

Case C-71/24

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:

30 January 2024

Referring court:

Sąd Okręgowy w Krakowie (Regional Court in Kraków, Poland)

Date of the decision to refer:

12 January 2024

Applicant:

Alior Bank S.A.

Defendant:

J.D.

Subject matter of the main proceedings

Consumer credit agreement; amounts under the agreement subject to interest; scope of information obligations.

Subject matter and legal basis of the request

Interpretation of Article 10(2)(f) and (g), Article 3(j) 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 ('Directive 2008/48/EC'); Article 3(1) and (2), Article 4(1), Article 5 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13/EEC'); Article 267 TFEU

Questions referred for a preliminary ruling

1 Should Article 10(2)(f) read in conjunction with Article 3(j) 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 (OJ 2008 L 133, p. 66), in view of the principle of the effectiveness of EU law and the purpose of that directive, and in the light of Article 3(1) and (2) read in conjunction with Article 4(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), be interpreted in such a way that they oppose the practice of including in consumer credit agreements the content of which is not the result of individual arrangements between the supplier (creditor) and consumer (borrower) provisions that provide for interest not only on the amount disbursed to the consumer, but also on the non-interest credit costs (that is to say, commissions or other fees that are not components of the credit amount disbursed to the consumer, and that make up the total amount to be paid by the consumer in performance of his or her obligation under the consumer credit agreement)?

2 Should Article 10(2)(f) and (g) 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 (OJ 2008 L 133, p. 66), in view of the principle of the effectiveness of EU law and the purpose of that directive, and in the light of Article 5 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), be interpreted in such a way that they oppose the practice of including in consumer credit agreements the content of which is not the result of individual arrangements between the supplier (creditor) and consumer (borrower) provisions disclosing only the borrowing rate and total value of capitalised interest expressed in amounts that the consumer is required to pay in the performance of his or her obligation arising under that agreement, without at the same time clearly informing the consumer that the basis for calculating the capitalised interest (expressed as an amount) is an amount other than the credit amount actually disbursed to the consumer, and in particular, that it is the sum of the credit amount disbursed to the consumer and non-interest credit costs (that is to say, commissions or other fees that are not components of the credit amount disbursed to the consumer, and that make up the total amount to be paid by the consumer in performance of his or her obligation under the consumer credit agreement)?

Provisions of European Union law relied on

Article 169(1) TFEU

Charter of Fundamental Rights of the European Union – Article 38

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 – Article 3(j), Article 10(2)(f)

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts – Article 3(1) and (2), Article 4(1), Article 5

Provisions of national law relied on

Ustawa z dnia 12 maja 2011 r. o kredycie konsumenckim (Law of 12 May 2011 on Consumer Credit) –

Article 5(6), (6a) and (10):

6) total cost of the credit – means all the costs which the consumer is obliged to pay in connection with the credit agreement, including in particular:

(a) interest, fees, commissions, 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 [...]

6a) non-interest credit costs – all costs that the consumer bears in connection with the consumer credit agreement, excluding interest.

10) borrowing rate – the interest rate expressed as a fixed or variable interest rate applied to the amount disbursed under the credit agreement on an annual basis.

Article 30(1)(6): A consumer credit agreement should specify, inter alia, the interest rate on the credit, the conditions for applying that rate, as well as the periods, conditions and procedures for changing the interest rate, including the index or reference rate, if applicable to the original interest rate on the credit; if the consumer credit agreement provides for different interest rates, that information shall be provided for all applicable interest rates during the term of the agreement.

Article 45(1): In the event of failure by the creditor to comply with [...] Article 30(1)(1) to (8), [...] the consumer shall, after submitting a written statement to the creditor, repay the credit, without interest and any other credit costs due to the creditor, within the time limit and in the manner laid down in the agreement.

Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code, ‘the CC’):

Article 385¹(1): The terms of a contract concluded with a consumer which have not been individually negotiated shall not be binding on the consumer if his or her rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his or her interests (unfair contractual terms). This shall not apply to terms setting out the principal obligations to be performed by the parties, including price or remuneration, on condition that they are worded clearly.

