calmly reviewed the copy of the original notarised copy of the power of attorney by which MK had identified himself.

17 Some time later on the same day, the applicant returned to the bank branch, but still did not inform the employees of the bank of any irregularities in the payment transactions ordered by MK; instead, he only wanted to revoke the power of attorney, for which purpose he completed an application in his own hand.

18 It was not until 20 February 2018 that the applicant verbally notified an employee of the bank of a problem with the transfers of funds from his current account, and, on 6 March 2018, he submitted a written report to the bank.

19 The bank concedes that, on 20 February 2018, it made an enquiry to the Italian notary, asking whether the power of attorney of 1 December 2017 had been duly filed and entered in his register, whether the notarised copy of the power of attorney had the same legal effect as the power of attorney itself and whether the making of such copies was in line with standard practice, sending him a scanned

copy thereof. The notary replied only with the following: ‘The attached document is A FORGERY. Do not use it’.

20 The bank submits that, on 27 February 2018, it sent a written enquiry to the Deputy Prosecutor of the Republic of Italy, who, with his signature, had certified the notarised copy of the power of attorney at issue by means of an ‘apostille’. The Public Prosecutor’s Office in Monza confirmed that the ‘apostille’ in question had been issued on 12 December 2017, that is to say, it officially confirmed that the ‘“apostille” placed on the copy of the power of attorney is valid’.

21 The bank concludes the following: (1) the document submitted is a copy of the power of attorney and not the power of attorney itself, and it therefore does not contain the signature of the principal; (2) the competent Italian authority confirmed the authenticity of the signatures and stamps on the documents by means of the ‘apostille’, confirming the notarisation of the copy of the power of attorney, that is to say, the authenticity of the document, for which reason the copy of the power of attorney can be used in Bulgaria; (3) the six payment transactions in question were executed in favour of a ‘putative creditor’, and, in accordance with a clause of the General Terms and Conditions of the agreement, in conjunction with Article 75(2) of the ZZD, ‘the bank shall not be liable … for the sums paid and disposals made under a power of attorney where it has not been notified in writing of the revocation of the power of attorney and where, before receiving such notification, it has in good faith paid a sum to a person who, on the basis of clear circumstances, appears to be entitled to receive it’.

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

22 The referring court considers that the Directive is applicable in the dispute in the main proceedings. Its regulatory objective is to establish a single market in payment services. In accordance with recitals 1 and 60 of the Directive, in order to dismantle internal frontiers in the Community while promoting the free movement of goods, persons, services and capital, it is necessary to harmonise the operation of that market.

23 According to the findings regarding the correct application of EU law – which are binding on national courts – in paragraph 31 of the judgment of the Court of Justice of 2 September 2021 in Case C-337/20, ‘in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part. The origins of a provision of EU law may also provide information relevant to its interpretation.’

24 The referring court states that paragraph 41 of that judgment makes clear that Article 86 of Directive 2007/64, under the heading ‘Full harmonisation’, provides that ‘without prejudice to [several provisions of that directive which it sets out] in so far as this Directive contains harmonised provisions, Member States shall not maintain or introduce provisions other than those laid down in this Directive’. It is stated in the same paragraph that ‘none of Articles 58, 59 and 60 of that directive

is among the provisions in respect of which Article 86 grants Member States freedom of action in their implementation.'

25 It is stated in paragraph 45 of the judgment that 'the harmonised liability regime for unauthorised or incorrectly executed operations established by [the] Directive … could be placed in competition with an alternative liability regime laid down under national law, based on the same facts and the same basis, only on condition that the regime thus harmonised is not adversely affected and the objectives and effectiveness of that directive are not undermined.'

26 According to paragraph 67 of the judgment cited, 'if the applicable national law so provides, the payment service provider may be held liable for his or her negligence in the execution of a payment transaction, in particular if he or she has failed to verify that that transaction has in fact been authorised by the payment service user, in so far as such negligence has caused loss to a third party … '.

27 Article 75(2) of the ZZD regulates the legal institution of performance vis-à-vis a presumed creditor, whereby the debtor is discharged of his or her debt where he or she has fulfilled, in good faith, an obligation vis-à-vis a person who, on the basis of clear circumstances, appears to be entitled to receive performance.

