

**Case C-222/19****Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

8 March 2019

**Referring court:**

Sąd Rejonowy w Opatowie (District Court, Opatów, Poland)

**Date of the decision to refer:**

4 February 2019

**Applicant:**

BW Sp. z o.o., having its seat in B.

**Defendant:**

D.R.

**Subject matter of the case in the main proceedings**

The main proceedings concern the issuing of an order for payment within the framework of an order for payment procedure. The applicant, BW Sp. z o.o., a limited company with its seat in B., seeks payment from a loan recipient, who is a consumer ('the defendant'), on the basis of a blank promissory note drawn by the consumer as security for a credit agreement.

**Subject matter and legal basis of the request**

Interpretation of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and of the principles of EU law concerning consumer protection and the balance between contracting parties from the point of view of the concept of 'maximum non-interest credit costs' introduced in national law and the mathematical formula for calculating those costs.

### Question referred

Must the provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), in particular Article 3(1) of that directive, and the principles of EU law concerning consumer protection and the balance between contracting parties be interpreted as precluding the introduction into national law of the concept of ‘maximum non-interest credit costs’ and the mathematical formula for calculating those costs set out in Article 5(6a), in conjunction with Article 36a, of the Ustawa o kredycie konsumenckim z dnia 12 maja 2011 r. (Law of 12 May 2011 on Consumer Credit: Dz. U. 2018:993), which allow the costs of the business activity of a seller or supplier to be included in the costs related to a credit agreement that are to be borne by the consumer (the total costs of the credit)?

### Provisions of EU law cited

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: thirteenth recital, Article 3(1).

### Provisions of national law cited

The Ustawa z dnia 12 maja 2011 r. o kredycie konsumenckim (Law on Consumer Credit; ‘the LCC’) (consolidated text: *Journal of Laws* [Dz. U.] of 2018, item 993).

Article 5(6) of the LCC — total cost of the credit — all the costs the consumer is required to pay in connection with the credit agreement, in particular:

- (a) interest, charges, fees, taxes and margins, if known to the creditor; and
- (b) costs of ancillary services, in particular insurance, if these must be incurred in order to obtain the credit or to obtain it on the terms and conditions marketed, except for notarial costs borne by the consumer;

Article 5(6a) of the LCC — non-interest credit costs — all costs that the consumer bears in connection with the consumer credit agreement, excluding interest;

Article 5(7) of the LCC — total amount of the credit — the maximum amount of all funds exclusive of credit costs covered by the credit that the creditor makes available to the consumer under the credit agreement and, in the case of agreements for which no maximum amount has been provided for, the total amount of funds exclusive of credit costs covered by the credit that the creditor makes available to the consumer under the credit agreement;

Article 5(8) of the LCC — the total amount payable by the consumer — the sum of the total cost of the credit and the total amount of the credit.

## Article 36a.

1. The maximum amount of non-interest credit costs shall be calculated as follows:

$$\text{MNICC} \leq (C \times 25\%) + (C \times n/Y \times 30\%)$$

where the meaning of the symbols is as follows:

MNICC — the maximum amount of non-interest credit costs;

C — the total amount of the credit;

n — the repayment period expressed in days;

Y — the number of days in a year.

2. Non-interest credit costs throughout the entire lending period may not exceed the total amount of the credit.

3. Non-interest credit costs arising from a consumer credit agreement shall not be payable in the part that exceeds the maximum non-interest credit costs calculated in the manner set forth in paragraph 1 above or the total amount of the credit.

Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 — Civil Code; ‘the CC’) (consolidated text: *Journal of Laws* [Dz. U.] of 2018, item 1025).

## Article 359 of the CC — Interest on principal

§ 1. Interest on a sum of money shall be due only if it results from a legal act or from a statute, from a court decision or from a decision of another competent authority.

§ 2. If the amount of interest is not specified otherwise, statutory interest shall be due in the amount equal to the sum of the National Bank of Poland benchmark rate and 3.5 percentage points.

§ 2<sup>1</sup>. The maximum amount of interest resulting from a legal act may not exceed twice the statutory interest rate on an annual basis (maximum interest).

