

Case C-485/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

25 June 2019

Referring court:

Krajský súd v Prešove (Slovak Republic)

Date of the decision to refer:

12 June 2019

Applicant:

LH

Defendant:

PROFI CREDIT Slovakia s.r.o.

Subject-matter of the main proceedings

Action brought by a consumer in which he seeks the repayment of EUR 1 500, together with interest, from a creditor on the basis of unfair terms in a consumer credit agreement.

Subject-matter and legal basis of the request for a preliminary ruling

Pursuant to Article 267 of the Treaty on the Functioning of the European Union, the Krajský súd v Prešove (Regional Court, Prešov, Slovak Republic) refers a number of questions for a preliminary ruling concerning the application of limitation periods, the burden of proof and the method of interpretation in conformity with EU law in consumer cases, in light of Article 47 of the Charter of Fundamental Rights of the European Union, the principle of effectiveness and the direct effect of Directive 2008/48/EC.

Questions referred

A.

- I. Must Article 47 of the Charter of Fundamental Rights of the European Union ('Article 47 of the Charter') and, by implication, the consumer's right to an effective legal remedy be interpreted as precluding national legislation, such as Article 107(2) of the *Občianský zákonník* (Civil Code of Slovakia) on the limitation of the consumer's right by a statutory three-year limitation period, in accordance with which the consumer's right to reimbursement which arises from an unfair contractual term may become time-barred even where the consumer is not in a position to evaluate the unfair contractual term and the limitation period starts even without the consumer being aware that the contractual term is unfair?
- II. In the event that, despite a lack of awareness on the part of the consumer, the legislation which imposes an statutory limitation period of three years on the consumer's right is consistent with Article 47 of the Charter and the principle of effectiveness, the national court then asks the following:

Is a national practice contrary to Article 47 of the Charter and the principle of effectiveness if, in accordance with that practice, **the burden of proof** falls on the consumer, who must prove in legal proceedings that the persons acting on behalf of the creditor were **aware** of the fact that the creditor was infringing the consumer's rights, in the present case that awareness consisting in the knowledge that, by failing to indicate the precise annual percentage rate of charge (APR), the creditor was infringing a legal provision, and must also prove awareness of the fact that, in such circumstances, the loan was non-interest bearing and, by receiving payments of interest, the creditor obtained unjust enrichment?

- III. In the event that question A.2 is answered in the negative, on the part of which persons, among the directors, the shareholders and the commercial representatives of the creditor, must the consumer prove awareness of the matters referred to in question A.2?
- IV. In the event that question A.2 is answered in the negative, what **degree** of awareness must be shown in order to **prove** the supplier's **intention** to infringe the relevant financial sector rules?

B.

- I. Do the effects of the directives and the relevant case-law of the Court of Justice on the matter, including *Rasmussen*, C-441/14, EU:C:2016:278, *Pfeiffer*, C-397/01 to C-403/01, EU:C:2004:584, paragraphs 113 and 114, *Kücükdıveci*,

C-555/07, EU:C:2010:21, paragraph 48, *Impact*, C-268/06, EU:C:2008:223, paragraph 100, *Dominguez*, C-282/10, paragraphs 25 and 27, and *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 38, preclude a national practice in accordance with which the national court reaches a conclusion concerning interpretation in conformity with EU law without employing interpretative methods and without giving due reasons?

II. If, after applying interpretative methods, such as purposive interpretation, authentic interpretation, historical interpretation, contextual interpretation, logical interpretation (the *a contrario* method, the *reductio ad absurdum* method) and after applying the whole body of domestic law, in order to secure the objectives referred to in Article 10(2)(h) and (i) of Directive 2008/48/EC ('the Directive'), the national court concludes that interpretation in conformity with EU law results in a situation *contra legem*, is it then possible — for example, by making a comparison with relationships involving discrimination or the protection of employees — to accord the abovementioned provision of the Directive direct effect, in order to protect traders against consumers in credit relationships, and disapply the provision of law which is not in conformity with EU law?

