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Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

22 September 2022 (*)

(Reference for a preliminary ruling – Unfair terms in consumer contracts – Revolving credit agreement – Unfairness of the term relating to the rate of remunerative interest – Action brought by a consumer for a declaration that that agreement is void – Satisfaction of that consumer’s claims out of court – Costs incurred having to be borne by the consumer – Principle of effectiveness – National legislation capable of dissuading the consumer from exercising the rights conferred by Directive 93/13/EEC)

In Case C-215/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia no 2 de Las Palmas de Gran Canaria (Court of First Instance No 2, Las Palmas de Gran Canaria, Spain), made by decision of 12 March 2021, received at the Court on 6 April 2021, in the proceedings

Ms Zulima

v

Servicios Prescriptor y Medios de Pagos EFC SAU,

THE COURT (Ninth Chamber),

composed of S. Rodin (Rapporteur), President of the Chamber, J.-C. Bonichot and L.S. Rossi, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Ms Zulima, by F.M. Montesdeoca Santana, procurador, and Y. Pulido González, abogada,
 - the Spanish Government, by J. Rodríguez de la Rúa Puig, acting as Agent,
 - the European Commission, by J. Baquero Cruz and N. Ruiz García, acting as Agents,
- having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
- gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings between, of the one part, Ms Zulima and, and of the other part, Servicios Prescriptor y Medios de Pagos EFC SAU, a credit institution formerly known as ‘Evofinance EFC SAU’, concerning the costs incurred in proceedings brought by the applicant in the main proceedings for a declaration that a revolving consumer credit agreement is void on account, *inter alia*, of the unfairness of one of its terms.

Legal context

European Union law

3 Article 6(1) of Directive 93/13 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 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.’

4 Article 7(1) and (2) of that directive provides:

‘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.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.’

Spanish law

5 Article 1303 of the Código Civil (Civil Code) provides:

‘When a contractual obligation has been declared void, the contracting parties must restore to one another those things that formed the subject matter of the contract, together with the profits derived therefrom, and the price together with interest, without prejudice to the following articles.’

6 Article 22 of Ley 1/2000, de Enjuiciamiento Civil (Law 1/2000 on the Code of Civil Procedure) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575), in the version applicable to the dispute in the main proceedings (‘the LEC’), entitled ‘Termination of the proceedings because the matter has been settled out of court or has become devoid of purpose. Special case of discontinuation of the eviction process’, provides:

‘1. Where, on account of circumstances arising after the claim and the counterclaim 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 counterclaim have been met out 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 or her claims have been met out of court or by relying on other arguments, the Registrar shall, within 10 days, summon the parties to enter an appearance in court for the sole purpose of debating this issue.

Following that appearance, the court shall, within the following 10 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. Only an order for the termination of proceedings shall be open to appeal to a higher court.’

7 Article 394(1) of the LEC provides:

‘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.

In order to assess, for the purposes of an order for costs, whether the case raised serious doubts of law, the case-law established in similar cases must be taken into consideration.’

8 Article 395(1) and (2) of the LEC provides:

‘1. Where an admission of the claim occurs prior to a statement of defence being lodged, neither party should be ordered to pay the costs of the proceedings unless the court finds, in a duly reasoned manner, that the defendant acted in bad faith.

Bad faith shall in any event be deemed to be present if, prior to any legal action, the defendant has received a due and substantiated demand for payment, mediation proceedings have been initiated or a request for conciliation has been made to him or her.

2. Where the admission of the claim occurs after the statement of defence has been lodged, paragraph 1 of the preceding article shall apply.’

The dispute in the main proceedings and the question referred for a preliminary ruling

9 On 21 September 2016, the parties to the main proceedings concluded a revolving consumer credit agreement. In March 2020, the applicant in the main proceedings gave formal notice to the defendant to terminate that credit agreement and to repay her the sums which the defendant had wrongly received, on the ground that the interest on the credit agreement was usurious. The defendant refused to heed that formal notice.

