

## Anonymised version

Translation

C-180/24 – 1

Case C-180/24

### Request for a preliminary ruling

**Date lodged:**

6 March 2024

**Referring court:**

Sąd Okręgowy w Poznaniu (Poland)

**Date of the decision to refer:**

29 January 2024

**Appellant:**

Santander Consumer Bank S.A.

**Respondent:**

EN

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### ORDER

[...]

**The Sąd Okręgowy w Poznaniu Wydział XV Cywilny Odwoławczy (Regional Court in Poznań, 15th Civil Appeals Division)**

[...]

following the hearing [...]

[...] [of the case brought by]

Santander Consumer Bank SA, having its registered office in Wrocław

against EN

for payment

EN

arising from appeals lodged by both parties

[...]

decides:

1. [...]
2. to refer the following question to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

Must 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) be interpreted as precluding the practice of including in consumer credit agreements terms the content of which was not agreed individually between the parties and which provide for interest to be charged on the entire amount of credit extended to the consumer, including not only the amount disbursed to the consumer, but also amounts allocated to cover the costs of the credit granted (including, as in the circumstances of the present case, the lender's commission or life insurance and assistance premiums)?

3. to stay the proceedings in the case pursuant to Article 177(3<sup>1</sup>) of the kodeks postępowania cywilnego (Code of Civil Procedure).

### **Grounds for the order**

#### **I. Facts and procedure in the main proceedings**

- 1 The appellant, Santander Consumer Bank SA with its registered office in Wrocław, claimed that the respondent, EN, should be ordered to pay it the amount of PLN 33 016.23, together with contractual interest at the maximum interest rate for late payment calculated on the amount of PLN 30 880.42 from 11 September 2020 until the date of payment, as well as statutory interest for late payment calculated on the amount of PLN 2 100.88 from the date of filing the claim until the date of payment. In addition, the appellant claimed that the respondent should be ordered to pay the costs of the proceedings.
- 2 The respondent contended that the action should be dismissed and that he be reimbursed for the costs of the proceedings.
- 3 In the judgment under appeal, the Sąd Rejonowy (District Court) upheld the action almost in its entirety.
- 4 That ruling was based on the following factual findings:

(i) On 6 September 2018, the respondent concluded with the appellant a cash loan agreement (No 158507783883) for the amount of PLN 38 786.35, which amount, under the agreement, was to be used for:

- the borrower's consumption purposes – PLN 5 500;
- repayment of the borrower's previous financial obligations to the lender – PLN 21 655.04;
- financing the lender's commission for granting the loan – PLN 4 525.10;
- financing the life insurance premium – PLN 6 516.11;
- financing the assistance premium – PLN 582;
- financing the fee for the method of transferring the funds allocated to consumption purposes – PLN 8.10.

The total amount to be repaid was calculated at PLN 49 570.34, which consisted of the principal amounting to PLN 38 786.35 plus interest for the entire lending period amounting to PLN 10 783.99 in total.

(ii) Under the agreement, the loan was to be repaid in 60 monthly instalments beginning in October 2018. 59 of the instalments amounted to PLN 831.16 each, and the final instalment amounted to PLN 831.30.

(iii) [...]

(iv) According to the payment statement submitted by the appellant, the respondent repaid only part of the amount owed, namely PLN 15 465.54, of which PLN 7 905.93 was principal [...].

(v) The appellant terminated the loan agreement and, as a consequence, brought the present action.

(vi) In the action, the appellant claimed the amount of PLN 33 016.23 from the respondent, which consisted of:

- PLN 30 880.42 for the outstanding principal plus further interest;
- PLN 2 100.88 in contractual and penalty interest;
- PLN 34.93 as a flat fee for a package of banking services.

5 Appeals were lodged by both the appellant and the respondent.

6 Taking into account the grounds put forward in the appeals of both parties, the facts presented above can be considered uncontested at the appeal stage.

7 [...].

