Case C-686/19

Request for a preliminary ruling

Date lodged:

18 September 2019

Referring court:

Augstākā tiesa (Senāts) (Senate of the Supreme Court, Latvia)

Date of the decision to refer:

12 September 2019

Applicant

‘Soho Group’ SIA

Defendant

Patērētāju tiesību aizsardzības centrs (Consumer Rights Protection Centre, Latvia)

[…]

Administrative law division.

Latvijas Republikas Senāts (Senate of the Supreme Court of the Republic of Latvia, Latvia)

ORDER

Riga, 12 September 2019

The [Supreme] court […] [composition of the referring court],

on the basis of written submissions, examined the appeal in cassation brought by ‘Soho Group’ SIA against the judgment of 4 December 2018 of the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) in administrative proceedings originating in an action for annulment brought by ‘Soho Group’ SIA against the decision of 21 February 2017 of the Patērētāju tiesību aizsardzības centrs (Consumer Rights Protection Centre, Latvia) made in proceedings for infringement of the collective interests of consumers […].

Background to the dispute

Description of the facts

[1] The Consumer Rights Protection Centre carried out an inspection to determine whether the information on the www.sohocredit.lv website about the distance services offered by 'Soho Group' SIA complied with the provisions governing consumer rights.

[2] As a result of the inspection, the Consumer Rights Protection Centre found that 'Soho Group' SIA was offering credit agreements in which one of the clauses, entitled 'Extension of the duration of the loan', was worded as follows:

> '6.1. The borrower may extend the duration of the loan.
>
> 6.2. The duration of the loan may be extended if the borrower pays the extension fee, by transfer to the lender's account. When paying the deferral fee, the borrower must indicate the agreement number in the payment instruction and include the word 'extension' (for example: R.N. 308 extension). Once it has received the extension fee, the lender will inform the borrower that the payment periods of the loan, indicated in the special conditions of the agreement or in a payment timetable, have been extended, or that the extension has been refused, by a communication sent to the borrower's mobile telephone number indicated when that borrower registered. The lender is entitled to refuse to extend the duration. The lender is not required to give reasons for refusing the extension. If the borrower has been notified by the lender that the extension has been refused, the lender will apply the amount received by way of the extension fee to partial discharge of the loan, the loan fee or interest, and to payment of default interest if any has been calculated in accordance with the provisions of the agreement. In any event, the borrower will be obliged to pay on the due date the entire outstanding amount of the loan and the loan fee or the amount indicated in the payment timetable.
>
> 6.3. When the extension fee is paid, the period for repayment of the loan will be extended:
>
> 6.3.1. If the loan is taken out for a repayment period of up to 30 (thirty) days, the period for repayment of the loan will be extended from the last loan repayment date until the date indicated in the extension proposed by the lender and confirmed by the borrower.
>
> 6.3.2. If the loan is taken out for a repayment period of up to 12 (twelve) months, the date, indicated in the payment timetable, for repayment of the loan and the payment of interest will [in that case] be deferred by one calendar month'.

The clause entitled 'Amount, grant and repayment of the loan' states as follows:

‘5.5. In consideration of provision of the loan and of its use or extension, the borrower will pay the lender remuneration for use of the loan:

…

5.5.2. A loan extension fee, depending on the amount and duration of the loan, where the borrower wishes to extend the period for repaying the loan laid down in the special conditions, in invoices or in the payment timetable.’

[3] The Consumer Rights Protection Centre found as a result of the inspection carried out that ‘Soho Group’ SIA was offering consumers credit agreements in which the total daily cost did not comply with Article 8(2)(3) of the Patērētāju tiesību aizsardzības likums (Consumer Protection Law) in respect of extension of the duration of the credit. It therefore [took the view that] the charges under ‘Soho Group’ SIA’s consumer credit agreement were disproportionate and not consistent with fair commercial practice, in accordance with Article 8(2)(2) of the Consumer Rights Protection Law. The Consumer Rights Protection Centre, taking the view that the total cost of credit included the charges for extending the credit, since the provisions on extending the credit formed part of the terms and conditions of the credit agreement agreed by the lender and the borrower, imposed a fine of EUR 25 000 on ‘Soho Group’ SIA.

[4] ‘Soho Group’ SIA, although it did not deny the facts, brought an action before the administratīvā rajona tiesa (District Administrative Court, Latvia) against the decision of the Consumer Rights Protection Centre, claiming that the Consumer Rights Protection Centre had misinterpreted the aforementioned legal provisions.