28 If the national court were to adopt a purely grammatical, literal interpretation and not a teleological, logical and systematic interpretation of the grounds provided for in the Directive for exempting the payment service provider from liability in the case of an unauthorised payment transaction – that is to say, the payer must have incurred the losses relating to any unauthorised payment transactions by acting fraudulently or by failing to fulfil one or more of his or her obligations under Article 56 with intent or gross negligence – situations would arise where the payment service provider, although acting in good faith (with due commercial care), would be fully liable for the unauthorised payment transaction made.

29 In this case, in order to be exempt from liability, the payment service provider must prove a qualified form of fault on the part of the payer, who must have acted with intent (including fraudulent intent) or gross negligence.

30 However, there have been cases in the case-law in which the payment service provider acted in good faith (acted with due commercial care, for the exercise of which he or she created all the necessary conditions in line with scientific, technical and commercial standards and good commercial practice in order to prevent a loss), but the payer incurred losses even though he or she did not act with a qualified form of fault (with intent, gross negligence or fraudulent intent).

31 It is precisely in such cases that the payment service provider would be liable in the event of an unauthorised payment transaction if it fails to prove a wrongful, unlawful act on the part of the payer.

32 Consequently, the payment service provider would run the risk of incurring significant pecuniary losses, even if it had acted in good faith, that is to say, had

taken all necessary measures to comply with the legal requirements and good commercial practice.

33 In that context, payment service providers acting in good faith would be extremely cautious in their commercial activities when providing payment services, even in the most ordinary situations. This would lead to delays in the payment procedure or refusals to execute direct debits or payment orders in the case of formally (*prima facie*) regular payment instruments, which would run counter to the purpose of the Directive to promote the free movement of services and capital.

34 In view of the requirements of Article 86 of the Directive, the question that arises for the referring court is whether national law, specifically the provision of Article 75(2) of the ZZD, may be applied where the payment service provider has acted in good faith and the payment instrument presented to it is formally (*prima facie*) regular.

35 The referring court's international letters rogatory established that, under Italian law, notaries may certify copies of powers of attorney, whereby the copies must be certified by the notary by signature, stamp and a statement, including an official certification statement (which has substantive evidentiary effect before the courts) confirming that the content of the copies corresponds to that of the original ('true and faithful to the original'). Bulgarian law also provides for such notarisation.

36 The bank submits that the document submitted in the main proceedings (power of attorney) is a copy of the original power of attorney, notarising the signature of the principal – the applicant – and issued by the competent Italian notary, who confirmed that the copy corresponds to the original.

37 The authenticity of that copy of the original notarised power of attorney was confirmed by the competent authority of the Republic of Italy, namely the Deputy Public Prosecutor, by the placing of an 'apostille' on it in accordance with the rules of the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

38 In accordance with the second sentence of Article 2 of that convention, certification of the authenticity of the document by means of an 'apostille' covers the authenticity of the signature and the capacity in which the person signing the document has acted.

39 It was precisely through the use of that document (original of a notarised copy of the power of attorney with an 'apostille') that the person claiming to be the applicant's agent made disposals on behalf of the account holder in favour of third parties.

40 Since that power of attorney authorises the agent to make disposals on behalf of the payer, that document could be classified as a 'payment instrument' under

Article 4(23) of the Directive, as it forms part of the procedure used by the payment service user to issue a payment order.

41 Under Article 54(1) of the Directive, in order to be authorised, the payment transaction must be executed on the basis of the payer's consent, which requires proof of the authorship of the declaration of intent contained in the payment order ('formal evidentiary effect' of the document). This is linked to the establishment of the authentication of the payment transaction (the procedure which allows the payment service provider to verify the use of a specific payment instrument, including its personalised security features). Under Article 59 of the Directive, the procedural obligation to prove (the burden of proof) that the payment transaction was authenticated lies with the payment service provider.

42 In that context, if the payment service provider authenticated the payment instrument (the regularity of the power of attorney at issue, on the basis of which the disposals of the funds in the applicant's account were made), the consent of the payer (on whose behalf the agent makes the disposals which have a direct effect on the legal rights of the current account holder) would be proven and the payment transactions executed would be authorised within the meaning of Article 54 of the Directive.