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PURSUIT OF CLAIMS AGAINST CONSUMERS ON THE GROUNDS OF A PROMISSORY NOTE – COMMENTS ON THE COURT OF JUSTICE OF THE EUROPEAN UNION'S JUDGMENT OF 13 SEPTEMBER 2018 IN CASE C–176/17

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Abstract. It seems that the extraordinary appeal is the only appropriate measure to revoke an order for payment to ensure compliance with the principle of a democratic state ruled by law and implementing the rules of social justice. Taking into account the position of the Constitutional Tribunal based on Article 76 of the Constitution, in accordance with the CJEU's interpretation of Directive 31/13 in the case C–176/17 and expressed in its ruling of 11 July 2011, P 1/10, the Supreme Court's judicature stresses that, "the consumer has a weaker procedural position because he is in a dispute with a professional entity." Therefore, in addition to the provisions of the Code of Civil Procedure, the court conducting promissory note proceedings against consumers must also apply provisions aimed at consumer protection of its own motion. Thus, by disregarding other factors and limiting itself only to the formal verification of whether the submitted promissory note has been duly completed and its contents and truthfulness do not give rise to any doubts, the adjudicating court does not fulfill its obligation under Article 76 of the Polish Constitution in connection with the provisions of Article 7(1) of Directive 93/13. Meanwhile, it should of its own motion examine whether the provisions agreed between the parties are just and fair.

Keywords: consumer, writ of payment proceedings, consumer protection, promissory note, extraordinary appeal

INTRODUCTION

This study analyzes the impact of EU law on Polish procedural rules in the field of consumer protection in civil cases for issuing an order for payment on the basis of a promissory note.

The judgment of the Court of Justice of the European Union in the case C–176/17[1] is the fundamental subject of this analysis. This judgment deserves

[1] Judgment of the Court of Justice of the European Union of 13 September 2018, C–176/17, Profi Credit Polska S.A. in Bielsko-Biala v Mariusz Wawrzosek, EU:C:2018:711 [hereinafter:

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to be discussed in more detail, as the implications of the views expressed in its justification are far reaching in issues of key importance from the point of view of pursuing claims made against consumers under promissory notes.

1. GENERAL REMARKS

The Polish Constitution provides that public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. In its jurisprudence, the Constitutional Tribunal assumes that this provision "imposes an obligation on public authorities to protect consumers against activities posing a threat to their health, privacy, safety and against unfair market practices."[2] Moreover, it indicates that the protection of consumer rights included in Article 76 of the Constitution of the Republic of Poland is determined by the conclusion that, "the consumer is the weaker party to the legal relationship. Thus, it requires protection and therefore certain rights that would lead to at least a relative equalization of the positions of the parties involved."[3] Meanwhile, the purpose of consumer protection is not so much to favor consumers, but rather to create legal solutions that make it possible to implement the principle of equality of all parties to civil law relations.[4] Thus, Article 76 of the Constitution of the Republic of Poland expresses the constitutional principle obliging state authorities, including general jurisdiction courts, to take measures to protect consumers against dishonest market practices.[5]

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the judgment C–176/17].

[2] See judgments of the Constitutional Tribunal of: 13 September 2011, ref. no. K 8/09, OTK–A 2011, No. 7, item 72; 11 Jul 2011, ref. no. P 1/10, OTK–A 2011, No. 6, item 53; 2 December 2008, ref. no. K 37/07, OTK–A 2008, No. 10, item 172; judgment of the Supreme Court of 27 October 2021, ref. no. I NSNc 180/21, OSNKN 2022, No. 1, item 3; judgment of the Supreme Court of 1 December 2021, ref. no. I NSNc 535/21, Lex no. 326360113; judgments of the Constitutional Tribunal of: 28 September 2005, ref. no. K 38/04, OTK–A 2005, No. 8, item 92; 21 April 2004, ref. no. K 33/03, OTK–A 2004, No. 4, item 31; judgment of the Supreme Court of 24 November 2021, ref. no. I NSNc 153/21, Lex no. 3283396; judgments of the Constitutional Tribunal of 26 September 2000, ref. no. P 11/99, OTK 2000, No. 6, item 187; 12 January 2000, ref. no. 11/98, Journal of Laws No. 3, item 46; 10 October 2000, ref. no. P 8/99, OTK 2000, No. 6, item 190; judgment of the Supreme Court of 28 October 2020, ref. no. I NSNc 22/20, OSNKN 2021, No. 1, item 4.