10 The applicant also brought an action before the referring court seeking a declaration that the credit agreement was void. As her principal claim, the applicant submitted that the rate of interest provided for therein was usurious, within the meaning of the national legislation, and she sought repayment of the sums paid in excess of the capital lent in application of that rate of interest. In the alternative, she argued that the clause relating to the rate of remunerative interest was unfair, within the meaning of Directive 93/13, on account of the lack of transparency.

11 The referring court declared that action admissible. Within the period prescribed for the defendant to submit its observations on that action, the latter requested that the case be removed from the register, contending that the applicant's claims had been satisfied out of court, and that it had terminated the revolving credit agreement concerned; it stated that the applicant could no longer carry out any transactions using the corresponding credit card, and that it had cancelled the debit balance in respect of interest and other charges. The defendant also requested that costs should not be awarded against it. Under Article 22(1) of the LEC, if the heads of claim are satisfied out of court, those proceedings are in principle terminated without any award of costs.

12 By the measure of organisation of procedure of 11 September 2020, the referring court served on the applicant in the main proceedings the request for removal from the register, submitted by the defendant and based on the applicant's no longer having a legitimate interest in obtaining effective judicial protection.

13 The applicant submitted that that request for removal from the register was unfounded, since the defendant had not, in her view, satisfied all her heads of claim, in particular as regards the declaration that the revolving consumer credit agreement concerned was void on grounds of usury, as well as the payment of the costs. The applicant also noted that, before bringing an action before the referring court, she had, unsuccessfully, given the defendant formal notice to terminate that credit agreement and to repay her the sums paid by way of interest.

14 In the light of such disagreement between the parties to the main proceedings, they were requested to appear before the referring court, pursuant to the first subparagraph of Article 22(2) of the LEC. After hearing those parties' observations and examining the evidence submitted by them, the referring court found that the applicant's heads of claim had been satisfied out of court, in so far as the defendant had terminated the revolving consumer credit agreement concerned and repaid the sums wrongly paid. It also found, first, that, before bringing the action before that court, the applicant had on several occasions given formal notice to the defendant by fax from a post office, the date or content of which is authentic (Burofax), in order to secure the termination of that credit agreement and the repayment of the sums which she had wrongly paid to the defendant and, secondly, that the defendant had refused to heed such notice.

15 Since the applicant's claims were satisfied outside the proceedings, the referring court observes that, under the national legislation concerned, it is not entitled to order either party to pay the costs. That court further states that it is also not entitled to take account of the existence of letters of formal notice prior to the bringing of the action which gave rise to the dispute in the main

proceedings in order to assess whether the defendant in the main proceedings acted in bad faith and to order that defendant to pay the costs incurred by the applicant in the main proceedings. In that context, since the applicant in the main proceedings has the status of a ‘consumer’, within the meaning of Directive 93/13, and since, in the dispute in the main proceedings, she seeks to enforce rights under that directive, the referring court is uncertain whether that national legislation complies with that directive.

16 In those circumstances the Juzgado de Primera Instancia no 2 de Las Palmas de Gran Canaria (Court of First Instance No 2, Las Palmas de Gran Canaria, Spain), decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Where a consumer raises a complaint against an unfair term under [Directive 93/13] and an out-of-court offer to settle is made, Article 22 of the [LEC] 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 or her]. 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 contrary to the principle of effectiveness and Article[s] 6(1) and 7(1) of Directive 93/13?’

The jurisdiction of the Court

17 As a preliminary point, the applicant in the main proceedings and the Spanish Government submit that the Court lacks jurisdiction to hear and determine the question referred, in so far as the legal situation giving rise to the dispute in the main proceedings does not fall within the scope of EU law.

18 According to settled case-law, it is for the Court to examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 45 and the case-law cited).

19 In that regard, it follows from Article 19(3)(b) TEU and the first paragraph of Article 267 TFEU that the Court has jurisdiction to give a preliminary ruling on the interpretation of EU law or on the validity of acts of the EU institutions. The second paragraph of Article 267 TFEU states, in essence, that whenever a question that is capable of being the subject of a reference for a preliminary ruling is raised in a case pending before a court of a Member State, that court may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to rule on it (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 46).