Provisions of EU law and EU case-law cited

Article 47 of the Charter of Fundamental Rights of the European Union

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

Judgments of the Court of Justice in *Océano Grupo Editorial and Salvat Editores*, C-240/98 to 244/98, EU:C:2000:346, *Pfeiffer*, C-397/01 to C-403/01, EU:C:2004:58, *Impact*, C-268/06, EU:C:2008:233, *Commission v Ireland and Others*, C-89/08 P, EU:C:2009:742, *Dominguez*, C-282/10, EU:C:2012:33, *Association de médiation sociale*, C-176/12, EU:C:2014:2, *CA Consumer Finance SA v Ingrid Bakkaus and Others*, C-449/13, EU:C:2014:2464, *Ernst Georg Radlinger and Helena Radlingerová*, C-377/14, EU:C:2016:283, *Rasmussen*, C-441/14 EU:C:2016:278, *Francisco Gutiérrez Naranjo and Others*, C-154/15 and C-307/15, EU:C:2016:980, *Home Credit Slovakia a.s. v Klára Bíroová*, C-42/15, EU:C:2016:842, *Cresco Investigation*, C-193/17, EU:C:2019:43, and *Mariusz Pawlak*, C-545/17, EU:C:2019:260

Provisions of national law and national case-law cited

Article 107(1) and (2) of the Občiansky zákonník č. 40/1964 Zb. (Civil Code, Law No 40/1964)

Articles 15 and 16 of the Trestný zákon č. 300/2005 Z.z. (Penal Code, Law No 300/2005)

Article 2(2) of the Civilný sporový poriadok, zákon č. 160/2015 Z.z. (Code of Civil Procedure, Law No 160/2015)

Articles 9 and 11 of the zákon č. 129/2010 Z.z. o spotrebiteľských úveroch a o iných úveroch a pôžičkách pre spotrebiteľov a o zmene a doplnení niektorých zákonov (Law No 129/2010 on consumer credits and other credits and loans to consumers and amending certain other laws), in the version in force until 1 May 2018

Judgment of the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic, ‘the Supreme Court of the Slovak Republic’) of 18 October 2018, Case No 1Cdo 238/2017

Judgment of the Supreme Court of the Slovak Republic of 22 February 2018, Case No 3 Cdo 146/2017.

Outline of the facts and the main proceedings

- 1 On 30 May 2011, the applicant, LH, entered into a consumer credit agreement with the defendant, the company PROFI CREDIT Slovakia, s.r.o. The agreement was for a loan of EUR 1 500 with an interest rate of 70% and an annual percentage rate of charge (APR) of 66.31%, and entailed an obligation to repay the total sum of EUR 3 698.40 over four years in 48 monthly repayments of EUR 77.05. On the first day of the credit relationship, the defendant applied a commission of EUR 367.49 in respect of the option of deferring repayments, without any certainty that the applicant would avail himself of that option in the future. Accordingly, the applicant received not EUR 1 500, but just EUR 1 132.51, that is to say, 24% less than the loan amount agreed upon.
- 2 At the time of concluding the agreement, the applicant did not receive information about the actual APR. The loan repayments were not specified in the agreement in terms of principal, interest and fees, which was contrary to the wording of Article 9(2)(k) of Law No 129/2010 on consumer credit, in the version then in force, which, up to 1 May 2018, required that information to be given.
- 3 On 9 November 2016, in its judgment in Case C-42/15, the Court of Justice held that such specification of loan repayments under Article 9(2)(k) of Law No 129/2010 was not required by Directive 2008/48/EC. The Slovak legislature corrected that legislative error and amended the provision in question, with effect from 1 May 2018.
- 4 The applicant repaid the loan, paying the defendant EUR 3 698.40.
- 5 On 2 February 2017, L.H. learned from his lawyer that he had suffered loss by reason of the defendant’s use of unfair contractual terms and that he had not been duly informed about the APR. Accordingly, on 2 May 2017, LH brought a legal action.

- 6 The applicant seeks reimbursement of the commission on the ground that, under Slovak law, a failure correctly to state the APR is sanctioned, inter alia, by the loss of the creditor's right to charge a commission.
- 7 In the proceedings before the national court, the defendant asserts that the applicant's claim is time-barred.