Article 359(1)–(2)²

Paragraph 1: Interest on a sum of money shall be due only if it results from a legal transaction or from a statute, from a court decision or from a decision of another competent authority.

Paragraph 2: If the amount of interest is not otherwise specified, statutory interest shall be due in an amount equal to the National Bank of Poland benchmark rate plus 3.5 percentage points.

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

Paragraph 2²: If the interest rate resulting from a legal transaction exceeds the maximum interest rate, the maximum interest shall be payable.

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 29 November 2017, the applicant, Alior Bank S.A. with its seat in Warsaw as the creditor, and the defendant J.D. as the borrower and consumer, entered into a credit agreement. The bank granted a loan amounting in total to PLN 199 814.35. The amount actually disbursed to the borrower was PLN 171 840.34, as the bank charged a loan origination fee of PLN 27 974.01, deducting it from the loan amount. The agreement was not the result of individual arrangements between the parties; it was concluded using a contractual template drafted by the bank. The total amount to be paid by the defendant, as stipulated in the agreement, was PLN 316 290.86, consisting of the loan principal of PLN 171 840.34 (the amount disbursed), a loan origination fee of PLN 27 974.01, and capitalised interest of PLN 116 476.51, which was calculated as the interest on the total amount including both the loan disbursed and the fee.
- 2 The loan was disbursed. Due to the defendant's failure to repay his obligations under the agreement, the bank terminated the loan agreement after unsuccessfully issuing demands for payment of arrears. On 21 March 2023, the bank brought an action for payment of PLN 148 990.69, consisting of the loan principal of PLN 124 281.23 and interest on late payment of PLN 24 709.46.
- 3 The defendant submitted a statement that he wished to take advantage of the sanction of free credit [under which the consumer is allowed to repay only the loan principal without interest and other credit costs], as interest had also been charged on the costs funded from the loan, and thus the annual percentage rate (APR) had been incorrectly stated in the agreement.
- 4 In his plea, the defendant alleged, in particular, that the applicant had charged interest for the entire term of the loan agreement on the total amount of the loan,

which consisted of the principal and the non-interest costs of the loan (loan origination fee). In the defendant's view, the creditor was not entitled to charge interest on the loan origination fee, even if it was funded from the loan, but only on the amount of the loan disbursed.

- 5 In view of the defendant's pleas, the referring court has significant doubts as to the correct interpretation of the provisions of Union law, in particular Directive 2008/48/EC. That interpretation directly affects the interpretation of national law implementing EU law, in particular the Law on Consumer Credit.

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

- 6 In Poland, there is a well-established practice of tolerating the activities of suppliers who grant consumer credit by calculating the capital interest in consumer credit agreements on the value representing the sum of the amount actually disbursed to the consumer and the non-interest costs of the credit. Subsequently, the interest thus capitalised is added to the amount that the consumer is required to repay in performing his or her obligation under the consumer credit agreement. That is also the case here.
- 7 The referring court has doubts as to whether the practice in question is correct in terms of the purpose of Directive 2008/48/EC and the principle of the effectiveness of EU law. In accordance with the second sentence of the sixth recital of the directive in question, the development of a more transparent and efficient credit market within the area without internal frontiers is vital in order to promote the development of cross-border activities. In accordance with the first sentence of the eighth recital of the directive in question, it is important that the market should offer a sufficient degree of consumer protection to ensure consumer confidence. Finally, on the basis of the first sentence of the ninth recital of the directive in question, in order 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, full harmonisation of the national legislation is sought.
- 8 Directive 2008/48/EC was, therefore, adopted both 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 (see the judgment of the Court of 21 April 2016, C-377/14, EU:C:2016:283, paragraph 61). The said objectives of the directive and the aforementioned practice of Polish courts not questioning the provisions contained in consumer credit agreements that require the consumer to pay capital interest calculated as the interest on both the amount of the credit disbursed to the consumer and the non-interest costs of the credit have led the referring court to ask the Court for a correct interpretation of the provisions of EU law in that regard.
- 9 That interpretation will be an important circumstance influencing the court's ruling in the case at hand, because it translates directly into the assessment of

whether the applicant has completed the blank promissory note correctly, which is an element of the factual basis of the claim in this case.

