

Anonymised version

Translation

C-303/20 — 1

Case C-303/20

Request for a preliminary ruling

Date lodged:

8 July 2020

Referring court:

Sąd Rejonowy w Opatowie (Poland)

Date of the decision to refer:

27 September 2019

Applicant:

Ultimo Portfolio Investment (Luxembourg) S.A.

Defendant:

KM

[...]

ORDER

Opatów, 27 September 2019

The Sąd Rejonowy w Opatowie I Wydział Cywilny (District Court, Opatów, First Civil Division), composed of:

[...]

having examined at the hearing on 27 September 2019 in Opatów
the case brought by Ultimo Portfolio Investment (Luxembourg) S.A.
with its seat in Luxembourg
against KM

for payment,

orders as follows:

the following question on a point of law is referred to the Court of Justice of the European Union in Luxembourg for a preliminary ruling:

- I Does the penalty of liability for a petty offence that is imposed in Article 138c(1) of the Polish Kodeks wykroczeń (Code of Petty Offences) for a failure to comply with the obligation to assess a consumer's creditworthiness laid down in Article 8(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 constitute proper and sufficient implementation of the requirement, imposed on the Member State in Article 23 of that directive, to lay down in national law effective, proportionate and dissuasive penalties for a breach by the creditor of the obligation to assess the creditworthiness of a consumer?
- II. Proceedings in the case are stayed (Article 177(1)(3¹) of the Kodeks postępowania cywilnego (Code of Civil Procedure)). [**Or. 2**]

FOUNDATIONS

of the order of 27 September 2019

I. Provisions of national law.

(a) Article 9 of the ustawa z 12 maja 2011 r. o kredycie konsumenckim (Law of 12 May 2011 on Consumer Credit, consolidated text: Dz. U. (Journal of Laws) 2019, item 1083)

1. Before concluding a consumer credit agreement, the lender shall assess the consumer's creditworthiness.

2. The assessment of creditworthiness shall be carried out on the basis of information obtained from the consumer or on the basis of information obtained from the relevant databases or the lender's data sets.

3. The consumer shall, at the lender's request, provide the lender with the documents and information necessary to carry out the assessment of his creditworthiness.

4. If the lender is a bank or another institution statutorily authorised to grant loans, the creditworthiness assessment shall be carried out in accordance with Article 70 of the ustawa z dnia 29 sierpnia 1997 r. — Prawo bankowe (Law on Banking of 29 August 1997) and other legislation applicable to those entities, taking paragraphs 1 to 3 into account.

(b) Article 138c(1a) and (4) of the Code of Petty Offences

1a. The same penalty [a fine] shall be imposed on anyone who fails to comply with the obligation to assess creditworthiness when concluding a consumer credit agreement with a consumer. **[Or. 3]**

4. If the trader is not a natural person, the liability provided for in paragraphs 1 to 3 shall be borne by the person in charge of the undertaking or the person authorised to conclude agreements with consumers.

(c) Article 24 of the Code of Petty Offences

1. Fines shall amount to between PLN 20 and PLN 5 000 unless the law provides otherwise.

2. If detention has been imposed for an offence committed for the purpose of financial gain, a fine shall also be imposed in addition to detention unless imposing a fine would not serve a useful purpose.

3. Where a fine is imposed, account shall be taken of the perpetrator's income, personal and family situation, assets and earning potential.

(d) Article 45 of the Code of Petty Offences

1. An offence shall cease to be punishable if one year has elapsed since it was committed; if proceedings have been instituted within this period, the offence shall cease to be punishable after two years have elapsed from the end of this period.

II. Findings of fact and circumstances of the case.

On 23 May 2018, the lender Aasa Polska S.A., whose seat is in Warsaw, and the defendant, KM, concluded loan agreement (consumer credit agreement) No 40725167. The total amount of the loan was set at PLN 5 000.00 and the total amount to be repaid was PLN 8 626.58. The total amount to be repaid comprised the following receivables: PLN 5 000.00 — principal, PLN 536.58 — interest on the principal for the entire duration of the agreement, PLN 2 490.00 — front-end fee **[Or. 4]** and PLN 600 — administration fee. The loan was to be repaid from 22 June 2018 until 22 May 2020 in 24 instalments amounting to PLN 408.00 each.

