

Anonymised version

Translation

C-192/20-1

Case C-192/20

Request for a preliminary ruling

Date lodged:

5 May 2020

Referring court:

Krajský súd Prešov (Regional Court in Prešov, Slovakia)

Date of the decision to refer:

9 March 2020

Applicant:

Prima banka Slovensko, a.s.

Defendant:

HD

[...]

ORDER

The Krajský súd v Prešove (Regional Court in Prešov), in the case brought by the applicant: **Prima banka Slovensko, a.s.**, with its seat in [...] [address] [...] Žilina, [...] [identification number], against the defendant: **HD**, [...] residing in [...] [address] [...], Hradisko, **for payment of EUR 5 083.79** plus interest and costs, following the applicant's appeal against the judgment of the Okresný súd Kežmarok (District Court in Kežmarok, Slovakia) [...] [case Ref. No] of 29 September 2019,

orders as follows:

to stay the proceedings pursuant to Paragraph 162(1)(c) of the Civilný sporový poriadok (Code of Civil Procedure) and refer the following questions to the Court of Justice of the European Union:

1. Must Directive 93/13 on unfair terms in consumer contracts ('Directive 93/13'), and in particular Articles 6(1) and 7(1) thereof, in conjunction with the interpretation contained in the judgment of the Court of Justice of the European Union in Joined Cases C-96/16 and C-94/17, be interpreted as **precluding** legislation such as the protective framework provision contained in Paragraph 54(1) of the Občiansky zákonník (Civil Code), which does not allow the consumer's position to be worsened by contractual terms in comparison to the statutory provision which provides for the following rights of the creditor in the event of a consumer defaulting on loan repayment:

- the creditor's right to default interest at a rate limited by a government regulation;
- the creditor's right to other penalties which the creditor may impose on the consumer and which, together with default interest, are limited to the amount of the loan principal outstanding;
- the creditor's right to compensation where the damage suffered by the creditor is higher than the default interest, that is, the creditor's right to unlimited compensation according to the actual damage.

2. If the answer to the first question is in the affirmative: does the high level of protection of consumer rights under Article 38 of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 4(2) and 169(1) TFEU preclude a consumer from paying, for his or her delay [**Or. 2**] in the performance of contractual obligations, the flat rate costs of the creditor rather than the equivalent of the actual loss suffered by the creditor, even if the actual loss is lower than the flat rate costs?

Statement of reasons

I. Summary of the facts

1. HD is the breadwinner of a family of four (consisting of him, his partner and two minors). After the birth of his child, HD's only income was the temporary newborn care allowance (maternity benefit) of EUR 746 per month. This was the only income that HD obtained, and only temporarily — until October 2019. HD assumed that after the benefit ceased, he would receive a minimum wage of EUR 550 for his work.
2. HD was unable to repay his loans, the cost of servicing which was around EUR 500 per month. In order to settle his debts, he took out a new loan from Prima Banka Slovensko, a.s. ('the bank'). That loan is the subject of this case. On 17 June 2016, the bank granted to HD a consumer loan of EUR 5 700 ('the loan') bearing an interest rate of 7.90%, and HD undertook to repay the loan in 96 monthly instalments of EUR 80.68 each.