[5] The Administratīvā apgabaltiesa (Regional Administrative Court), hearing the matter on appeal, dismissed the application by judgment of 4 December 2018. The reasoning of that decision is as follows:

[5.1] It can be seen from Article 1(9) of the Consumer Rights Protection Law that the total cost of credit is understood to include any fees that the consumer is required to pay in order to obtain or use the credit and that are known to the lender, except for notarial costs. That includes, for example, interest on use of the credit, the payment of fees, various administrative expenses such as for preparing the loan agreement, checking creditworthiness, grant of the credit, confirmation payments, credit intermediation fees paid by the consumer and so on.

[5.2] The concept ‘total cost of credit’ that Council of Ministers Decree No 1219 of 25 October 2016, entitled ‘Noteikumi par patērētāja kreditēšanu’ (Provisions on consumer credit), uses in paragraph 6 refers to calculation of the annual percentage rate of charge of the credit, as also borne out, on a schematic interpretation of the legislation, by the title of the corresponding chapter of the Council of Ministers Decree, and, for example, paragraph 8 of that decree, according to which ‘the calculation [of the annual percentage

rate of charge] shall be based on the assumption that the credit agreement is to remain valid for the period agreed and that the creditor and the consumer will fulfil their obligations under the terms and by the dates specified in the credit agreement'. That is to say, calculation of the annual percentage rate of charge of the credit is based on the period of time in which it is assumed that the creditor and the consumer will comply with the undertakings in accordance with the dates and on the terms agreed by both in the credit agreement. When interpreting Article 8(2)(3) of the Consumer Rights Protection Law, it should be borne in mind that the fees for extending the credit are subject to the limits on the total cost of credit, since those costs are included in the total cost of credit.

[5.3] It is undisputed in the proceedings that, effectively, the applicant offers the possibility of extending the period set in the agreement for repaying the credit or of deferring payment for a period of time. The lender is entitled to impose a charge for using the credit in the period in which repayment of the obligations under the agreement has been deferred. Nevertheless, in the court's view, that charge may not be unlimited or disproportionate. It is also apparent from the case file that a substantial volume of extensions were granted to the applicant's customers in the first half of 2016, amounting to several tens of thousands of euros. This shows that borrowers' creditworthiness is not sufficiently assessed and that the applicant relies on extensions and sets a high fee for them, thereby leaving consumers no choice in the event that they cannot repay the loan within the time limit set, which is relatively short. The amendments to the Law attempted to mitigate that situation and thereby protect consumers.

[5.4] The applicant's argument that the lender must be found not to know about the fee paid for the extension is untenable. The fee payments are specifically laid down and known to both parties. Furthermore, given that half the credits are extended, this cannot be regarded as an exceptional situation or as a rare and unforeseeable occurrence. At the time a credit agreement is concluded, the fee payable for extending the repayment period of the credit is not taken into account because, according to the agreement, that clause is not compulsory and might not be agreed. Nevertheless, if the duration of the agreement is extended or if grace periods are granted, in those circumstances those costs — because they are linked to use of the credit, during the subsequent period in which the credit is used (extension payments, payments for the grant of grace periods and so on) — become known and are deemed to be costs of the credit, to which the limitations referred to in Article 8(2)(3) of the Consumer Rights Protection Law apply.

[5.5] It is apparent from Article 8(2)(2) of the Consumer Rights Protection Law that the costs under consumer credit agreements must be proportionate not only before or at the time the agreement is concluded, but also throughout the period during which that agreement remains valid. According to the preamble to the draft legislation, its aim is to protect the

economic interests of consumers as the weaker contracting party, including the consumer's interest in not becoming over-indebted, ensuring that the total cost of credit is proportionate and encouraging assessment of consumers' creditworthiness.

The total cost of credit must be proportionate and must reflect fair commercial practice, irrespective of whether the credit is being granted or if its repayment period is being extended. It can be seen from the case file that, after extensive discussion within this sector and also in Parliament, it was decided to use the broader definition of the total cost of credit, in order to achieve the objective stated in the preamble of the draft legislation, and the total cost of credit was therefore limited. The concept of total cost of credit was deliberately transferred to the Consumer Rights Protection Law, with the intention that the concept should apply not only to calculation of the annual percentage rate of charge but also to the limitations on the total cost of credit. Since the cost of deferring credit is set at the time the loan agreement comes into force, when the consumer wishes to extend the agreement concluded, the limitations on the total cost of credit established in Article 8(2)(3) of the Consumer Rights Protection Law also apply to the cost of extending the credit, since the total cost of credit becomes known at the time when the extension is agreed.

