

Case C-252/19**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:**

20 March 2019

Referring court:

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

Date of the decision to refer:

31 January 2019

Applicant:

QL S.A. in B.

Defendant:

C.G.

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, QL S.A. 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 reference

Interpretation of Article 3(g) and Article 22(1) 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 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 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, and in particular Article 3(g) and Article 22(1) of that directive, 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(6)(a) 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, consolidated text: *Journal of Laws* [Dz. U.] of 2018, item 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)?

Applicable provisions of Community law

Article 3(g) and Article 22(1) of Directive of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

Applicable provisions of national law

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

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 obtain it on the terms and conditions marketed, except for notarial costs borne by the consumer;

Article 5(6)(a) 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 — 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) of the LCC — the maximum amount of non-interest credit costs shall be calculated as follows:

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

where the meaning of the symbols is as follows:

MNICC — maximum amount of non-interest credit costs,

C — total amount of the credit,

n — repayment period expressed in days,

Y — number of days in a year.

Article 36a(2) of the LCC — non-interest credit costs throughout the entire lending period may not exceed the total amount of the credit.

Article 36a(3) of the LCC — 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 otherwise specified, statutory interest shall be due in an amount equal to the sum of the National Bank of Poland benchmark rate and 3.5 percentage points.

§ 2¹. The maximum amount of interest resulting from a legal act may not exceed twice the statutory interest rate on an annual basis (maximum interest).

§ 2². If the amount of interest resulting from a legal act exceeds the maximum interest, maximum interest shall be payable.

§ 2³. Contractual provisions may not exclude or limit the provisions on maximum interest, including 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. of the CC — 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 an 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.

§ 2¹. 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).

§ 2². If the amount of interest for late payment exceeds the maximum interest for late payment, maximum interest for late payment shall be payable.

§ 2³. Contractual provisions may not exclude or limit the provisions on maximum interest for late payment, including where foreign law has been selected. In such a case, the provisions of this Law shall apply.

Announcement of the Minister of Justice of 7 January 2016 on the amount of statutory interest (Official Journal of the Republic of Poland [Monitor Polski] of 2016, item 46)

Pursuant to Article 359 § 4 of the Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 — Civil Code) (*Journal of Laws* of 2014, item 121, as amended), as of 1 January 2016 the amount of statutory interest shall be 5% on an annual basis.

Announcement of the Minister of Justice of 7 January 2016 on the amount of statutory interest for late payment (Official Journal of the Republic of Poland [Monitor Polski] of 2016, item 47)

Pursuant to Article 481 § 24 of the Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 — Civil Code) (*Journal of Laws* of 2014, item 121, as amended), as of 1 January 2016 the amount of statutory interest for late payment shall be 7% on an annual basis.

Succinct presentation of the facts and procedure

On 31 August 2016, the applicant and the defendant concluded a loan (consumer credit) agreement under which the defendant was obliged to pay PLN 10 764.00 together with contractual interest at 9.81% per annum. The above amount

comprised PLN 5 000.00 as the total amount of the loan (the total amount of funds made available to the borrower) and PLN 5 764.00 as the total cost of the loan, which included a front-end fee (PLN 129.00), a commission fee (PLN 3 939.00), remuneration for the 'Twój Pakiet' [Your Package] service (PLN 900.00) as well as contractual interest on the principal for the entire term of the agreement (PLN 796.00). The annual percentage rate was 77.77%. The agreement was concluded for a term of three years.

The maximum non-interest credit costs provided for in the agreement amounted to PLN 4 968.00 and included the amounts due in respect of the front-end fee (PLN 129.00), commission fee (PLN 3 939.00) and remuneration for the 'Twój Pakiet' [Your Package] service (PLN 900.00). The amount of these costs was calculated using the formula provided for 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, while 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 5 293.72 together with statutory interest for late payment; at the same time, within the framework of the claim, it submitted 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.