- 10 **As regards the first question referred**, the court notes that the borrowing rate specified in the consumer loan agreement should refer to the credit amount disbursed to the consumer. This follows directly from the definition contained in Article 3(j) of Directive 2008/48/EC and Article 5(10) of the Law on Consumer Credit, which implements that provision into the national order. However, it is doubtful whether, as a consequence, in the light of the objectives of Directive 2008/48/EC, it is unacceptable to include provisions in consumer credit agreements that provide for the consumer's obligation to pay capital interest calculated not only on the amount of credit actually disbursed to the consumer, but also on the non-interest credit costs, which are funded from the loan granted by the supplier (creditor).
- 11 In that context, two opposing interpretations are possible.
- 12 **According to the first interpretation**, which refers to the literal wording of Article 10(2)(f) read in conjunction with Article 3(j) of Directive 2008/48/EC, as well as to the general principle of civil law that is the freedom of contract, the cited provisions do not explicitly preclude the contractual relationship from being shaped in such a way that capital interest is also charged on the non-interest costs of the loan, which will be repaid by the borrower at the time of repayment of the loan and which are funded from the amount of the loan granted by the creditor. If the borrower (consumer) agrees to such a solution – even tacitly – by concluding a contract drawn up by the creditor (supplier), and the wording of the provisions of Directive 2008/48/EC and the Law on Consumer Credit does not explicitly prohibit it, such a contractual provision should be considered to be not prohibited by law. This literal interpretation is also the basis for the practice described above of not questioning the imposition on the consumer of the obligation to pay capital interest calculated on the sum of the amount actually disbursed to the consumer and the non-interest costs of the credit, which is common in Poland.
- 13 **The second possible interpretation** of Article 10(2)(f) read in conjunction with Article 3(j) of Directive 2008/48/EC refers to the rules of teleological interpretation and to the nature of capital interest. Pursuant to Article 359(1) of the CC, interest on a sum of money is due only if it results from a legal transaction or from a statute, from a court decision or from a decision of another competent authority. Such interest is not the same as interest for late payment (Article 481 of the CC). At the same time, the court has also borne in mind the judgment of the Court of Justice of 21 April 2016, C-377/14, EU:C:2016:283, in accordance with which ‘the total amount of the credit and the amount of the drawdown together designate the sums made available to the consumer, which excludes those used by the creditor to pay the costs connected with the credit concerned and which are not actually paid to that consumer’ [...] ‘it follows that the concepts of “total amount of the credit” and of “total cost of the credit to the consumer” are mutually exclusive and that, accordingly, the total amount of the credit cannot include any

of the sums included in the total cost of the credit to the consumer. Thus, within the meaning of Articles 3(1) and 10(2) of Directive 2008/48/EC, none of the sums intended to meet the commitments agreed under the credit concerned, such as the administrative costs, interest, commissions and any other type of cost which the consumer is required to pay, can be included in the total amount of the credit’.