3. HD made payments under the loan until August 2017; in September 2017, he made only a partial payment. In total, he repaid EUR 1 162.60, of which the bank counted EUR 616.21 towards repayment of the loan.
4. On 28 December 2017, as a result of the borrower's default, the bank declared the outstanding loan amount immediately due and payable. The bank informed HD that he should repay the entire loan forthwith, and then brought an action against HD for payment of:
 - I. the outstanding principal of EUR 5 083.79;
 - II. remaining interest for the period until the loan was made immediately due and payable, amounting to EUR 137.80;
 - III. default interest for the period until the loan was made immediately due and payable, amounting to EUR 2.21;
 - IV. penalty interest of 5% on the outstanding loan amount of EUR 5 083.79 for the period from the time the loan was made immediately due and payable until the remainder of the loan is fully repaid;
 - V. insurance fees amounting to EUR 3.96;
 - VI. default interest of 5% on the outstanding interest to be paid of [EUR] 137.80 for the period from the time the loan was made immediately due and payable until the payment date;
 - VII. **contractual interest of 7.90% on the outstanding loan amount of EUR 5 083.79 for the period from the time the loan was made immediately due and payable until the remainder of the loan is fully repaid;**
5. The District Court in Kežmarok ('the district court') upheld a large part of these claims and ordered HD to pay to the bank the amounts set out in points 4(I), (II), (III), (IV) and (V). **[Or. 3]**
6. However, the district court dismissed the claim in the part indicated in points 4(VI) and (VII).
7. Therefore, the district court did not award to the bank **contractual interest of 7.90% on the outstanding loan amount of EUR 5 083.79 for the period from 28 December 2017 until the remainder of the loan is fully repaid.** The district court stated that no such interest was awarded due to the fact that the applicable law only grants the creditor the right to default interest as a result of the claim becoming immediately due and payable (Paragraph 517(2) of the Civil Code), and this view was shared both by the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) [...] [case reference number] and by the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic) [...] [case

reference number]. In addition, the district court pointed out that in other court proceedings, a court had ruled in a final judgment that an identical clause in an agreement with the bank concerning the payment of interest over and above default interest ('accumulation of interest') was found to be an unfair contractual term, and as a result the bank had been prohibited from applying this clause in future pursuant to Paragraph 53a of the Civil Code.

8. The Bank appealed against the judgment and requested that the court of appeal award it contractual interest for the period after the loan had been made immediately due and payable in addition to default interest. The Bank relied, inter alia, on the judgment of the Court of Justice of the European Union in Joined Cases C-96/16 and C-94/17 in which the Court indicated that the purpose of interest is remuneration for the use of a sum of money until it is repaid.
9. It is precisely the judgment of the Court of Justice delivered in response to the Spanish court's question (C-96/16 and C-94/17) that makes it difficult to clearly interpret the law in this case, all the more so because the court of appeal distinguishes between, on the one hand, the function of interest payable (contractual interest) as the price of the service of credit and, on the other hand, the function of statutory default interest as a penalty and partial compensation. Compared to the Spanish legal order, the Slovak Republic has a different legal framework for punishing debtors for late payment. Slovak law explicitly regulates the regime applicable as a result of a claim becoming due and payable, that is to say: 1. default interest; 2. damages; 3. other penalties (for instance, contractual penalties); 4. the limit for all penalties combined; and 5. the prohibition on derogations from standard statutory regulations to the detriment of the consumer.

II. Slovak law

10. Pursuant to Paragraph 54(1) of the Civil Code [...] [subparagraph number], **contractual provisions included in a contract concluded with a consumer may not derogate from the provisions of that law to the detriment of the consumer.** In particular, the consumer may not waive in advance his rights granted by that law or by separate provisions which confer protection on consumers, and may not otherwise worsen his contractual position.
11. Pursuant to Paragraph 503(1) of the Obchodný zákonník (Commercial Code) [...] [subparagraph number], **interest is payable on the same date on which the debtor is obliged to return the funds used.** If the date of repayment of the funds made available exceeds one year, interest is payable at the end of each calendar year. At the time when the remaining part of the funds made available must be returned, interest is also payable [**Or. 4**] in respect of this part.
12. Pursuant to Paragraph 517(2) of the Civil Code: 'In the event of a delay in debt repayment, **the creditor shall have the right to demand from the debtor default interest in addition to meeting his obligation** where the debtor is not

required by this law to pay a default charge; the amount of default interest and of the default charge shall be set forth in an implementing provision’.