Essential arguments of the parties in the main proceedings

In its pleading of 19 December 2018, the applicant argued that the loan agreement constitutes a consumer credit agreement within the meaning of the LCC and takes into account the amendments made to the Law on Consumer Credit, in particular to Article 36a, which specifies the maximum non-interest credit costs. The amounts due in respect of the front-end fee, commission fee and remuneration for the 'Twój Pakiet' [Your Package] service are within the limits of the maximum non-interest credit costs. The legislature considered such costs to be maximum costs, hence costs permitted by law and therefore justified by the cost and risk of running a financial institution.

Brief statement of and reasons for the reference

The Law of 12 May 2011 on Consumer Credit ('LCC') introduced into national law Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

According to recital 9 of Directive 2008/48/EC, the aim of the directive and of the full harmonisation it stipulates is to ensure that all consumers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market. Member States should therefore not be allowed to maintain or introduce national provisions other than those laid down in that directive. However, such restriction should only apply where there are provisions harmonised in this directive. Recital 10, in turn, states that the definitions contained in this directive determine the scope of harmonisation. The obligation on Member States to implement the provisions of that directive should therefore be limited to its scope as determined by those definitions.

The mandatory nature of Directive 2008/48/EC is clearly set out in Article 22(1), which provides that, in so far as the directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in that directive.

The provisions which introduced into Polish law the concept [of non-interest credit costs to the LCC] entered into force on 11 March 2016 and aimed 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 authorisation from the Komisja Nadzoru Finansowego (Polish Financial Supervision Authority). This was to be achieved by introducing legal arrangements to limit the possibility of charging excessive fees, commissions and interest in loan and credit agreements. 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.

In accordance with Article 5(6)(a) of the LCC, non-interest credit costs are all the costs that the consumer bears in connection with the consumer credit agreement, excluding interest. The concept of non-interest credit costs is not referred to in the Directive. Article 3(g) of the Directive, however, provides for the concept of the ‘total cost of the credit to the consumer’, which means 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 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 marketed.

The concept of the total [cost of the] credit was also introduced to the LCC — in Article 5(6) — and is defined as all the costs the consumer is required to pay in connection with the credit agreement, including without limitation:

- (a) interest, charges, fees, taxes and margins, if known to the creditor; and

(b) the costs of ancillary services, in particular insurance, if these must be incurred in order to obtain the credit or obtain it on the terms and conditions marketed, except for notarial costs borne by the consumer.

In view of the legal arrangements and the mandatory nature of the directive, the admissibility of the introduction by the national legislature of a separate and independent concept of 'non-interest credit costs', which also concerns the issue of charging the consumer costs in connection with the credit agreement, is questionable. Since the directive provides for the concept of the total cost of the credit, which means the extent to which the consumer may be made to bear the cost of the credit by reference to the concept of 'costs in connection with the credit agreement', it would appear that the Member State's obligation remains solely and exclusively to introduce the provisions of the directive into its national law within the limits of the definitions laid down by the directive and with strict regard to the content and scope of those definitions. This justifies the conclusion that issues relating to the charging of costs in connection with the credit agreement to the consumer should be resolved within the scope of the concept of the total cost of the credit. Any upper limit on the charging to the consumer of costs in connection with the credit agreement should therefore be established within the scope of the concept of the total cost of the credit and in relation to those costs which fall within that scope, hence costs that are connected with the credit agreement. The introduction of the concept of non-interest credit costs is not an appropriate means of achieving the objectives of the directive, since it enables the financial burden on the consumer to be increased beyond the limits under the concept of the total cost of the credit, i.e. the costs connected with the credit agreement.

Going beyond the limits of what the consumer may be made to bear, which are specified in Article 3(g) of the directive, is a consequence of the method adopted by the national legislature for calculating the maximum non-interest credit costs, that is to say, using the mathematical formula contained in Article 36a of the LCC. That formula was established taking into account the percentage ratios of operating costs incurred by sellers or suppliers engaged in the business of granting credits and loans and on the assumption that the maximum level of non-interest credit costs, calculated according to this formula, is meant to cover the costs of creditors' business activity and ensure its economic profitability. The explanatory memorandum to the draft law amending the Polish Law on Consumer Credit shows that the formula provided for in Article 36a of the LCC was established with reference to the costs of business activity incurred by loan institutions and in order to ensure its profitability. After all, the percentage ratios that are the basis of this formula, i.e. 25% and 30%, were established taking into account average operating costs — the costs incurred by sellers or suppliers in the consumer credit sector. This means that the legislature included in the costs relating to the granting of a loan or credit not only the costs associated with the conclusion or servicing of a specific agreement and with the servicing of a specific consumer, but also those which should clearly be classified as business costs (the costs of maintaining customer databases, staff remuneration, etc.). Those assumptions have resulted in