Succinct presentation of the reasons for the request for a preliminary ruling

- 8 With regard to the questions referred for a preliminary ruling that are set out in part A above, it is the opinion of the national court that, when the contract was provided, an incorrect APR was indicated and an unfair commission was charged.
- 9 In so far as concerns the limitation defence, it is necessary, under Slovak law, to exercise the right which arises from unjust enrichment within a subjective limitation period of two years. For the purposes of that limitation period, time begins to run when the complainant becomes aware of the fact that there has been unjust enrichment. The national court considers that the applicant has complied with that limitation period and has brought his action in good time.
- 10 In addition to the subjective limitation period, there is also an objective limitation period for the exercise of that right. If the unjust enrichment was deliberate, the right becomes time-barred ten years after the date on which the unjust enrichment occurred. If the unjust enrichment was the result of negligence, the right becomes time-barred three years after the date on which it occurred.
- 11 The national court states that, in accordance with the new Code of Civil Procedure, it is bound by the established decision-making practice of the Supreme Court of the Slovak Republic. According to the judgment of the Supreme Court of the Slovak Republic of 18 October 2018, the burden of proof rests on the applicant in so far as concerns the question of whether the three-year limitation period or the ten-year limitation period applies. In order for the ten-year limitation period to apply, the consumer must first of all determine the precise moment when the unjust enrichment occurred and then demonstrate that the creditor intended (the element of knowledge and volition) to obtain a pecuniary advantage to the detriment of the consumer. In the assessment of liability (the element of knowledge and volition), the principles of criminal law must be applied by analogy. If the consumer fails to prove the necessary intent on the creditor's part, the three-year limitation period will apply.
- 12 However, it is not clear to the national court what degree of intention to infringe the law must be established. In this connection, it explains that it is virtually impossible for an applicant to prove a defendant's intention in so far as concerns the latter's knowledge that it was infringing the rules which govern consumer credits and that, if it did have such knowledge, it was aware that it was obtaining an unjust enrichment to the detriment of the consumer. Equally, it is unclear who

must be shown to have had the necessary intention, whether it is a director, a shareholder or the commercial representative of the defendant.

- 13 In this connection, the national court refers to the judgment in *CA Consumer Finance SA v Ingrid Bakkaus*, C-449/13, EU:C:2014:2464, in which the Court of Justice held that EU law precluded national rules according to which the burden of proving the non-performance of the obligation to provide the consumer with adequate information lies with the consumer and that the task of verifying the consumer's creditworthiness also lies with the consumer. In regard to the above, it is much more difficult for a Slovak consumer to prove intentional fault on the part of a creditor.
- 14 With regard to the temporal limit on the exercise of the consumer's right, the national court observes that, in its judgment in *Gutiérrez Naranjo and Others*, C-154/15 and C-307/15, EU:C:2016:980, the Court of Justice held that Directive 93/13/EEC precludes national case-law that temporally limits the restitutory effects connected with a finding of unfairness by a court in respect of a clause to amounts overpaid under such a clause after the delivery of the decision in which the finding of unfairness is made.
- 15 The national court doubts whether the abovementioned national decision-making practice, which in the present case effectively leads to the application of the objective three-year limitation period and a weakening of the right of the uninformed consumer to the point of the loss of that right, is consistent with the right to an effective remedy and to a fair trial referred to in Article 47 of the Charter or with the principle of the effectiveness of EU law.
- 16 As regards the questions referred for a preliminary ruling that are set out in part B above, which concern the methods for interpreting the original wording of Article 9(2)(k) of Law No 129/2010, which required specification of loan repayments in terms of principal, interest and fees, the national court observes that, on 22 February 2018, the Supreme Court of the Slovak Republic held that, in old cases which preceded the amendment of that law, interpretation had to be in conformity with EU law. According to that judgment, the wording of Article 9(2)(k) of Law No 129/2010 had to be interpreted as not imposing an obligation to provide the required information specifically with regard to each component (principal, interest and fees), but only an obligation to provide the information in a global fashion, in terms of instalments that include principal, interest and fees.
- 17 The national court considers that it is unclear from that judgment what interpretative methods the Supreme Court of the Slovak Republic used and how it arrived at an interpretation in conformity with EU law. The national court takes the view that interpretation of the provision in question in conformity with EU law would result in an interpretation that is *contra legem*. One solution could be to disapply the provision. However, the case would have to involve social relationships of importance, discrimination, for example (*Rasmussen*, C-441/14,

EU:C:2016:278) or a threat to the health of employees (*Pfeiffer*, C-397/01 to C-403/01, EU:C:2004:58). The national court doubts whether, in order to protect traders that make money available, Directive 2004/48/EC could be given direct effect, since that would undermine the certainty of the right of consumers who might have based their expectations on the wording of Law No 129/2010.

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