§ 2<sup>2</sup>. If the amount of interest resulting from a legal act exceeds the maximum interest, maximum interest shall be payable.

§ 2<sup>3</sup>. Contractual provisions may not exclude or limit the provisions on maximum interest, including in cases where foreign law has been selected. In such a case, the provisions of this Law shall apply.

## Article 481 of the CC — Interest for late payment

§1. If the debtor is late in making a payment, the creditor may claim interest for the duration of the delay even if the creditor has not suffered any damage and even if the delay was due to circumstances for which the debtor is not liable.

§ 2. If the interest rate for late payment is not specified, statutory interest for late payment shall be due in the amount equal to the sum of the National Bank of Poland benchmark rate and 5.5 percentage points. However, where the claim bears interest at a higher rate, the creditor may claim interest for late payment at that higher rate.

§ 2<sup>1</sup>. The maximum amount of interest for late payment may not exceed twice the statutory interest rate for late payment on an annual basis (maximum interest for late payment).

§ 2<sup>2</sup>. If the amount of interest for late payment exceeds the maximum interest for late payment, maximum interest for late payment shall be payable.

§ 2<sup>3</sup>. Contractual provisions may not exclude or limit the provisions on maximum interest for late payment, including in cases where foreign law has been selected. In such a case, the provisions of this Law shall apply.

#### Article 385<sup>1</sup> of the CC — Abusive clauses

§1. The provisions of a contract concluded with a consumer which have not been agreed individually shall not be binding on the consumer if his rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his interests (abusive clauses). This shall not apply to provisions setting forth the principal matters to be performed by the parties, including price or remuneration, so long as they are worded clearly.

§ 2. If a contractual term is not binding on the consumer pursuant to paragraph 1, the contract shall otherwise continue to be binding on the parties.

§ 3. The provisions of a contract which are not agreed individually are those over the content of which the consumer had no genuine influence. This refers in particular to contractual provisions taken from a standard contract proposed to a consumer by a contracting party.

§ 4. The burden of proving that a provision has been agreed individually rests with the person relying thereon.

Article 385<sup>2</sup> of the CC — [Time of assessment as to whether provisions conform with good practice]

#### Article 385<sup>3</sup> of the CC — List of abusive clauses

3. For the avoidance of doubt, clauses which have the following effects shall, without limitation, be considered abusive:

[...]

- (2) exclude or substantially limit liability towards the consumer for non-performance or improper performance of an obligation;
- (3) exclude or substantially limit the setting-off of the consumer's claims against the other party's claims;
- (4) provide for terms with which the consumer did not have any opportunity to become acquainted prior to the conclusion of the agreement;

[...]

- (11) confer exclusively upon the consumer's counterparty the right to declare the service provided to be in conformity with the agreement;
- (12) exclude the obligation to reimburse the consumer with the payment made for services not performed in whole or in part if the consumer opts not to conclude or perform the agreement;
- (13) provide for the forfeiture of the right to claim reimbursement for a consumer's performance whose fulfilment preceded the fulfilment of the counterparty's performance where the parties terminate the agreement, submit a notice of its termination or withdraw therefrom;
- (14) deny exclusively to the consumer the right to terminate the agreement, withdraw from it or submit a notice of its termination;

[...]

- (16) impose exclusively on the consumer an obligation to pay a fixed sum in the event of the consumer opting not to conclude or perform the agreement;

[...]

- (19) provide exclusively for the consumer's counterparty the unilateral right to alter the essential characteristics of the service provided without valid reasons;
- (20) provide for the consumer's counterparty the right to fix or increase the price or remuneration due to it after the conclusion of the agreement without giving the consumer the right to withdraw from the agreement;

[...]

**Brief outline of the facts and procedure**

On 8 March 2018, the applicant and the defendant concluded a loan (consumer credit) agreement under which the defendant was obliged to pay PLN 9 225.00 together with contractual interest on the principal calculated using a variable interest rate (as at the agreement conclusion date, this amounted to 10% per annum). The foregoing amount comprised PLN 4 500.00 as the total amount of the loan (the cash made available to the borrower) and PLN 4 725.00 as the total cost of the loan, which included contractual interest on the principal for the entire term of the agreement (PLN 900), the loan origination fee (PLN 1 125.00) and the loan management fee (PLN 2 700.00). The annual percentage rate was determined to be 119.42%. The agreement was concluded for a term of 2 years and provided for loan repayment in 24 monthly instalments.