13. **Pursuant to Paragraph 519 of the Civil Code, the creditor’s right to obtain compensation for the damage caused by the debtor’s delay remains unaffected; however, in the case of a delay in debt repayment, the creditor may claim compensation for damages to the extent that these are not covered by default interest or the default charge.**

14. Pursuant to Government Regulation No 87/1995 Zz.:

§ 3. The amount of default interest shall be the European Central Bank’s benchmark interest rate plus five percentage points [...] [footnote reference] in force on the first day of default in debt repayment.

§ 3a.

(1)

Where the purpose of the contract concluded with the consumer is to make funds available to the consumer, penalties for late repayment by the consumer may not exceed in total the average annual percentage rate published most recently under the specific provision [footnote reference] before the default occurred by more than 10 percentage points per annum and, at the same time, may not exceed three times the default interest provided for in this Government Regulation; the annual percentage rate for a similar type of consumer credit shall be regarded as conclusive.

(2)

The penalties under subparagraph 1 shall be deemed to include default interest, contractual penalties and any other consideration for late repayment of funds by the consumer.

(3)

If the penalties under subparagraph 1 reach the amount of the funds made available, subsequent penalties for late repayment of funds by the consumer shall not exceed the default interest provided for in this Government Regulation.

15. Pursuant to § 53a of the Civil Code [...] [subparagraph number], if a court has found a term included in a consumer contract of a type which is regularly concluded and whose terms are substantially beyond the consumer’s control, or in general terms and conditions, to be invalid because of its unfair nature or if a court has denied the supplier’s claim because of such a term, the supplier is required to cease to apply this term or an analogous term in contracts with all consumers. The supplier is also under this obligation if a court has ordered him, in connection with such a term, to return the amount of unjust enrichment to the consumer, redress

the damage or pay the appropriate compensation. The same obligation also applies to the supplier's [Or. 5] legal successor.

III. European Union law

16. Recital 13 of Directive 93/13:

‘Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording ‘mandatory statutory or regulatory provisions’ in Article 1 (2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established’.

Article 1 of the directive:

‘The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive’.

Article 3(1) and (3) of the directive:

‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair’.

Article 4(1) of the directive:

‘Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent’.

Article 6(1) of the directive:

‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be **[Or. 6]** binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms’.

Article 7(1) of the directive:

‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’.

Article 8 of the directive:

‘Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer’.

Point 1(e) of the Annex to the directive includes in the list of contractual terms referred to in Article 3(3) thereof, those terms which have the object or effect of **‘requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation’**.

IV. Questions referred

First question

17. Under Slovak legislation, a creditor is entitled to default interest whose amount is determined by the government by way of a regulation depending on the state of the economy 1/. However, if the creditor has suffered damage in excess of default interest, the creditor is also entitled to compensation. If the creditor has suffered damage, his right to compensation is not limited by law. The only limit is the amount of **actual damage. However, the law imposes an obligation to deduct default interest from the damage which serves as minimum flat rate compensation**, but default interest in the form of a flat rate is tolerated because default interest serves as a penalty at the same time.
18. The court points out that the creditor’s rights discussed in the previous point are stipulated in statute, and therefore the creditor has these rights even where they have not been agreed. The law therefore guarantees that the damage suffered by the creditor as a result of the consumer’s delay will be compensated **in full**, but at the same time prohibits in consumer cases contractual terms that worsen the consumer’s legal position.
19. However, going beyond the framework arising from the penalty and compensation mechanism limited by statute, the bank relies on the judgment of the Court of

Justice in Joined Cases C-96/16 and C-94/17 and applies contractual interest together with default interest, arguing [**Or. 7**] that interest is due until the money is repaid. This is supported by the view that the debtor uses the money and should therefore pay interest. In this connection, an interpretation problem has arisen which has prompted the court to refer questions for a preliminary ruling.