20 In the present case, it is true that the rules on the allocation of costs concerned are applicable to proceedings brought before the Spanish courts and are therefore, in principle, governed by Spanish procedural law.

21 However, it is apparent from the request for a preliminary ruling that the subject matter of the dispute in the main proceedings falls within an area governed by EU law. That dispute concerns the unfairness, within the meaning of Directive 93/13, of several terms of a contract concluded between a seller or supplier and a consumer and, by the question referred, the referring court asks the Court, in essence, whether Article 6(1) and Article 7(1) of that directive must be interpreted as precluding a provision of national procedural law governing the allocation of costs, namely Article 22 of the LEC. In particular, the referring court asks the Court to examine whether such a provision of

national law may constitute a substantial obstacle capable of dissuading consumers from exercising their rights, in breach of provisions of EU law, in the light of the principle of effectiveness. The exercise of consumer rights, derived from Directive 93/13, is dependent on the procedural law of the Member States. The national procedural law concerned is, therefore, likely to have a crucial influence on the effectiveness of EU law.

22 Indeed, when called upon to examine the content of order for payment proceedings, the Court has held on several occasions that the costs entailed by legal proceedings might dissuade consumers from lodging the objection required by that type of proceedings (see, to that effect, judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 54; of 18 February 2016, *Finanmadrid EFC*, C-49/14, EU:C:2016:98, paragraph 52; and of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 69).

23 Although the implementation of the rules on the allocation of costs is a matter falling within the domestic legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, the detailed rules for that implementation must nevertheless meet a dual condition. Thus, they should be no less favourable than those governing similar domestic situations (principle of equivalence) and they should not in practice render impossible or excessively difficult the exercise of rights conferred on consumers by the EU legal order (principle of effectiveness) (see, to that effect and by analogy, judgment of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 31).

24 In those circumstances, the Court has jurisdiction to rule on the request for a preliminary ruling.

Admissibility of the question referred for a preliminary ruling

25 The applicant in the main proceedings and the Spanish Government propose that the Court should declare the question referred inadmissible, since that question has already been decided in the national case-law. That case-law makes it possible to apply a ‘correction criterion’ allowing account to be taken of any bad faith on the part of the seller or supplier and defendant in the proceedings and, in that situation, to order the latter to pay the costs, even in the event that the claimant’s heads of claim are satisfied out of court.

26 In that regard, it must be borne in mind that, in accordance with settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 76 and the case-law cited).

27 Thus, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 77 and the case-law cited).

28 That is clearly not the position in the present case.

29 It should be noted in that regard that the request for a preliminary ruling concerns the interpretation of Article 6(1) and Article 7(1) of Directive 93/13 and seeks to enable the referring court to rule on whether Article 22 of the LEC, as interpreted by the national courts, is compatible with those provisions of that directive.

30 In addition, it is apparent from the file before the Court that, under Article 22 of the LEC, the applicant in the main proceedings, who is a consumer covered by Directive 93/13, risks having to pay the costs relating to the action which she has brought against unfair terms of the revolving credit agreement concerned despite having obtained satisfaction on the merits, out of court, from the credit institution concerned.

31 In the light of the foregoing considerations, it must be held that the question referred is admissible.

Substance

32 By its question, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness, must be interpreted as precluding national legislation, such as Article 22 of the LEC, under which, in the context of court proceedings relating to a finding that a term in a contract between a seller or supplier and a consumer is unfair, that consumer must, in the event that his or her claims are satisfied out of court, bear his or her own costs relating to the court proceedings which he or she was required to institute in order to assert the rights conferred on him or her by Directive 93/13, without any account being taken of the previous conduct of the seller or supplier concerned, who failed to heed the letters of formal notice previously sent to him or her by that consumer.

33 In accordance with settled case-law, in the absence of specific EU rules governing the matter, the rules implementing the consumer protection provided for by Directive 93/13 are a matter for the domestic legal order of the Member States in accordance with the principle of the procedural autonomy of those States. However, those rules must be no less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgments of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 83, and of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 27 and the case-law cited).

34 In that regard, it is clear from the case-law of the Court that the award of the costs of judicial proceedings before the national courts falls within the procedural autonomy of the Member States, subject to compliance with the principles of equivalence and effectiveness (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 95).