The maximum non-interest credit costs provided for in the agreement amounted to PLN 3 825.00 and included the amount due under the loan origination fee and under the loan management fee. The amount of these costs was calculated using the formula set out in Article 36a of the LCC and was not negotiated between the parties on an individual basis. The agreement itself was prepared using a ready-made template. The repayment of the liability under the agreement was secured with a blank promissory note.

The agreement was terminated by the applicant due to non-payment of the agreed loan instalments.

The applicant filed a claim with the referring court against the defendant in which it sought the amount of PLN 7 311.90 together with statutory interest for late payment; at the same time, within the framework of the claim, it lodged a motion for an order for payment to be issued on the basis of the blank promissory note drawn. The applicant, when obliged to do so by the court, submitted the loan agreement, loan repayment schedule and promissory note agreement.

According to the applicant's clarifications in its pleadings, the loan origination fee (25% of the total amount of the credit within the meaning of Article 5(7) of the LCC) consists, *inter alia*, of the financial intermediary's remuneration, the cost of access to systems which enable the borrower's creditworthiness to be verified and the cost of remuneration of the staff involved in the granting of loans. In turn, the loan management fee (30% of the total amount of the credit for each year) consists of: the labour cost of the employees who handle repayments, service the helpline and write letters to debtors, the cost of maintaining the office, the cost of accessing the Business Information Bureau and Credit Bureau systems and so forth. As regards the costs of concluding and performing the agreement concluded with the defendant, the applicant refused to indicate their amount while at the same time noting that the fees charged were in accordance with Article 36a of the LCC and the mathematical formula set out in that provision.

The defendant claims that the action should be dismissed.

### **Essential arguments of the parties in the main proceedings**

The applicant takes the view that the fees charged are in compliance with applicable laws, in particular Article 36a of the LCC, and therefore cannot be considered to be contrary to the law, in particular Article 385<sup>1</sup>(1) of the CC, Article 58 of the CC and Article 359(2<sup>1</sup>) of the CC. In the applicant's opinion, the provisions of the agreement concerning the fee and its amount reflect statutory provisions and therefore cannot be considered abusive. The statutory provision concerning maximum interest does not restrict the parties' right to provide for other types of fees in addition to interest. The creditor's right to charge fees is restricted only indirectly by the introduction of a limit on non-interest credit costs. By charging fees, creditors compensate for the increased costs of credit risk and the costs of capital financing. Moreover, the payment of the fee should be regarded as the borrower's main obligation, which precludes any review of this contractual term in terms of its fairness.

The defendant, in turn, has claimed that the agreement was concluded in breach of Article 385<sup>1</sup>(1) of the CC, Article 58 of the CC and Article 359(2<sup>1</sup>) of the CC.

### **Brief statement of and reasons for the reference**

The regulations which introduce the concept of maximum non-interest credit costs into Polish law are included in Article 5(6a) and Article 36a of the LCC. They seek to improve the protection of consumers who use the financial services of companies which grant consumer credit and are not subject to the obligation to obtain an authorisation from the Komisja Nadzoru Finansowego (Polish Financial Supervision Authority). While complying with the regulations concerning the maximum amount of interest, sellers or suppliers at the same time reserve the right to charge high fees and additional non-interest charges. As a consequence of such practices, the total costs of servicing the debt often exceed the amount of the loan or credit granted. The above provisions took effect on 11 March 2016 and are mandatory. The formula for calculating maximum non-interest credit costs is stipulated in Article 36a of the LCC and is designed on the basis of the assumption that the amount of maximum non-interest credit costs is meant to cover the costs of creditors' business activity and guarantee its economic profitability. As a result, the percentage ratios included in the mathematical formula in question, that is, 25% and 30%, have been set at a level which ensures that creditors' operating costs related to the granting of a loan as well as the risk of the consumer failing to repay the loan are covered. The cap on maximum non-interest credit costs calculated using this formula ranges from 25% and 100% of the total amount of the credit, depending on the lending period.