[3] Ref. no. P 1/10.

[4] See judgments of the Constitutional Tribunal: ref. no. P 1/10 and of 15 March 2011, P 7/09, Journal of Laws No. 72, item 388 and the case law cited therein.

[5] See judgments of the Constitutional Tribunal: ref. no. K 33/03; ref. no. K 38/04; ref. no. K 8/09.

2. CONSUMER PROTECTION IN THE EU

We cannot forget that pursuant to Article 9 of the Polish Constitution, consumer protection is also rooted in the Treaty on the Functioning of the European Union.[6] According to the TFEU, consumer protection must be taken into account when defining and implementing other Union policies, as consumer protection policy aims to improve the quality of life of all citizens of the European Union.

Pursuant to Article 169 of the TFEU, "the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests" [Mikłaszewicz 2016, 1719]. According to the principles currently expressed in Article 169(2)(a) and in conjunction with Article 114 TFEU, the Union has adopted one of the important consumer protection instruments, namely Directive of 5 April 1993 on Unfair Terms in Consumer Contracts.[7] Its purpose is to approximate the laws of Member States relating to unfair contractual terms in consumer contracts. The preamble to this directive expressly states that the courts or administrative authorities of Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.

Pursuant to the requirements of the TFEU, consumer protection requirements must be taken into account when defining and implementing other Union policies, as the purpose of consumer protection policies is to improve the quality of life of all citizens of the European Union. This is why Article 38 of the Charter of Fundamental Rights (CFR) also references consumer protection. It provides that different European Union policies shall ensure high level of protection in this field.[8]

Article 7(1) of Directive 93/13 is particularly important for this study. It states that Member States shall ensure that, in the interests of both consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. Judicial proceedings involving consumers seem particularly relevant in applying the principles outlined in this article. One of the most important issues is that procedural rules should be shaped in line with the principles of equivalence and effectiveness. In accordance with the principle of effectiveness, Member States are required to provide adequate and effective means "to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers." This is particularly important due to the nature

[6] O.J. EU C 202 of 7 June 2016, p. 47.
[7] Hereinafter: Directive 93/13.
[8] O.J. EU C 326 of 2012, p. 391.

and importance of wider public interest, namely protecting consumers finding themselves in weaker positions than contractors.

The Supreme Court's resolution of 19 October 2017[9] states that proceedings involving consumers to whom EU rules apply have a "community value," which obliges national courts to take account of Directive 93/13 and the CJEU's interpretation of this directive in a way that ensures the effectiveness of protection granted to consumers by Community law.

3. POSITION OF THE COURT OF JUSTICE OF THE EU

One of the most key issues to highlight in this study is that pursuant to Article 6(1) of Directive 93/13, Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall 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. On the other hand, according to Article 3(1) of the same Directive, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

It should be stressed that the state of facts of case C–176/17, which the CJEU looked into, is similar to the states of facts of many cases brought forward by loan institutions against natural persons who have concluded a loan agreement with them.

In case C–176/17, the lender concluded a consumer credit agreement with collateral in the form of a promissory note, the value of which was not determined. Since the borrower did not repay the loan, the financial institution asked the court for an order for payment on the basis of the promissory note for an amount corresponding to the remaining amount due. The lawsuit documentation featured only the filled out and signed promissory note and loan agreement termination documents. However, the agreement itself was not submitted. This form of collateral was typical of the contracts concluded by the lender at that time.