- 14 In the light of the above, it should be considered that capital interest is to reward the creditor only for providing the borrower with the principal of the consumer loan, and not for also funding the non-interest costs of the loan, in particular, a commission that by its nature constitutes additional remuneration for the creditor for granting the loan.
- 15 In that context, the court also considered Article 3(1) of Directive 93/13/EC, under which a contractual term that has not been individually negotiated is 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 court also took into account Article 385¹(1) of the CC, which implements that provision of the directive, and under which the terms of a contract concluded with a consumer that have not been individually agreed are not binding on the consumer if his or her rights and obligations are set forth in a way that is contrary to good practice and grossly infringes on his or her interests (unfair contractual terms). This does not apply to terms setting out the principal obligations to be performed by the parties, including price or remuneration, on condition that they are worded clearly.
- 16 At the same time, it should be emphasised that, in the light of a resolution of the Sąd Najwyższy (Supreme Court, Poland), a loan origination fee constituting remuneration for granting a loan provided for in a loan agreement to which the provisions of the Law on Consumer Credit apply is not a principal obligation within the meaning of Article 385¹(1) of the CC. This, in turn, means that the interest on that fee is not a principal obligation either.
- 17 Therefore, the aforementioned arguments may justify the adoption of such an interpretation of Article 10(2)(f) read in conjunction with Article 3(j) of Directive 2008/48/EC according to which the charging of capital interest also on the non-interest credit costs (and not just on the disbursed loan amount) should be considered contrary to those provisions in the context of the objectives of Directive 2008/48/EC, additionally interpreted through the prism of Article 3(1) of Directive 93/13/EEC and Article 385¹(1) of the CC.
- 18 As regards the **second question referred**, it also concerns the essence of the problem of a creditor charging capital interest on the total amount to be paid by the consumer, but from the point of view of the information obligations imposed on the creditor (supplier).
- 19 In the case at hand, the bank included in the text of the agreement two pieces of information relating to the interest rate. First, it was indicated that the loan was to

bear interest at a variable rate, which on the date of the agreement was 9.99% per annum. Second, it can be inferred from the wording of the agreement that the total amount of capitalised interest on the principal is PLN 116 476.51.

- 20 Pursuant to Article 10(2)(f) and (g) of Directive 2008/48/EC, the credit agreement must specify in a clear and concise manner the borrowing rate, the conditions governing the application of that rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedures for changing the borrowing rate and, if different borrowing rates apply in different circumstances, the abovementioned information in respect of all the applicable rates (point f), as well as the annual percentage rate of charge and the total amount payable by the consumer, calculated at the time the credit agreement is concluded; all the assumptions used in order to calculate that rate must be mentioned (point g).
- 21 In the light of the Court's judgment of 5 September 2019, C-331/18, EU:C:2019:665 (paragraph 48), 'Directive 2008/48 does not impose an obligation to include in a credit agreement, in any particular form, a breakdown of the payments to be made by the consumer showing the repayment of the capital [...], interest and other charges due under that contract'.
- 22 The above leads to the conclusion that the creditor's drawing up of a repayment schedule – including the amount, number and frequency of payments to be made by the consumer and, where appropriate, the order in which payments will be credited to the repayment of various outstanding balances, to which different borrowing rates apply – which fulfils the requirement of Article 10(2)(h) of Directive 2008/48/EC, does not in itself constitute compliance with the obligation to provide information under Article 10(2)(f) of Directive 2008/48/EC.
- 23 The Court has already explained that the obligation to provide information referred to in Article 10(2) of Directive 2008/48/EC contributes, similarly to the obligations indicated in Articles 5 and 8 of the directive, to attaining the objectives pursued by that directive, that is to say, 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 (cf. the judgments of the Court of 21 April 2016, C-377/14, EU:C:2016:283, paragraph 61, and of 5 September 2019, C-331/18, EU:C:2019:665, paragraphs 41 and 42).
- 24 The referring court has doubts as to whether the information presented by the applicant to the defendant regarding the interest on the loan granted to him can be deemed to be exhaustive, full and clear in the light of the objectives of Directive 2008/48/EC. Although the applicant specified the borrowing rate, there was no information in the agreement on the specific amount on which interest would be charged. As is clear from the applicant's answer, which was only given in response to the court's question, the amount of capitalised interest under the loan agreement was calculated as the interest rate (9.99% per annum) on the total

amount of the loan (PLN 199 814.35), including both the amount disbursed to the borrower (PLN 171 840.34) and the loan origination fee deducted from the loan amount (PLN 27 974.01). There is no evidence that prior to the conclusion of the loan agreement, the applicant provided the defendant with information on the exact manner in which the amount of capitalised interest under the agreement was calculated.