20. There should be no doubt that if the consumer fails to return the money, he will have to bear the costs associated with the delay. As the court has already noted, Slovak law grants creditors both the right to full compensation for costs borne as a result of non-payment and the right to penalties (default interest). However, contractual interest for the use of money is the **price of the service**, and the Slovak legislature has regulated the obligation to pay the price for the product even after the agreed period has expired only with respect to one type of contract, namely, rent under contracts for the lease of movables in connection with business activity 2/.
21. With respect to loans, the Civil Code does not explicitly provide for the possibility of the price of the service being paid even after the agreed period for the use of the money has expired. In addition to compensation for damage, the law only lays down the obligation to pay default interest, at the same time limiting such default interest by way of a government regulation. Contractual interest violates this statutory limit.
22. The court cannot fail to address the effects of the accumulation of contractual interest and default interest and whether such cumulation negates the entire penalty and compensation mechanism provided for in national law.
23. The creditor is also able to apply other penalties, such as a contractual penalty, but if all the penalties combined reach the principal amount of the claim, the creditor is subsequently only entitled to default interest 3/.
24. Therefore, Slovak law grants the creditor **full compensation** for the damage he has suffered as a result of a breach of contract by a consumer. The law provides for the same regime with respect to all pecuniary claims, for example claims arising from contracts for a specific work and rental agreements as well as consumer credit agreements and other contracts. As regards default interest, the Civil Code in no way favours banks and other lenders over other entities to which pecuniary claims are owed.
25. **The law prohibits contractual terms that worsen the consumer's position in comparison to that stipulated in the Civil Code (Paragraph 54(1) of the Civil Code).**
26. There should be no doubt that in addition to the penalty mechanism provided for by statute, which assumes full compensation for the damage suffered by the creditor, any additional burden, namely contractual interest (accumulation of interest), goes beyond the framework of the law and worsens the consumer's

position compared to that stipulated in applicable laws, which is prohibited under Paragraph 54(1) of the Civil Code.

27. If Slovak law were to be disregarded, taking only the obligation to pay contractual interest on top of default interest into account, the consumer's position in such a legal environment would become extremely unfavourable, **since after unilaterally declaring [Or. 8] the loan immediately due and payable, the creditor would not only retain all his rights under the agreement, including interest, but could also add default interest and other penalties on top and would, moreover, be entitled to compensation for damage. On the other hand, the consumer would not retain any contractual advantages.**
28. **Therefore, once the loan was declared immediately due and payable, the situation would become extremely detrimental to the consumer, while the creditor, in addition to all his retained rights, would be able to take advantage of the statutory penalty and compensation mechanism.**
29. Under Slovak law, a bank is not obliged to declare a loan immediately due and payable. It is the bank's exclusive prerogative to do so. If the bank does not declare the loan immediately due and payable, it is entitled to contractual interest until the end of the period stipulated in the agreement. It is, however, almost certain that if the bank were to declare a loan immediately due and payable and the bank's position were to be accepted, this would result in a significantly more favourable outcome for the bank with regard to the accumulation of contractual interest and default interest. The sooner the loan becomes immediately due and payable, the sooner the bank will start to benefit from the accumulation of interest. However, when combined with the consumer's unfavourable and weak social position, such a mechanism would contribute to the deterioration of the consumers' quality of life.
30. It cannot be assumed that hundreds of thousands of consumers would enthusiastically breach their obligations to repay consumer loans if such delays lead to court and enforcement proceedings, which often result in consumers' assets being attached during enforcement.
31. Rather, the problem appears to lie, on the one hand, in the unfavourable financial situation of consumers, as in HD's case, and, on the other hand, in the lender's failure to observe his obligation to analyse the consumer's creditworthiness and to make a loan decision with professional diligence depending on the consumer's financial situation. In this respect, the barest modicum of prudence would have been sufficient for the bank to recognise that HD was not creditworthy; instead, the bank granted the loan and immediately demanded protection. The Consumer Credit Directive aims to ensure that the consumer's creditworthiness is taken into account 4/.
32. The court notes that in the light of the case-law, the bank's claim also constitutes property, and the law secures such property with default interest, the right to

compensation and the right to other penalties. The concepts of default in payment and default interest are usually linked to the rights arising from an infringement of the law, while interest as the price of money is linked to the period of permitted use of money, which logically is the period agreed in the contract until the loan becomes due and payable.