The court adjudicating the case raised doubts as to the fairness of the contractual clauses contained in the loan agreement and asked the CJEU for a preliminary ruling on the compatibility of Polish provisions on the order for payment procedure. Particularly, Article 485(2) and the following articles of the Code of Civil Procedure,[10] which restrict the competences of the national

[9] Ref. no. III CZP 42/17, OSNC 2018, No. 7–8, item 70.

[10] Article 485 has been amended twice: the amendment of 4 July 2019 and pursuant to Article 1(1)(a) and (b) of the Act of 19 July 2019 amending certain acts to minimize payment gridlocks,

court solely to reviewing the validity of a promissory note obligation in order to preserve the formal terms of a promissory note, disregarding their relationship with the relevant provisions of Directive 93/13.

In its judgment of 13 September 2018, C–176/17, when assessing the procedural position of the consumer in the dispute with the loaner who was vindicating payment on the basis of a promissory note for an amount representing the sum of the outstanding consumer credit collateralized by that promissory note, the CJEU focused on whether the provisions of Polish procedural law complied with the standards set out in the Directive on Unfair Terms in Consumer Contracts.

The Court of Justice ruled that Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation permitting the issue of an order for payment founded on a valid promissory note that secures a claim arising from a consumer credit agreement, where the court dealing with the application for an order for payment does not have the power to examine whether the terms of that agreement are unfair and if the rules for exercising the right to lodge an objection against such an order do not allow the consumer to keep the rights he derives from the Directive.

Therefore, it ruled that the national court is bound to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair and, by doing so, to compensate for the imbalance existing between the consumer and the seller. That is so only if the national court has available to it the legal and factual elements necessary to perform such a task.[11]

As noted by the CJEU, adequate and effective means that are to guarantee consumers the right to an effective remedy must include the possibility of taking action or lodging an objection under reasonable procedural conditions so that the exercise of their rights is not subject to external conditions, in particular time limits or costs, which reduce the consumer's ability to exercise their rights guaranteed by Directive 93/13.[12] The Court pointed out that although Polish rules governing the writ of payment procedure give the defendant the right to challenge the order for payment by lodging objections, exercising that power is subject to the fulfillment of exceptionally restrictive conditions such as a short period of two weeks, the requirements for a letter containing allegations against the defendant-consumer and the high costs of court fees, three times higher than those borne by the claimant-seller.[13]

Journal of Laws item 1649.

[11] See the judgment C–176/17.

[12] Ibid., point 63; similarly judgment of the Court of Justice of the European Union of 21 April 2016, Radlinger and Radlingerová, C–377/14, EU:C:2016:283, point 46.

[13] Article 19(2)(1) and (4) of the Act of 28 July 2005 on court costs in civil cases, Journal of Laws of 2020, item 755 as amended; see the judgment C–176/17, points 64–68.

It stressed that consumers are the weaker party to the dispute with sellers, suppliers or traders and that it is therefore in the public interest to protect their rights. In that regard, the Court referred to the opinion of the Advocate General, Juliane Kokott, of 26 April 2018. The Advocate stated that the opinion of the referring court should consist in determining whether the procedural rules on the lodging of objections laid down by national law do not give rise to a significant risk that the consumers concerned would not take the legal action required.[14] Moreover, the Advocate pointed out that "the purpose of Directive 93/13/EEC is to prevent the use of unfair terms in contracts concluded between a seller or supplier and a consumer. The consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms." She stressed that, "national law must guarantee effective judicial protection for consumers by making it possible for them to bring legal proceedings against the disputed contract under reasonable procedural conditions, so that the exercise of their rights is not subject to conditions, in particular time limits or costs, which make it excessively difficult or practically impossible to exercise the rights guaranteed by the Unfair Contract Terms Directive." Referring to the CJEU's settled case-law, she stated that "the national court shall assess, of its own motion, whether a contractual term falling under the scope of the Directive on Unfair Terms in Consumer Contracts is unfair." In her opinion, "a procedure such as the Polish procedure is incompatible with the Unfair Contract Terms Directive in so far as it makes it excessively difficult for the consumer to lodge an objection to an order for payment issued on the basis of a promissory note by permitting the courts to assess the unfairness only when a corresponding complaint has been made by the consumer, by requiring the consumer to adduce the facts and evidence which enable the court to make this assessment within two weeks of service of the order for payment, and by prejudicing the consumer as far as his bearing of court costs is concerned."