35 As regards the principle of effectiveness, which is the only principle referred to in the present case, it should be noted that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal

system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (see, in particular, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 28 and the case-law cited).

36 In addition, the Court has stated that the obligation on the Member States to ensure the effectiveness of the rights that individuals derive from EU law, particularly the rights deriving from Directive 93/13, implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, which applies, *inter alia*, to the definition of detailed procedural rules relating to actions based on such rights (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 29 and the case-law cited).

37 Directive 93/13 gives consumers the right to apply to a court to have a contractual term declared unfair and disappplied. In that regard, the Court has held that making the decision on the award of costs in such proceedings exclusively dependent on how much has been unduly paid and must be refunded, however, is likely to deter consumers from exercising that right, given the costs which legal action would entail (see judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 98 and the case-law cited).

38 Thus, the Court has ruled that Article 6(1) and Article 7(1) of Directive 93/13 and the principle of effectiveness must be interpreted as precluding 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 or her 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 (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 99).

39 In the present case, the referring court notes that, under Article 22 of the LEC, it cannot order the defendant in the main proceedings to pay the costs since the heads of claim of the applicant in the main proceedings had been satisfied outside the court proceedings pending before it. According to that court, that is also the case where it becomes apparent that the defendant in the main proceedings acted in bad faith and that the applicant in the main proceedings was, therefore, forced to assert his or her rights by way of judicial remedy, since Article 22 of the LEC does not allow the court hearing the case to take account of such circumstances in order to derogate from the rule on the award of costs which that provision lays down.

40 In that regard, it should be noted that, in the context of typical proceedings instituted pursuant to Article 6(1) and Article 7(1) of Directive 93/13, the consumer is the applicant and the defendant is the seller or supplier, which means that if the seller or supplier decides to satisfy the consumer's claims outside the court proceedings, that consumer must, in accordance with the Spanish legislation described in the preceding paragraph, always bear the costs of those proceedings, even where that seller or supplier acts in bad faith.

41 It must be found that such legislation, which imposes a risk of that kind on that consumer, creates a substantial obstacle that is likely to discourage him or her from exercising his or her right to an effective judicial review of the potential unfairness of contractual terms in the contract concerned and, ultimately, amounts to a breach of the principle of effectiveness.

42 In its observations submitted to the Court, the Spanish Government contends, however, that Article 22 of the LEC is capable of being interpreted in a manner consistent with the requirements

arising from the principle of effectiveness. Article 22 of the LEC could be interpreted as meaning that it is for the national court to take into account any bad faith on the part of the seller or supplier concerned and, where appropriate, to order the seller or supplier to pay the costs of the court proceedings.

43 It must be found that such an interpretation of national law is compatible with the principle of effectiveness, in that it makes it possible not to discourage consumers from exercising the rights conferred on them by Directive 93/13. It is for the referring court to determine whether such an interpretation in conformity with EU law is possible.

44 In the light of all the foregoing considerations, Article 6(1) and Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness, must be interpreted as not precluding national legislation, under which, in the context of court proceedings relating to a finding that a term in a contract between a seller or supplier and a consumer is unfair, the consumer concerned must, in the event that his or her claims are satisfied out of court, bear his or her own costs, provided that the court hearing the case necessarily takes account of any bad faith on the part of the seller or supplier concerned and, where appropriate, orders the latter to pay the costs relating to the court proceedings which that consumer was required to institute in order to assert the rights conferred on him or her by Directive 93/13.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in the light of the principle of effectiveness,

must be interpreted as:

not precluding national legislation, under which, in the context of court proceedings relating to a finding that a term in a contract between a seller or supplier and a consumer is unfair, the consumer concerned must, in the event that his or her claims are satisfied out of court, bear his or her own costs, provided that the court hearing the case necessarily takes account of any bad faith on the part of the seller or supplier concerned and, where appropriate, orders the latter to pay the costs relating to the court proceedings which that consumer was required to institute in order to assert the rights conferred on him or her by Directive 93/13.

[Signatures]

* Language of the case: Spanish.