

Case C-555/21

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:

9 September 2021

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

19 August 2021

Applicant (respondent in the appeal on a point of law before the OGH):

Verein für Konsumenteninformation

Defendant (appellant in the appeal on a point of law before the OGH):

UniCredit Bank Austria AG

Subject matter of the main proceedings

Credit agreements for consumers relating to residential immovable property – early repayment of the amount of credit – proportional reduction of the sum of interest to be paid by the borrower and costs that are dependent on the duration of the agreement, but not costs that are not dependent on the duration of the agreement

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Is Article 25(1) of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 to be interpreted as precluding

national legislation that provides for the sum of interest to be paid by the borrower and the costs that are dependent on the duration of the agreement to be proportionally reduced in the event that the borrower exercises the right to repay the amount of credit, either fully or partially, prior to the expiry of the agreed term, with no corresponding rule for costs that are not dependent on the duration of the agreement?

Provisions of European Union law relied on

Articles 4 and 25(1) of Directive 2014/17/EU

Articles 3 and 16(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

Provisions of national law relied on

Hypothekar- und Immobilienkreditgesetz (Law on mortgage and immovable property loans; ‘the HIKrG’) (in the version applicable until 31 December 2020): Paragraph 20 – Early repayment

(1) The borrower has the right to choose at any time to repay the amount of credit, either fully or partially, prior to the expiry of the agreed term. The early repayment of the entire amount of credit, plus interest, constitutes termination of the credit agreement. In the event of early repayment of the amount of credit, the sum of interest to be paid by the borrower decreases proportional to the reduced receivable and, where appropriate, proportional to the reduced term of the agreement; costs that are dependent on the duration of the agreement decrease proportionally.

Verbraucherkreditgesetz (Law on consumer credit; ‘the VKrG’), Paragraph 16(1)

Konsumentenschutzgesetz (Law on consumer protection; ‘the KSchH’), Paragraphs 28 and 29.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant is an association for enforcing consumer interests. The defendant is a credit institution that uses standard forms when concluding mortgage-secured loan agreements with consumers, which forms set out under the heading ‘early repayment’ the borrower’s right to repay the loan early and to have the interest to be paid and the costs that are dependent on the duration of the agreement reduced, but also contain the following clause: ‘It is clarified that the processing costs that are not dependent on the duration of the agreement will not be reimbursed, not even on a pro-rata basis.’

- 2 The association brought an action before the Handelsgericht Wien (Commercial Court, Vienna) against the credit institution requesting that they cease and desist from using this clause and that the judgment be published. The court of first instance dismissed the forms of order sought and upheld the defendant's request to have the judgment dismissing the action published. However, the Oberlandesgericht Wien (Higher Regional Court, Vienna) upheld the appeal filed by the applicant association and allowed the action in its entirety. The Oberste Gerichtshof (Supreme Court) is now called upon to rule on the defendant's appeal on a point of law brought against the decision on the appeal on the merits, by which it seeks to have the action dismissed.