The abovementioned arguments in the Advocate General's opinion determined the CJEU's final position. It held that, "Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits issue of an order for payment founded on a valid promissory note that secures a claim arising from a consumer credit agreement, where the court dealing with an application for an order for payment does not have the power to examine whether the terms of that agreement are unfair, if the detailed rules for exercising the right to lodge an objection

[14] Opinion of the Advocate General of 26 April 2018, C–176/17, Profi Credit Polska S.A. in Bielsko-Biala.

against such an order do not enable observance of the rights which the consumer derives from that directive to be ensured."[15]

It is settled case-law of the CJEU that the obligation to examine *ex officio* the unfairness of certain terms and the presence of mandatory information in a credit agreement constitutes a procedural rule placed on judicial authorities.[16] Thus, when national courts apply domestic law, they are bound to interpret it, as much as possible, in light of the wording and the purpose of the relevant directive in order to achieve the result sought by the directive.[17] On the other hand, where it is not possible to interpret and apply national provisions in accordance with the requirements of Directive 93/13, national courts are obliged to examine of their own motion whether the provisions agreed between the parties are unfair and, where necessary, to leave out any national legislation or case-law precluding such an examination.[18]

The CJEU's judgment was welcomed as reflecting the essence, objectives and values of European consumer law, which is not about favoring the consumer, but about ensuring a level playing field between the two parties to the transaction: the seller/supplier and the consumer [Jagielska and Markiewicz 2020, 39–46].

Against the background of the current procedural regulation, the issue of appealing against an order for payment issued in payment order proceedings or in writ of payment proceedings is regulated by Article 480(2) of the Code of Civil Procedure.[19] Subject literature indicates that although the introduction of the new provision does not affect the framework of those proceedings, it "reveals the shortcomings of the regulations" indicating the need to refer to relevant provisions, i.e. in the case of payment order procedures to the amended Article 493 (1), according to which the defendant may lodge objections against the order for payment. In the case of writ of payment proceedings, judicial bodies shall refer to Article 505 (1), which provides for the possibility of objecting to the order for payment [Zembrzuski 2020]. The issue of possible omission of late claims and evidence and their admission by the court is now governed by the general provisions on proceedings before the court of first instance, in particular Article 2053 and Article 20512 of the Code of Civil Procedure [Góra-Błaszczykowska 2020]. According to the contents of Article

[15] See the judgment C–176/17, point 71.

[16] Judgment C–377/14, point 77.

[17] See judgment of 7 November 2019, P., C–419/18 and C–483/18, EU:C:2019:930, points 74 and 75, and judgment C–377/14, point 79.

[18] See judgment C–419/18 and C–483/18, point 76, similarly judgments: of 4 June 2009, Pannon GSM, C–243/08, EU:C:2009:350, points 32, 34, 35; of 14 June 2012, Banco Español de Crédito, C–618/10, EU:C:2012:349, point 42 and the case-law cited therein; as well as of 18 February 2016, Finanmadrid EFC, C–49/14, EU:C:2016:98, point 46.

[19] The existing Article 493(1)(sentence 1) and Article 503(1)(sentence 1) of the Code of Civil Procedure have been transferred to the new Article 4803(1) of the Code of Civil Procedure.