the setting of percentage ratios, which are the essential elements of this mathematical formula, at a level which assumes that creditors' operating costs related to the granting of a loan and the risk of the consumer failing to repay the loan are covered. The limit of maximum non-interest credit costs ranges from 25% to 100% of the total amount of the credit; over the course of one year it amounts to 55%, over two years to 85%, and thereafter to 100% of the total amount of the credit, irrespective of the subsequent lending period.¹ It should be noted, however, that those percentage ratios constitute the essential elements of the mathematical formula, since they determine the maximum non-interest credit costs. The establishment of a mathematical formula to calculate such credit costs on the basis of the assumptions set out above has had the effect of disassociating the maximum amount of non-interest credit costs from the actual amount of costs relating to a specific credit agreement. This entails, as a consequence, the possibility of placing a greater financial burden on the consumer. The seller or supplier may charge the consumer both the maximum non-interest credit costs as well as interest, and the amount of each charge is independent of the other. The total cost of the credit is therefore higher than the amount of credit itself and the present case is an example of this.

In the opinion of the referring court, while the desire to set the maximum amount of costs borne by the consumer in connection with a credit agreement is justified and is in line with the system of consumer protection and the objectives of Directive 2008/48/EC, the manner in which this has been done, namely, the introduction of maximum non-interest credit costs and establishment of a formula for calculating those costs on the basis of the assumptions set out above, is questionable. It follows from Article 3(g) of Directive 2008/48/EC that the consumer may be charged costs, but only those in connection with the credit agreement. The specimen list of the types of such costs, namely, interest, commissions, taxes, etc., justifies the conclusion that the consumer may be charged those costs that are generated by the conclusion and performance of a specific credit agreement. The consumer may not, however, be burdened with those costs incurred by the lender or creditor in the course of its business. It appears that this is the position taken by the Court in its judgment of 16 January 2014, *Constructora Principado SA v José Ignacio Menéndez Álvarez* (C-226/12), in which the admissibility of passing on to the consumer the obligation to pay capital gains tax 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. In the present case, it follows from the Court's judgment that, notwithstanding the differences in the facts, there are certain general principles that are applicable *mutatis mutandis* in cases which concern a consumer being charged costs in connection with a credit agreement.

¹ Explanatory memorandum to the Ustawa z 5 sierpnia 2015 r. o zmianie ustawy o nadzorze nad rynkiem finansowym oraz niektórych innych ustaw (Law of 5 August 2015 Amending the Law on Supervision of the Financial Market and Certain Other Laws, *Journal of Laws* [Dz.U.], item 135), Seventh term, Sejm paper No 3460, published on www.sejm.gov.pl.

What is primarily at issue here is the extent to which the consumer may be made to bear those costs, and in particular the extent to which the consumer may be charged the costs of the creditor's or lender's business activity.

Therefore, it would appear that the arrangements described above, introduced into Polish law, do not implement the principle adopted in Article 3(g) of Directive 2008/48/EC of charging the consumer exclusively with costs in connection with the credit agreement. The assumptions taken into account when constructing the mathematical formula set out in Article 36a of the LCC have de facto enabled consumers to be charged the costs of business activity conducted by creditors and lenders. This is because, when determining the percentage ratios in the above formula, reference was made to indicators determining the overall level of operating costs incurred by the seller or supplier.

It does not appear that the introduction into national law of arrangements which make it possible to charge to the consumer the costs of credit that are equal or similar to the total amount of the credit, especially those which make it possible to charge the consumer the costs of credit that are in excess of the total amount of the credit, is compatible with the objectives and principles of Directive 2008/48/EC. Such a situation is permissible under national law because the national legislature has allowed the consumer to be charged both the maximum non-interest credit costs and interest. Such legal arrangements cause a significant imbalance in the contractual rights and obligations of parties to an agreement, which is to the detriment of the consumer. It cannot be assumed that there exists a balance between the creditor's and the consumer's obligations in a situation where the creditor's obligation remains solely to make available the agreed sum of money, while the consumer is obliged to pay that amount with interest and to pay the costs of the credit whose amount is equal to, or slightly less than, the amount of the credit itself.