The essential arguments of the parties in the main proceedings

- 3 The applicant claims that the clause contradicts Article 25(1) of the Mortgage Credit Directive 2014/17/EU (MCD), according to which, in the event of early repayment, the consumer is entitled to a reduction in the total cost of the credit, such reduction consisting of the interest and the costs for the remaining duration of the agreement. As regards the broadly identical provision of Article 16(1) of Directive 2008/48/EC (CCD), the European Court of Justice, in its judgment of 11 September 2019, *Lexitor*, C-383/18, EU:C:2019:702, ruled that both costs that are dependent and those that are not dependent on the duration of the agreement should be reduced. This case-law is also to be applied to mortgage and immovable property loans. The provision of Paragraph 20(1) of the Austrian Law on mortgage and immovable property loans (HKG) enacted in implementation of the MCD is based on the provision of Paragraph 16(1) of the Austrian Law on consumer credit (VKrG) created in implementation of the CCD; both provisions similarly provide for a proportional reduction of the sum of interest to be paid by the borrower and the costs that are dependent on the duration of the agreement in the event of early repayment, whereas no mention is made of costs that are not dependent on the duration of the agreement. Both provisions are to be interpreted in conformity with the relevant directives, within the meaning of the aforementioned judgment of the European Court of Justice, as meaning that costs that are not dependent on the duration of the agreement are also to be reduced.
- 4 The defendant argues that the aforementioned judgment was issued only in relation to the CCD and should not be applied to residential and immovable property loans. Even though the provisions of the directives and the laws implementing them are virtually identical, a distinction had to be made due to the particular features of mortgage agreements and in consideration of the fact that the directives define the total cost of the credit differently. Mortgage and immovable property loans incur significantly higher costs that are not dependent on the duration of the agreement. The clause is thus not affected by the *Lexitor* judgment. Even if one wished to view this differently, Paragraph 20(1) of the HKrG would not, due to its clear wording and the unambiguous will of the legislature, be amenable to such an interpretation in conformity with the relevant directives, as there is no unintended oversight.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 5 There is no judicial remedy under national law against the decision of the Supreme Court (Article 267 TFEU). In accordance with the case-law of the Court of Justice, the national court dealing with such a matter must, in principle, assess both the need for a preliminary ruling and the relevance of the questions of EU law to be referred to the Court of Justice. The adjudicating Chamber does not share the view taken by the Court of Appeal that the interpretation of Article 25 of the MCD is clear enough for the principle of *acte clair* to apply.
- 6 In paragraph 36 of the *Lexitor* judgment, the European Court of Justice states that Article 16(1) of the CCD must be interpreted as meaning that the right of the consumer to a reduction in the total cost of the credit in the event of early repayment includes all the costs imposed on the consumer. The objective of the directive is to guarantee a high level of consumer protection (paragraph 29). The inclusion of costs that are not dependent on the duration of the agreement in the reduction of the total cost is not unduly detrimental to the creditor, as Article 16(2) of the CCD provides for the creditor's right to compensation for possible costs directly linked to early repayment of credit. The referring court takes the view that there are arguments both for and against an interpretation of Article 25(1) of the MCD according to the criteria of the *Lexitor* judgment:
- 7 First, the fact that the second sentences of Article 16(1) of the CCD and Article 25(1) of the MCD have virtually identical wordings favours an interpretation within the meaning of the *Lexitor* judgment. The objective of the CCD, namely that of guaranteeing a high level of consumer protection, also applies in respect of the MCD.
- 8 However, there are also solid arguments against such an interpretation: In accordance with Article 2(2)(a) and (b) of the CCD, which had already been adopted in 2008, this directive does not apply to credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property, nor credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building. The application of Article 16(1) of the CCD to cases involving early repayment of such immovable property loans has thus always been excluded. The MCD, which was first adopted in 2014, regulated for the first time certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers secured by a mortgage or otherwise relating to residential immovable property (Article 1 of the MCD). One of the particular features of mortgage and immovable property credit agreements is that this type of loan agreement is typically associated with a series of costs that are not dependent on the duration of the agreement and the amount of which are mostly beyond the control of the credit institution, which costs do not exist at all in the case of 'simple' consumer credit agreements subject to the CCD. Since, according to the definition given in Article 4(13) of the MCD, 'Total cost of the

credit to the consumer' also includes the one-off costs for valuation, entering the mortgage in the land register or attestation of signatures that are typically incurred in relation to such agreements but do not ultimately accrue to the creditor, the referring court takes the view that an interpretation of Article 25(1) of the MCD to the effect that it was not intended to grant a right of reduction in relation to costs that are not dependent on the duration of the agreement in the area of immovable property loans cannot be ruled out. Such an interpretation would not be detrimental to interests of consumer protection, as imposing an obligation on the creditor to repay such costs that are not dependent on the duration of the agreement, within the meaning of Article 25(3) of the MCD, could result in compensation for possible costs directly linked to early repayment of credit.

- 9 The decision to be made by the referring court hinges on the answer to the question put to the Court of Justice of the European Union. If the question is answered in the negative, the clause used by the defendant would then correspond to the legal situation applicable until 31 December 2020, meaning that its use could not in any case give rise to a cease-and-desist obligation on the part of the defendant. However, if it is answered in the affirmative, it would be for the Supreme Court to answer the question of whether and, if appropriate, how Paragraph 20(1) of the HIKrG (old version) can be interpreted in conformity with the relevant directives.