2053(2) of the Code, the defendant may, at the stage of the exchange of preparatory letters, be required to provide all the claims and evidence relevant to the outcome of the case, under the pain of losing the right to submit them in the course of further proceedings. The amendment of the provisions of the Polish civil procedure, as regards to the defendant's procedural position in the case for payment of a promissory note, has therefore been mitigated in the context of the requirements of the pleas against the order for payment [Białecki 2020; Stelmach 2020, 49–66]. This confirms the correctness of the Court of Justice's contention that Article 7(1) of Directive 93/13 must be interpreted in a way so that a national court, acting of its own motion and in accordance with national procedural rules, shall be able to effectively verify the potentially unfair nature of the terms of a consumer credit agreement. However, the legislator's interference in this regard seems indispensable in order to achieve the full effectiveness of EU consumer protection rules.

In the case at hand – that is in case C–176/17 – the Court of Justice pointed out that, "There is a significant risk that the consumers concerned will not lodge the objection required, be it because of the particularly short period prescribed for that purpose, or because they might be dissuaded from defending themselves in view of the costs which legal proceedings would entail in relation to the amount of the disputed debt, or because they are unaware of or do not appreciate the extent of their rights, or indeed because of the limited content of the application for the order for payment lodged by the seller or supplier, and thus the incomplete nature of the information available to them."

The Court of Justice stated that it is for the national court to only exclude the use of an unfair term so that it cannot have a binding effect on the consumer. However, that court is not entitled to change the content of that term. In order to do so, the national court is required to assess of its own motion the unfairness of a contractual term falling within the scope of Directive 93/13 and, in making that assessment, to eliminate the inequality existing between the consumer and the seller where that court has the factual and legal elements necessary for that purpose at its disposal. The Court of Justice has pointed out that the full effectiveness of the protection provided for by the Directive requires that the national court, which of its own motion finds that a contractual term is unfair, can draw all the consequences from that finding without waiting for the consumer informed of his rights to make a declaration seeking the annulment of that term. It is therefore clear from the case-law of the Court of Justice of the European Union that the court must act of its own motion in such a way as to ensure the protection of consumers' rights.[20]

[20] See judgments: C–618/10, point 54; of 14 March 2013, Aziz, C–415/11, EU:C:2013:164, point 58; of 18 February 2016, Finanmadrid EFC, C–34/14, EU:C:2016:98, point 52; judgment C–377/14, point 46.

Summing up, it should be noted that the CJEU has rightly observed that Polish procedural rules on writ of payment proceedings do not fully protect consumers' interests against unfair terms in consumer contracts. Until an order has been issued, the court judging the case may not even have read the contents of the contract in question. Moreover, the conditions for appealing against the order are very restrictive and unfavorable for the consumer compared to the conditions under which the seller or supplier files a claim.

It must therefore be held that the court carrying out the payment order proceeding against the consumer shall apply of its own motion provisions aimed at protecting the consumer, in addition to the provisions of the Code of Civil Procedure. Thus, although the CJEU ruled in Joined Cases C–419/18 and C–483/18 that the rules of Directive 93/13 do not preclude national provisions permitting the borrower to issue a blank promissory note in order to secure the payment arising from a consumer loan agreement, the national court shall, if it finds serious doubts as to the merits of an application based on such a promissory note, examine of its own motion whether the provisions agreed between the parties are unfair.[21]

In its judgment of 7 November 2019 (joined cases C–419/18 and C–483/18)[22], the Court of Justice of the EU stated that the national court was required to make its own findings as to the facts of the case. In that context, the court may require the parties to produce the documents necessary to establish the content of the consumer agreement and to review it. This also applies to proceedings in which national law would allow a judgment to be given without presenting contract documents to the court, e.g. on the basis of a promissory note in the Polish model of writ of payment proceedings. The common opinion on the subject is that under Polish law, when a court recognizes of its own motion the abusiveness of a contractual clause, it does so as a result of a legal assessment of that clause. This means that the court always *ex officio* applies substantive law to the established factual state, which also includes provisions on the unlawful nature of contractual provisions [Kostwiński 2019, 1227–231; Nowak 2001, 1187; Weitz 2019]. Moreover, the court examines the abusiveness as well as the admissibility of issuing an order for payment only on the basis of statements contained in the statement of claim [Markiewicz 2010, 112–14].