[6] The applicant lodged an appeal in cassation against that judgment. It argued in the appeal that the extension fee is not compulsory in order to obtain or to use the loan. Extending the agreement is one of three options when the loan becomes due. The other two are to repay the loan with no extra payments or not to repay the loan, allowing default interest to be charged. In its view, the cost of the extension cannot be included in the total cost of credit, because the fact of the extension is not known at the time the agreement is concluded, that is to say, at the time by reference to which the total cost of credit is determined and the annual percentage rate of charge is calculated.

Legal basis

Applicable legal framework

EU law

[7] Recitals 20 and 43 and Article 3(g) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC ('Directive 2008/48').

Latvian law

[8] The Consumer Rights Protection Law (in the version applicable for the purposes of ruling on the case, accessible at: https:likumi.lv/doc.php?id= 23309) provides that:

‘Article 1. Terms used in this law.

For the purposes of this law, the following terms shall have the following meanings: ….

(9) Total cost of the credit to the consumer: All the costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor (except for notarial costs). Costs in respect of ancillary services relating to the credit agreement, in particular insurance premiums, are also included in the total cost of credit if, in addition, the conclusion of a service contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions offered.

…

Article 8 Consumer credit

…

(2)(2) The costs of the consumer credit agreement will be proportionate and will comply with fair commercial practice. The total cost of the credit to the consumer will be calculated in accordance with the procedures laid down in the legal provisions governing consumer credit.

(2)(3) The following will be deemed to be requirements incompatible with subparagraph (2)(2): any total costs to the consumer exceeding 0.55% per day of the amount of the credit from the first to the seventh day (inclusive) of use of the credit; 0.25% per day of the amount of the credit from the eighth to the fourteenth day (inclusive) of use of the credit; and 0.2% per day of the amount of the credit from the fifteenth day of use of the credit. In agreements under which the credit is repaid following a demand or in which the period for using the credit is more than 30 days, any total costs of the credit to the consumer exceeding 0.25% per day of the amount of the credit will not be deemed to be compatible requirements under subparagraph (2)(2). The limitations on the total cost of the credit to the consumer will not apply to consumer credit agreements in which, as a condition of their conclusion, a good is provided to the creditor as security and under which the consumer’s liability is limited exclusively to the good pledged. …’.

[9] Council of Ministers Decree No 1219 of 25 October 2016, Provisions on consumer credit, (accessible at https://likumi.lv/ta/id/285975-noteikumi-par-pateretaja-kreditesanu).

‘2. Terms used in this decree:

2.1. ‘total amount payable by the consumer’ will mean the sum of the total amount of the credit and the total cost of the credit to the consumer;

2.2. ‘annual percentage rate of charge’ will mean the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit, plus the costs referred to in paragraphs 5, 6 and 7 of this decree;

…

6. In order to calculate the annual percentage rate of charge, the total cost of the credit to the consumer will be determined. The following payments will not be taken into account in calculating the total cost to the consumer:

6.1. Any charges payable by the consumer for non-compliance or incorrect compliance with any of the consumer’s commitments under the credit agreement.

6.2. Any charges paid by the consumer to acquire goods or services, except for the purchase price, irrespective of whether the transaction is effected in cash or on credit.

7. The costs of maintaining an account recording both payment transactions and drawdowns, the costs of using a means of payment for both payment transactions and drawdowns, and other costs relating to payment transactions will be included in the total cost of the credit to the consumer unless the opening of the account is optional and the costs of the account have been clearly and separately specified in the credit agreement or in any other agreement concluded with the consumer.

8. The calculation of the annual percentage rate of charge will be based on the assumption that the credit agreement is to remain valid for the period agreed and that the creditor and the consumer will fulfil their obligations under the terms and by the dates specified in the credit agreement.

9. In the case of credit agreements that allow variations in the annual percentage rate of charge, the borrowing rate under the agreement or in other charges that are included in the annual percentage rate of charge but are unquantifiable at the time their amount is to be calculated, the annual percentage rate of charge will be calculated on the basic assumption that the borrowing rate and other charges will remain fixed and will remain applicable until the end of the credit agreement.’

Reasons for doubts as to the interpretation of the EU legislation

[10] The concept ‘total cost of the credit to the consumer’ was introduced into the Consumer Rights Protection Law in accordance with Article 3(g) of Directive 2008/48. How the provision of the Consumer Rights Protection Law should be interpreted is therefore dictated by the terms of the corresponding EU provision. In the present case, it is necessary to determine whether the total cost of credit includes the costs for extending the credit, since the provisions relating to extending the credit form part of the terms and conditions of the loan agreement

concluded between the lender and the borrower. The question therefore relates to the interpretation of the provisions of Directive 2008/48, in respect of which the referring court harbours a number of doubts, for the reasons set out below.