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 to the amount of the loan. The credit amount and lending period alone are insufficient to ensure that these costs are set at a level which ensures the balance of contract and the equivalence of mutual obligations, since percentage ratios play a fundamental role in the formula.

The problem of consumers being charged non-interest credit costs such as commissions, service fees or insurance premiums is the subject of numerous claims for payment brought before the referring court. In practice, the actions undertaken by creditors in fulfilment of the obligation imposed by the court to show the actual costs related to a credit agreement, and to clarify what the fees in question concern and what justifies their amount, usually consist solely in citing the mathematical formula for calculating maximum non-interest credit costs and the explanatory memorandum to the draft amending law. This, in turn, raises legitimate doubts as to whether the costs determined using that formula

correspond to the actual amount of costs related to a credit agreement which may be charged to the consumer. 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. The national court uses the term 'symbolic assessment' because, in the vast majority of cases, credits and loans are granted to persons who are heavily in debt and who are subject to numerous enforcement proceedings or even consumer bankruptcy proceedings. Therefore, performing a few simple and uncomplicated steps cannot generate costs of up to 100% of the total amount of the credit. The absence of a relationship between the actual costs of the credit and the maximum non-interest credit costs is evidenced by the agreement concluded in the present case, since the cost of the front-end fee corresponding to the costs related to the conclusion of the agreement was set at PLN 129.00. The remaining amount of PLN 3 939.00, defined simply as a commission fee, constitutes the applicant's actual remuneration in regard to non-interest credit costs, which the lender has not in any way concealed, since that is the amount due. It should be noted that this remuneration alone is four times the maximum interest on the principal for the entire lending period and represents 78.78% of the loan principal. Such an economic burden on the consumer meets the criteria for a significant contractual imbalance and calls into question the compliance of the arrangements used in Polish law with Directive 2008/48/EC.

Actual practice regarding the application of non-interest credit costs justifies the conclusion that this statutory arrangement has not resulted in improved consumer protection, since the consequence of its introduction has been to enable the financial burden on the consumer to be increased. From the agreements submitted in court cases, it clearly follows 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. However, that criterion is constituted neither by the actual cost of the credit nor by any reasonable relationship between the amount of capital and the amount of 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. It should be noted that the sanction provided for by the legislature for exceeding the limit in question is illusory.

Another effect of this arrangement has been a radical reduction in the courts' ability to examine the terms of agreements which provide for such fees and 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 illegality, attempts to circumvent the law or being contrary to accepted moral principles. This effect follows from the pronounced trend in the case-law of the national courts which has emerged after the entry into force of the limit on non-interest credit costs and according to which contractual terms concerning non-interest credit costs cannot be examined for 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 laws cannot be considered invalid or abusive. There was no doubt as to the admissibility of examining contractual terms which fix the amount of commission or other fees borne by the consumer for abusiveness or invalidity. The excessive level of such fees was effectively corrected by the application of Article 58 of the CC (absolute nullity of the contract) and Article 385¹ of the CC (abusive clauses), while fees amounting to 40% of the loan or credit amount were also considered invalid or abusive. Restricting the possibility of examining the legality or abusiveness of contractual terms concerning maximum non-interest credit costs also leads to a disregard for the obligation to assess the creditworthiness of potential customers.

In the view of the national court, an answer to the question referred is necessary for the national court to give a proper ruling in the present case. The answer will be of direct relevance to determining the extent to which a financial burden may be imposed on the consumer and to clarifying the meaning of the concept of 'costs connected with the credit'. The Court's answer is all the more necessary as it has not yet taken a position on the issues set out in the question. Finally, given the significant divergence in the case-law of the Polish courts in the matter at hand, this state of affairs makes it more difficult to achieve the objectives of the Directive and seriously undermines the effectiveness of EU law.

WORKING DOCUMENT