Against the background of the abovementioned cases, the Tribunal also stated that the court is obliged to disregard national provisions and jurisprudence, which prevent the *ex officio* review of provisions of consumer contracts. This also applies to situations where, according to national regulations, an order awarding execution of a contractual obligation from the consumer

[21] Judgment of the Court of Justice of 7 November 2019, C–419/18, Profi Credit Polska S.A. in Bielsko Biala v Bogumila Wlostowska and Others, Lex no. 2735813.

[22] Profi Credit Polska S.A. in Bielsko Biala and Profi Credit Polska S.A. based in Bielsko-Biala against Bogumila Wlostowska and others, EU:C:2019:930, points 66–67.

may only be ordered on the basis of a promissory note and domestic regulations allow for the control of the basic relationship only on the basis of a motion filed by a promissory note debtor (points 73–76 of the CJEU judgment of 7 November 2019).

The consequence of the CJEU ruling in case C–176/17 is the obligation to assume that, due to the principle of primacy of EU law and the obligation to apply Directive 93/13 directly, the provisions of domestic law do not prohibit adjudicating courts from examining the basic relationship between the promissory note issuer and creditor before issuing an order for payment in writ of payment proceedings.

4. CONSEQUENCES OF THE CJEU'S RULING IN CASE C–176/17 ON JUDICIAL PRACTICE

Indicating grounds for possible revocation of abusive contract clauses seems like an important issue in the context of all the court cases that ended with a final order for payment or a default judgment and in which the court did not take into account the abusiveness of the contractual clauses [Jagielska and Markiewicz 2020, 39–46].

In its statement of 22 October 2009, in the case I UZ 64/09, Poland's Supreme Court expressed that, "The inconsistency of the final judgment with Community law, including the European Court of Justice's interpretation, may not constitute grounds for reopening civil proceedings."[23]

In turn, the Supreme Administrative Court answered (by its decision of 10 February 2017, I FSK 1541/16) the question it had asked in the resolution of 16 October 2017, I FPS 1/17.[24] The Court said that, "a preliminary ruling of the Court of Justice of the European Union may constitute the basis for resuming a case, which is mentioned in Article 272(3) of the Act of 30 August 2002, the Law on Proceedings before Administrative Courts,[25] even if the party asking for the reopening of the case has not been served on the ruling" [Kastelik–Smaza 2018, 44–51; Górski 2017, Maliński 2018]. However, the question arises whether it is appropriate to interpret Article 272(3) of the Law that broadly, or whether there are more convenient options to provide legal protection for individuals deriving their powers from EU regulations?

The legal doctrine has also expressed the view that Article 401 of the Code of Civil Procedure should be properly applied due to the principle of

[23] Compare judgment of the ECJ of 16 March 2006 in case C–234/04 Rosmarie Kapferer v Schlank & Schick GmbH, ECR ETS 2006, p. I–2585 [Łukańko 2011, 586–92; Grzegorczyk 2010, 73].

[24] ONSAiWSA 2018, No. 1, item. 1, p. 9.

[25] Journal of Laws of 2017, item 1369.

equivalence and be the basis for the resumption of proceedings in a situation where the Court of Justice has ruled on the invalidity of an act of EU law, which or whose provision was the basis for adjudication by a Polish court [Łukańko 2011, 591–92; Weitz 2013, 1404; Jagielska and Markiewicz 2020, 39–46].