As at the date on which the agreement in question was concluded, the defendant was burdened with liabilities under 23 loan agreements. The total liabilities under all those agreements amounted to PLN 261 850.00 and the total amount of the monthly payments resulting from those liabilities was PLN 8 198.00. As at 24 June 2019, the total amount of the defendant's liabilities is PLN 163 500.00.

As at the date on which the agreement in question was concluded, the defendant's husband (AB) was burdened with liabilities under 24 loan agreements. The total liabilities under all those agreements amounted to PLN 457 830.00 and the total amount of the monthly payments resulting from those liabilities was PLN 9 974.35.

As at the date on which the agreement in question was concluded, the defendant was employed on the basis of an employment contract with a net salary of PLN 2 300.00. The defendant's spouse did not work or have any other income due to illness.

The agreement in question was concluded via a credit intermediary. Prior to concluding the agreement, the lender made no attempt to determine the defendant's financial situation or her liabilities. During the interview preceding the conclusion of the loan agreement, no questions were asked about the defendant's financial situation or that of her spouse, in particular about their income and liabilities.

The receivables arising from the loan agreement in question were sold to Ultimo Portfolio Investment (Luxembourg) S.A. whose seat is in Luxembourg.

In the action against KM filed with the District Court, Opatów, on 4 April 2019, the lender's legal successor sought the amount of [Or. 5] PLN 7 139.76 together with statutory interest for late payment calculated from the date of filing of the action until the date of payment.

In response, the defendant, KM, sought dismissal of the claim in its entirety.

By order of 14 June 2019, the applicant's counsel was obliged to provide information on the actions taken by the lender in order to assess the defendant's creditworthiness and to provide the documents obtained during verification of the defendant's creditworthiness. This obligation has not been fulfilled as the applicant's counsel has not provided any information or any documents to date.

III. Grounds for the request for a preliminary ruling.

Pursuant to Article 8 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, Member States are to ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database. Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement. Also, pursuant to Article 23 of the directive Member States are to lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to the directive and are to take all

measures necessary [Or. 6] to ensure that they are implemented. The penalties provided for are to be effective, proportionate and dissuasive. Finally, according to recital 47 of the directive, Member States should lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to the directive and ensure that they are implemented. While the choice of penalties remains within the discretion of the Member States, the penalties provided for should be effective, proportionate and dissuasive.

Pursuant to Article 9 of the Law of 12 May 2011 on Consumer Credit (consolidated text: Dz. U. (Journal of Laws) 2019, item 1083), before concluding a consumer credit agreement, the lender is to assess the consumer's creditworthiness (paragraph 1). The assessment of creditworthiness is to be carried out on the basis of information obtained from the consumer or on the basis of information obtained from the relevant databases or the lender's data sets (paragraph 2). The consumer is, at the lender's request, to provide the lender with the documents and information necessary to carry out the assessment of his creditworthiness (paragraph 3). If the lender is a bank or another institution statutorily authorised to grant loans, the creditworthiness assessment is to be carried out in accordance with Article 70 of the *ustawa z dnia 29 sierpnia 1997 r. — Prawo bankowe* (Law on Banking of 29 August 1997) and other legislation applicable to those entities, taking paragraphs 1 to 3 into account (paragraph 4).

Under Polish law, failure to observe the obligation to check the consumer's creditworthiness is penalised under Article 138c(1a) and (4) of the Code of Petty Offences. Failure to assess the consumer's creditworthiness is an offence punishable by a fine of between PLN 20 and PLN 5 000. It should be noted that the penalty of liability for this offence is the only penalty provided for in Polish law for failure to comply with the obligation to check the consumer's creditworthiness. In accordance with Polish legal literature and the case-law of Polish courts, non-performance or improper performance of this obligation does not result in the agreement being invalid and does not [Or. 7] lead to the lender's liability for damages vis-à-vis the consumer or the guarantor or other third parties who provide security for the repayment of consumer credit. Moreover, a negative assessment of the consumer's creditworthiness does not impose an obligation on the lender to refuse the loan.¹

In the view of the national court, the penalty for this offence provided for under Polish law does not comply with the requirements 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.