33. Under Slovak law as well, default interest constitutes a penalty while contractual interest is the price at which funds are made available. The difference, however, is that Slovak law (the Civil Code) does not lay down an obligation for consumers or other debtors to pay contractual interest in addition to default interest after a default in payment of the loan. Any creditor whose claim is of a financial nature has the right to default interest, which is limited by law, against the consumer after a default in payment of the loan. Therefore, the issue is not the right to interest, **[Or. 9]** which is the price for making the money available and for the use of the money during the period agreed in the contract, that is, until the loan is declared due and payable. Until the loan is declared due and payable, the contract is properly performed and contractual interest applies, but after it has been declared due and payable, an infringement occurs along with the resulting claims, including in particular penalties and compensation for damage.
34. As the court has already noted, the only type of contract provided for in the Civil Code which assumes payment of the price even after the agreed period has expired is the lease of movables in connection with business activity under Paragraph 723(1) of the Civil Code, according to which the price (rent) is still payable even after the agreed period has expired /2.
35. Therefore, Slovak law: 1) does not provide for interest for the use of funds made available to the consumer after they have been declared due and payable, but only for default interest together with other penalties and compensation; and 2) does not allow the consumer's position to be worsened by contractual terms compared that stipulated in applicable laws (Paragraph 54(1) of the Civil Code).
36. The payment of contractual interest even after the date of the loan becoming due and payable raises doubts and therefore the court has decided to refer the following question for a preliminary ruling [...].

[...] [repetition of the first question]

Second question

37. The court asks the second question in the event that the answer to the first question is in the affirmative, that is, if European Union law precludes the Slovak provision on default in connection with the prohibition on the consumer's position being worsened by contractual terms.
38. There should be no doubt that if the consumer returns the money to the bank on time (before the loan becomes due and payable), then the bank naturally seeks a

new investment. However, there should also be no doubt that a new investment with a new consumer will not necessarily guarantee the same return as the one with the previous consumer. **[Or. 10]**

39. As a result, if contractual interest were to be paid in combination with penalties and compensation, this would essentially correspond to flat rate compensation. However, assuming that the actual damage is lower, the payment of flat rate costs raises fundamental questions and doubts and undermines the concept of improving the quality of life of consumers. Therefore, the court refers the second question for a preliminary ruling.

[...] [repetition of the second question]

[...] [information on the possibility of appeal]

[...] [place, date]

[...] **Michal Boroň**

Presiding Judge, Judge-Rapporteur

[...]

Explanatory notes and references:

1. In the past, the government of the Slovak Republic set the interest rate limit for the period from 20 December 1993 until 16 March 1995 at 24% (<https://www.najpravo.sk/clanky/vyvoj-sadzieb-urokov-z-omeskania.html?print=1>).
2. Pursuant to Paragraph 723(1) of the Civil Code, if the lessee returns the asset after the date agreed in the contract, he is obliged to pay rent until the return of the asset. If the lessee is in default with the return of the asset, he is also obliged to pay a default charge.

Government Regulation No 87/1995 Zz., Paragraph 3a(3); see also Paragraph 13.
3. There are approximately 3 500 000 enforcement actions pending in Slovakia; see also the judgment of the Court of Justice in C-76/10. **[Or. 11]**
4. Recital 28 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.
5. For instance, Joined Cases C-240/98 to C-244/98: *‘the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as*

regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms. The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is true that in many Member States procedural rules allow individuals to appear in such disputes in person, there is a real danger that, in particular because of ignorance, consumers will not invoke the unfair nature of the conditions imposed on them'.

WORKING DOCUMENT