However, it seems that extraordinary appeal still remains the most suitable tool, as practice and the recent judgments of the Supreme Court have shown.[26]

The purpose of the institution of extraordinary appeal, introduced in 2018, is to eliminate legally valid judgments violating powers, freedom, human and civil rights specified in the Constitution of the Republic of Poland, or grossly violating the law through incorrect interpretation or application (Article 89 et seq. of the Supreme Court Act).[27] The constructive assumption of the extraordinary appeal is therefore to define its premises in such a way that it serves to eliminate defective court judgments of fundamental importance – i.e. those deemed defective from the point of view of a democratic state implementing the principles of social justice.[28]

Extraordinary appeal is inadmissible if the judgment may be revoked or changed under other extraordinary means of appeal (Article 89(1) uSN). The substantive scope of an extraordinary appeal has also been specified. Such appeals may be brought up only when it is necessary to ensure compliance of common and military courts' final judgments with the principle of a democratic state governed by law and implementing the rules of social justice (Article 89(1) in principio of the uSN) and only if it can be additionally based on at least one of the three grounds specified in Article 89(1)(1–3) uSN. The first ground is violation of the powers, freedoms and human and civil rights set out in the Constitution of the Republic of Poland. The second is a gross, and therefore not every but only particularly serious, infringement of the law due to its incorrect interpretation or application. The third ground for appeal is the obvious contradiction of the essential findings of the court with any evidence gathered in the case in question. The necessity to ensure compliance with the principle of a democratic state ruled by law emerges "provided that" there are specific grounds for an extraordinary appeal.

On the basis of the available case law in this regard, the Supreme Court has so far examined two extraordinary appeals.[29]

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[26] Judgment of the Supreme Court of 28 October 2020, ref. no. I NSNc 22/20, OSNKN 2021, No. 1, item 4.

[27] Act of 8 December 2017 on the Supreme Court, Journal of Laws of 2019, item 825 as amended [hereinafter: uSN].

[28] See judgment of the Supreme Court of 3 April 2019, ref. no. I NSNk 2/19, unpublished.

[29] Ref. no. I NSNc 22/20 and the judgment of the Supreme Court of 25 November 2020, ref. no. I NSNc 57/20, Lex no. 3093105.

In the judgment of 28 October 2020, NSNc 22/20, the Supreme Court recognized Article 76 of the Polish Constitution as an admissible model for reviewing judgments pursuant to Article 89(1)(1) uSN. Thus, it allowed for the assessment of compliance of a promissory note payment order with this provision. When assessing the scope of violation of the constitutional principle of consumer protection in the writ proceedings conducted on the basis of a blank promissory note issued by the consumer and then supplemented by the creditor, the Supreme Court decided that the District Court violated the constitutional principle of consumer protection resulting from the Polish Constitution by issuing a payment order in the writ proceeding and by not ensuring the consumer protection against unfair market practices as required by Directive 93/13. Moreover, it pointed out that, "When issuing the order for payment on the basis of a blank promissory note, the court did not take into account the fact that it served to secure a consumer debt, and thus did not take into account the protection against unfair market practices due to persons bound by a consumer loan agreement." It then added, "balancing the reasons which, in light of the Constitution, support maintaining a legally valid order for payment in force issued in breach of Article 76 of the Polish Constitution in connection with Article 7(1) of Directive 93/13 and reasons supporting the repeal of this order in general, arising, in light of the Constitutional Tribunal's jurisprudence, from the integrally understood principle of a democratic state governed by law, implementing the rules of social justice" it unambiguously stated that "revoking this order for payment is a proportionate measure and allows to ensure compliance of jurisdictional decisions with Article 2 of the Constitution of the Republic of Poland." The Court stressed that, "the premise for such a conclusion is the fact that the acceptance of the jurisprudence of issuing an order for payment against the consumer on the basis of the content of the promissory note presented by the seller/supplier alone, without controlling the content of the contract on the basis of which it was issued, could lead to a mechanism of circumvention of Directive 93/13 and endanger the collective interests of consumers."[30] A similar argumentation underlies the judgment in another extraordinary appeal brought forward by the Public Prosecutor General.[31]

[30] Ref. no. I NSNc 22/20.
[31] Ref. no. I NSNc 57/20.

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