The desire to set the maximum amount of the costs to be borne by the consumer in connection with a credit agreement is justified and is in line with the system of consumer protection provided for in EU law. However, the method by which it is implemented raises doubts: the issue is the introduction of a formula for

calculating maximum non-interest credit costs which includes the costs of the business activity conducted by the seller or supplier in the costs related to the granting of a loan or credit. The national legislature has included in the costs related to the granting of a loan or credit not only costs associated with the conclusion or handling of an individual agreement but also those which constitute business costs (for instance, the costs of maintaining customer databases or staff remuneration, operational risk and other burdens borne by the seller or supplier) and are not inherently related to any individual credit agreement. The introduction of such legal arrangements results in the consumer being burdened with such costs, which are meant to be borne by the seller or supplier as a result of the nature of its business activity. It does not appear acceptable that the consumer should be charged with the general costs of the business activity of the seller or supplier, with the exception of costs which can be classified as costs borne in connection with the credit agreement within the meaning of Article 3(g) of Directive 2008/48/EC. The specimen list of the types of such costs contained in that provision, namely, interest, commissions, taxes, other types of charges, the costs of insurance premiums and services, justifies the conclusion that the consumer may be charged those costs that are generated by the conclusion and performance of a specific credit agreement. On the other hand, this authorisation to impose financial burdens on the consumer does not extend to all of the business costs of the seller or supplier. It is clear that the creditor must provide the appropriate material infrastructure and staffing in order to engage in this type of business activity at all. It appears that this position was taken by the Court of Justice in its judgment of 16 January 2014, *Constructora Principado SA v Jose Ignacio Menendez Alvarez* (C-226/12), in which the admissibility of passing on to the consumer the obligation to pay tax on the increase in the value of property payable by the seller or supplier was challenged, and it was pointed out that such an obligation could be classified as causing a ‘significant imbalance’ within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The effect of the provisions of Article 5(6a) and Article 36a of the LCC, on the other hand, is that the consumer can be charged both the maximum non-interest credit costs and the amount of interest, and the amount of each charge is independent of the other. This results in a situation where the total cost of the credit is higher than the amount of credit itself and the case at hand is an example of this.

It does not appear that the introduction into national law of legal rules which make it possible to charge to the consumer credit costs which exceed the total amount of the credit, or even equal or close to it, is compatible with the objectives and assumptions of Council Directive 93/13/EEC. Legal rules of this kind cause a significant imbalance in the contractual rights and obligations of parties to an agreement, which is to the detriment of the consumer. This is because the purpose of Council Directive 93/13/EEC is to replace the formal balance between the rights and obligations of parties to an agreement with a real balance which re-establishes equality between them. This purpose is served by the mandatory provision of Article 6(1) of the Directive, which provides that unfair terms are not to be binding on the consumer. In the court’s opinion, it cannot be assumed that

there is a real, as opposed to a merely formal, balance between the obligations of the creditor and those of the consumer in the case where the creditor's obligation remains solely to make the agreed sum of money available to the consumer, whereas the consumer is obliged to pay that amount with interest and to pay credit costs the amount of which is equal to, or slightly less than, the amount of the credit itself.

In the view of the national court, the formula for calculating maximum non-interest credit costs provided for in the LCC does not contain any elements which would enable the amount of those costs and also the profits obtained by the creditor to be reasonably linked with the amount of the loan. Credit amount and lending period figures are by themselves insufficient to ensure that these costs are set at a level which ensures a balance between the contracting parties and the equivalence of mutual obligations, since percentage ratios play a fundamental role in the formula. The application of the formula has the following results: even for credit granted for just one day, the maximum amount of non-interest credit costs reaches 25% of the total amount of the credit, and for a lending period of more than three years, it reaches 100% of the total amount of the credit. Significant imbalance within the meaning of Article 3 of Council Directive 93/13/EEC results, first, from the fact that the consumer is charged costs which in principle he should not bear, namely, the general costs of the business activity of the seller or supplier, and second, from the absence of an adequate relationship between the actual services provided to the consumer by the creditor in the sole interest of the former and the costs charged to the borrower. In this respect, it should be noted that the operation of outlets by the creditor, the employment of staff or the provision of appropriate equipment and access to databases do not appear to be actual services provided to the consumer. These activities are not actual services undertaken in the sole interest of the consumer as party to a particular agreement.