- 25 In the opinion of the referring court, two different interpretations of Article 10(2)(f) and (g) of Directive 2008/48/EC are possible.
- 26 **According to the first possible interpretation** – based on a textual interpretation of the provisions – the creditor is required to provide information only on the borrowing rate on the loan, which follows literally from Article 10(2)(f) of Directive 2008/48/EC, as well as the annual percentage rate of charge and the total amount payable by the consumer, pursuant to Article 10(2)(g) of the directive. Based on that interpretation, information provided to the consumer by the creditor (supplier) about the borrowing rate on the loan may only include an indication of the specific borrowing rate, and furthermore, the creditor is required to indicate the total amount to be paid by the consumer and the APR. The obligation to provide the consumer with that information does not, however, stand in the way of including in the agreement provisions regarding the interest rate on non-interest credit costs as well. In other words, if the creditor has provided the consumer with information only about the borrowing rate on the loan, it has fulfilled its information obligations under Directive 2008/48/EC in a satisfactory manner. Based on that interpretation, it should, therefore, be concluded that the creditor is not required to inform the consumer whether the amount of capitalised interest was calculated as interest on the loan amount disbursed to the borrower or as interest on the loan amount disbursed plus the bank's commission or other non-interest credit costs included in the loan amount. This interpretation constitutes – it would seem – the basis for the practice, common in Poland, of suppliers formulating consumer credit agreements in such a way that this information is not provided to the consumer, which is often not challenged by the courts adjudicating these types of cases.
- 27 **According to the second possible interpretation** – the justification for which, in the opinion of the court, can be sought in the objectives of Directive 2008/48/EC – the obligation to provide information set out in Article 10(2)(f) of Directive 2008/48/EC, also assessed from the perspective of Article 10(2)(g) of the directive, refers not only to the borrowing rate, but in fact aims to provide the consumer with clear and complete information on how the amount to be paid to the creditor by the consumer under the consumer credit agreement has been calculated. From a practical point of view, the issue that is of major, if not crucial, importance to the consumer who takes out a loan is not so much the abstract interest rate on that loan, but the actual amount of interest he or she will have to pay to the creditor in the performance of his or her obligation. From that point of view, it is important for the consumer to obtain information on how exactly the amount of capitalised interest was calculated. In that regard, the creditor's failure

to provide such information transparently at the pre-contractual stage – or, at the latest, in the agreement itself – may appear to constitute a failure to take sufficient care to ensure consumer confidence (recital 8 of Directive 2008/48/EC). Indeed, it appears that on the basis of the literal wording of Article 10(2)(f) read in conjunction with Article 3(j) of the directive, the consumer may assume that capitalised interest will only be charged on the amount of the loan disbursed. Thus – without prejudging the admissibility of charging capital interest also on non-interest credit costs, which is the essence of the first question referred – it should be considered whether the adoption in an agreement drafted by the creditor (supplier) of a different basis for calculating the amount of capitalised interest (here: the sum of the loan amount disbursed and of commission or other non-interest credit costs included in the total amount of the loan) should not inherently entail an obligation to provide the consumer with explicit information on this matter in order to ensure that the contractual provisions are transparent. The above interpretation appears to be supported by the first and second sentences of Article 5 of Directive 93/13/EEC, according to which, in the case of contracts where all or certain terms offered to the consumer are in writing, those terms must always be drafted in plain, intelligible language, and where there is doubt about the meaning of a term, the interpretation most favourable to the consumer must prevail. As the Court explained in its judgment of 18 November 2021, C-212/20, EU:C:2021:934, the requirement of transparency of contractual terms must be understood as requiring not only that the term in question must be formally and grammatically intelligible to the consumer, but also that an average consumer, who is reasonably well informed and reasonably observant and circumspect, is in a position to understand the specific functioning of that term (paragraph 42); the requirement for plain, intelligible drafting requires that, in the case of loan agreements, financial institutions must provide borrowers with sufficient information to enable them to take prudent and well-informed decisions (paragraph 43).