[11] Analysis of the case-law of the Court of Justice of the European Union makes it clear that the concept 'total cost of the credit to the consumer' in Article 3(g) of Directive 2008/48 is defined particularly broadly, so that it conforms to the objective of the directive of ensuring a high level of consumer protection, and any clauses of the loan agreement that constrain that concept would be incompatible. Directive 2008/48 provides, as regards consumer credit, full and mandatory harmonisation in a number of key areas, which is regarded as necessary in order to ensure that all consumers in the European Union enjoy a high and equivalent level of protection of their interests and to facilitate the emergence of a well-functioning internal market in consumer credit. The particularly broad definition of the concept 'total cost of the credit to the consumer' within the meaning of Article 3(g), meets the objective pursued by that directive, in so far as it provides for comprehensive consumer protection (judgment of 8 December 2016, *Verein für Konsumenteninformation*, C-127/15, EU:C:2016:934, paragraphs 27 and 35). In that case, the Advocate General found that the definition of the 'total cost of the credit to the consumer' in Article 3(g) is sufficiently broad to incorporate the recovery costs incurred where a borrower is in default under the initial agreement, whether those costs are charged by the lender himself or by a debt collector acting on his behalf (Opinion of Advocate General Sharpston in *Verein für Konsumenteninformation*, C-127/15, EU:C:2016:584, point 41).

[12] Furthermore, according to the Court of Justice's case-law, the lender is entitled to levy other types of charges not referred to in Directive 2008/48. Accordingly, the Member States have discretion to regulate the types of charges (see judgment of 12 July 2012, *SC Volksbank România*, C-602/10, EU:C:2012:443, paragraphs 65 to 67). This suggests that the concept 'total cost of the credit to the consumer' in Article 3(g) of Directive 2008/48 can also be interpreted differently from one national legal order to another.

[13] In the Guidelines on the application of Directive 2008/48, the European Commission stated that the total cost of the credit to the consumer includes all the range of costs that the consumer has to pay in order to access the credit or to use it, which are known (or ascertainable) by the creditor. Those costs include interest charges, taxes and commissions arising from the credit agreement (as opposed to a service or goods tax, for example), credit intermediation fees payable by the consumer, administrative fees (for loan preparation or examination and authorisation of the credit, for example), membership fees and costs for providing account statements or for postage. The total cost of the credit to the consumer does not include dormancy or inactivity fees, which are linked to non-use of the credit. Nevertheless, those fees must be disclosed as part of pre-contractual information under Articles 5(1)(i) and 6(1)(e) and contractual information under Article 10(2)(k) (Commission staff working document: Guidelines on the

application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge, SWD(2012) 128, Brussels, 8.5.2012, p. 15).

[14] Moreover, in its judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, the Court of Justice ruled on the meaning of the total cost of the credit to the consumer. However, that ruling does not contain an interpretation of the legislation of the kind required to resolve the issue under analysis. Similarly, the Opinion of Advocate General Hogan in *Lexitor Sp.*, C-383/18, EU:C:2019:451), available at the time this decision is being made, concerns a number of aspects of application of the concept 'total cost of the credit to the consumer'.

[15] Having regard to the law developed to date by the Court of Justice, the referring court finds that, at first sight, analysis of the legal provisions suggests that the costs of extending the agreement should not be included in the 'total cost of the credit to the consumer'. However, in the present case, a number of specific clauses of the agreement examined show that the lender conceives of an extension of the credit agreement as an acceptable option in the event of default. This is borne out not only by a close reading of those terms and conditions in the agreement and the statements of the applicant in the appeal in cassation, but also by the large number of agreements extended in practice.

[16] For all the foregoing reasons, the referring court harbours doubts as to the interpretation of Article 3(g) of Directive 2008/48. The referring court therefore finds it necessary to refer a question to the Court of Justice for a preliminary ruling. […].

Operative part

In accordance with Article 267 of the Treaty on the Functioning of the European Union, […] the referring court:

hereby

refers the following questions to the Court of Justice for a preliminary ruling:

1. Is the concept 'total cost of the credit to the consumer', defined in Article 3(g) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, an autonomous concept of EU law?

2. Are the costs of extending the credit included in the concept 'total cost of the credit to the consumer', defined in Article 3(g) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, in circumstances such as those of the present case, if the clauses on extending

the credit form part of the terms and conditions of the credit agreement agreed by the borrower and the lender?

stays the proceedings until the Court of Justice makes a ruling.

[…] [appeals, certification of the copy, signatures and dates]