The actions undertaken by creditors in fulfilment of the obligation imposed by the court to show the actual costs related to the credit agreement, and to clarify what the fees in question concern and what justifies their amount, usually consist solely in quoting the mathematical formula for calculating maximum non-interest credit costs and the explanatory memorandum to the draft amending law. In general, the costs associated with the conclusion and performance of such an agreement are not significant. They usually include a symbolic assessment of the prospective customer's creditworthiness and the generation of the agreement as well as the drawing up of a blank promissory note and promissory note agreement. In the vast majority of cases, loans and credits are granted to heavily indebted persons. In these cases, no security other than a blank promissory note is used.

Actual practice related to the application of non-interest credit costs justifies the conclusion that this statutory arrangement has not resulted in improved consumer protection and the resulting benefits have proved illusory. In the opinion of the national court, the introduction of this arrangement has resulted in a situation where the consumer can be burdened not only with the costs related to the credit agreement but also with the creditors' business costs. From the agreements

submitted in court cases, it follows clearly that the formula provided for in Article 36a of the LCC is commonly used and constitutes the sole criterion for determining the amount of non-interest credit costs. In practice, the cost of the credit is determined as a lump sum using the above formula, which results in an unreasonable economic burden on the consumer and undue benefits for the creditor.

Another effect of this arrangement has been a radical reduction in the ability of courts to examine the terms of agreements which provide for such fees and to fix their amounts in accordance with that formula from the point of view of the presence of abusive clauses or their invalidity on the grounds of their illegality, attempts to circumvent the law or being contrary to accepted moral principles. This effect follows from the marked trend in the case-law of the national courts which has emerged after the entry into force of the limit on maximum non-interest credit costs and according to which contractual provisions concerning non-interest credit costs cannot be examined in terms of their abusiveness or invalidity if the amount of those costs does not exceed the statutory limit. This position is based on the legitimate premise that contractual terms which are lawful and respect the limitations set out in applicable legislation cannot be considered invalid or abusive.

The foregoing position is also supported by Article 1(2) of Council Directive 93/13/EEC as well as by its thirteenth recital. It must be admitted that those contractual terms which determine the amount of charges to be borne by the consumer in individual agreements, including the agreement concluded in the case at hand, are compatible with the aforementioned provisions of national law, since the amount of those charges is determined in accordance with the formula provided for in Article 36a of the LCC and does not exceed the limits stipulated therein. In principle, therefore, any review of these contractual terms is excluded owing to the assumption made in the preamble to the Directive. Therefore, in the current legal environment, the finding that maximum non-interest credit costs are lawful does in fact preclude an examination of provisions which set the amount of these charges in terms of their abusive nature. The question of the equivalence of the obligations imposed on the parties is thus not taken into account and there is also no assessment as to whether the creditor, in return for the fee envisaged in the agreement, provides an actual service which is in the consumer's sole interest and whether the balance between the parties' rights and obligations under the agreement is genuine as opposed to merely formal. It appears that this is not in line with the assumptions underlying the Directive and in principle the national court should assess of its own motion whether a contractual term coming within the scope of the Directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.<sup>1</sup>

<sup>1</sup> Judgment of the Court of Justice of the European Union in *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai* (C-472/11) and the case-law cited therein.

The national court considers that this request for a preliminary ruling is necessary in order to dispel the doubts discussed above and also for the national court to rule in the present case. The answer to the question posed will be of direct relevance for determining the extent to which the consumer can bear the financial burden of the costs associated with credit. The Court's answer is required owing to the absence of direct findings by the Court in relation to these issues and also owing to the significant divergence in the case-law of the national courts, which makes it more difficult to achieve the objectives of the Directive and seriously undermines the effectiveness of the rules of EU law.

WORKING DOCUMENT