¹ Czech Tomasz, *Kredyt konsumencki. Komentarz*, 2nd edition, SIP Lex; judgment of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland) of 7 May 2014, Ref. No VI ACa 945/13, LEX No 1469473; judgment of the Sąd Okręgowy w Kielcach (Regional Court, Kielce, Poland) of 11 June 2014, Ref. No II Ca 452/14, LEX No 1511361; judgment of the Sąd Apelacyjny w Białymstoku (Court of Appeal, Białystok, Poland) of 6 November 2014, Ref. No I ACa 452/14, LEX No 1566930; resolution of the Sąd Najwyższy (Supreme Court) (sitting in a panel of 7 judges) of 30 September 1996, Ref. No III CZP 85/96, OSP 1997 No 7-8, item 139.

The penalty in question is ineffective because it does not persuade lenders, especially those operating in the so-called shadow banking sector, which offer payday loans, to assess consumers' creditworthiness. A clear example of this is the present case as well as other cases involving identical facts which have been heard by the national court. An analysis of the facts of the case at issue as well as a number of other cases unequivocally shows that loans are granted to highly indebted persons who have little or no income and are often already subject to enforcement by court enforcement officers. The information provided by lenders about the checks conducted in databases with respect to persons applying for loans is generally inaccurate and does not reflect the actual state of affairs. In the opinion of the national court, the present case is an example of such a practice and this conclusion is justified by the fact that the applicant has so far provided no information concerning the assessment of the defendant's creditworthiness or **[Or. 8]** information on the defendant obtained from databases, including in particular the databases of Biuro Informacji Gospodarczej InfoMonitor S.A., whose seat is in Warsaw, Krajowy Rejestr Długów Biura Informacji Gospodarczej S.A., whose seat is in Wrocław, Biuro Informacji Kredytowej S.A., whose seat is in Warsaw, Rejestr Dłużników ERIF Biura Informacji Gospodarczej S.A., whose seat is in Warsaw, and the database maintained by the Związek Banków Polskich (Polish Bank Association). It should be pointed out that it follows from the content of the information form concerning the loan taken out by the defendant that, prior to the conclusion of that agreement, the lender declared that it had checked the data available on the defendant in the aforementioned databases, and that in the loan agreement the defendant granted the lender power of attorney to apply to credit information bureaux for information subject to bank secrecy. In the loan agreement itself, it was also stipulated that granting power of attorney for the carrying out of these activities was a condition for carrying out the assessment of the customer's creditworthiness required by law, and thus also a condition for concluding the loan agreement and granting the loan.

In the context of the evidence gathered by the national court in the course of the proceedings, in particular information on the number and amount of liabilities incurred by the defendant and her spouse, the lender's actions described above cannot be regarded as anything other than hollow claims which have nothing to do with fulfilling the obligation to check the customer's creditworthiness thoroughly. Indeed, it should also be noted that foregoing an assessment of the consumer's creditworthiness is regarded as a factor which attracts customers and an important part of the lender's advertising. It is common to find advertisements which explicitly mention the granting of loans without prior assessment of the consumer's creditworthiness: 'loan in 5 minutes without a credit information bureau', 'self-certification loans' or even 'loan in 15 minutes for those subject to enforcement'. It should be noted that the negative consequences of such practices have been recognised by the Polish authorities and were indicated in **[Or. 9]** the explanatory memorandum to a draft law of the government amending certain laws in order to combat usury (Sejm Document No 3600).² However, it should be

² <http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=3600>

added that due to the end of the eighth (2015–2019) term of the Sejm, the draft law did not get through parliament and has not been pursued further; the changes it envisaged have not ultimately been adopted.

The penalty provided for in Polish law is not dissuasive either, and this is evidenced by the fact that business activities consisting in the granting of loans are advertised as foregoing the assessment of a prospective customer's creditworthiness. Furthermore, it should be added that foregoing the assessment of a consumer's creditworthiness or failing to conduct this assessment properly is a common practice which results in loans being granted to persons in debt and persons who cannot guarantee repayment of the loan. Such practices, in the view of the national court, preclude the attainment of one of the objectives of the directive, which is envisaged in recital 26, namely, promoting responsible practices during all phases of the credit relationship and deterring creditors from engaging in irresponsible lending or giving out credit without prior assessment of creditworthiness. Tolerating such practices also breaches the Member State's obligation to carry out the necessary supervision to avoid such behaviour and determine the necessary means to punish creditors in the event of such situations arising.

In the view of the national court, the absence of a dissuasive effect is due to the penalties for breaching the obligation to check the creditworthiness of the consumer being excessively lenient. Failure to assess the consumer's creditworthiness is a petty offence which is punishable only by a fine of between PLN 20 and PLN 5 000. As a rule, a petty offence ceases to be punishable if one year has elapsed since it was committed, and if [Or. 10] proceedings have been instituted within this period, the offence ceases to be punishable after two years have elapsed from the end of this period. Only natural persons can be liable for a petty offence; legal persons and unincorporated organisational units cannot. This is of crucial importance because the overwhelming majority of entities which grant loans on the Polish market are legal persons. A lender that is a legal person or an organisational unit cannot be subject to a penalty for this offence — it may be imposed only on a natural person who acts as a lender himself or who manages an undertaking or is a person authorised to conclude agreements with consumers. A lender that is a legal person cannot in fact be held liable for failure to comply with the obligation to check a consumer's creditworthiness before concluding an agreement. Failure to comply with this obligation does not in any way affect the validity of the concluded agreement and does not deprive the lender of the benefits arising from it, in particular of the right to charge interest or fees. In the view of the national court, the widespread failure to observe the obligation to assess consumers' creditworthiness demonstrates that the penalties provided for under Polish law are not dissuasive and do not deter lenders from engaging in irresponsible lending. A lender who has granted a loan in breach of the obligation to assess the consumer's creditworthiness does not lose any of the benefits arising from the loan agreement concluded. Only individuals can be held liable for this offence, and this has no direct or indirect impact on the lender itself.

In the view of the national court, the penalty for the offence in question is also not proportionate to the seriousness of breach of the obligation to assess the consumer's creditworthiness. It should be noted here **[Or. 11]** that the creditor's obligation to assess the borrower's creditworthiness is intended to protect consumers against the risks of over-indebtedness and bankruptcy; it contributes to attaining the objective of Directive 2008/48, namely to provide, as regards consumer credit, full and mandatory harmonisation in a number of key areas, which is regarded as necessary in order to ensure that all consumers in the European Union enjoy a high and equivalent level of protection of their interests and to facilitate the emergence of a well-functioning internal market in consumer credit. The obligation to assess a consumer's creditworthiness is intended to ensure the effective protection of consumers against the irresponsible granting of credit agreements which are beyond their financial capacities and which may bankrupt them.³

In the light of the foregoing, in the view of the national court, the obligation to assess a consumer's creditworthiness is extremely important in order to achieve the objectives of the directive and cannot be regarded as an insignificant or even unnecessary burden. Measures taken by lenders to assess a consumer's creditworthiness must not be spurious; they must be genuine and appropriate for fulfilment of that obligation. The lack of appropriate penalties for breaching the obligation to assess a consumer's creditworthiness encourages uncontrolled borrowing, resulting in a debt spiral. This is the case with the defendant, since the amount of her debt is significant and the lender's failure to comply with its obligation to check the consumer's creditworthiness has materially contributed to that indebtedness. In the absence of appropriate penalties, lenders are also not induced to change their practices with a view to ensuring rigorous compliance with their obligations under Directive 2008/48 and the legislation **[Or. 12]** transposing that directive into the domestic law of the Member States. This negatively affects the achievement of one of the directive's objectives, namely, ensuring the effective protection of consumers against the irresponsible granting of credit which is beyond their financial capacities and which may bankrupt them.

The national court considers that this request for a preliminary ruling is necessary in order to clarify the doubts discussed above and also in order for the national court to give a correct ruling in the present case. The answer to this question will be of direct relevance to assessing the consequences of a failure to meet the obligation to assess a consumer's creditworthiness and will also serve as a point of reference both in this case and in other cases which are identical or similar in fact and in law. The Court's answer is required owing to the absence of direct statements by the Court referring to the issues touched upon in this request and also owing to the aforementioned practice of neglecting the obligation to assess a consumer's creditworthiness, which hinders the achievement of the objectives of the directive and seriously undermines the effectiveness of EU legislation.

³ Judgment of the Court of Justice of 27 March 2014, C-565/12.

In these circumstances and having regard to the above, the court has ruled as stated in point I of the operative part of this order.

[...] [**Or. 13**] [stay of proceedings]

[...] [national procedure]

WORKING DOCUMENT