8 The respondent's appeal challenged the District Court's ruling in its entirety and sought to dismiss the action. In his grounds of appeal, the respondent claimed infringement of:

[indication of provisions of national law infringed]

(i) [...] Article 58 of the kodeks cywilny (Civil Code) as a result of the unfounded assumption that the credit agreement was compatible with applicable laws in terms of the interest rate set therein; in that regard, in particular, the respondent alleged that the agreement, contrary to the laws on consumer credit, allowed contractual interest to be charged on the costs credited, and that the agreement contained unfair terms in that regard; the respondent 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], which statement 'invalidated' the contractual provisions on interest and as a result the agreement provided for no interest; thus, the appellant had failed to demonstrate the amount of its claim; additionally, the appellant had ineffectively terminated the credit agreement;

(ii) [...]

(iii) [...].

As a consequence, the respondent requested that the judgment under appeal be amended and that the action be dismissed in its entirety.

9 In support, the respondent put forward arguments to the effect that:

- the interest on the credited costs of the loan stipulated in the agreement was unacceptable;
- as a result, the indication of the amount of interest in the agreement was incorrect and misleading, and resulted in an incorrect determination of the respondent's total liability;
- the respondent submitted the statement that he wished to take advantage of the sanction of free credit under Article 45 of the ustawa o kredycie konsumenckim (Law on Consumer Credit), which provides for the elimination of the agreement's provisions on interest;
- the request for payment incorrectly specified the amount of arrears and did not meet the requirements of Article 75c of the prawo bankowe (Law on Banking) and therefore, in light of the agreement, was ineffective;

- the agreement was not effectively terminated, since as at the date of the termination notice, the respondent's arrears did not meet the contractual requirements for termination.

## **II. Provisions of national and European Union law relied on**

### 10 Provisions of national law

Article 3 of the Law on Consumer Credit:

1. A consumer credit agreement is defined as a credit agreement the amount of which does not exceed PLN 255 550 or the equivalent in a currency other than the Polish currency, with the creditor granting or promising to grant the credit to the consumer in the course of the creditor's business.

2. The definition of 'consumer credit agreement' includes, in particular:

(2) a credit agreement within the meaning of the Law on Banking;

Article 5 of the Law on Consumer Credit:

(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 percentage rate applied to the amount disbursed under the credit agreement on an annual basis;

(12) annual percentage rate of charge – the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit;

Article 30(1) of the Law on Consumer Credit:

a consumer credit agreement [...] should specify: [...] (6) 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;

(7) the annual percentage rate and the total amount payable by the consumer, determined as at the date on which the consumer credit agreement is concluded, together with all assumptions used in order to calculate it;

Article 45(1) of the Law on Consumer Credit: In the event of failure by the creditor to comply with Article 29(1), Article 30(1)(1) to (8), (10), (11), (14) to (17), Articles 31 to 33, Article 33a, and Articles 36a to 36c, the consumer shall, after submitting a written declaration 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.

Article 47 of the Law on Consumer Credit: Contractual terms may not exclude or limit the consumer's rights as provided for by law. In such cases, the provisions of this Law shall apply.

Article 6 of the kodeks cywilny (Civil Code): The burden of proof shall rest on the person seeking to rely on the evidence in question.

Article 58 of the Civil Code:

1. A legal transaction contrary to or intended to circumvent the law shall be void, unless a relevant provision provides otherwise, in particular that the invalid provisions of the legal transaction are to be replaced by the relevant provisions of the law.
2. A legal transaction which is *contra bonos mores* shall be invalid.
3. Where only part of the legal transaction is invalid, the other parts of the transaction shall remain in force, unless circumstances show that, without the invalid terms, the transaction would not have been carried out.

Article 385<sup>1</sup> of the Civil Code:

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 parties' principal obligations, including price or remuneration, so long as they are worded clearly.
2. If a contractual term is not binding on the consumer pursuant to paragraph 1, the contract shall otherwise continue to be binding on the parties.
3. The terms of a contract which have not been agreed individually are those over the content of which the consumer had no actual influence. This relates in particular to contractual terms taken from a standard contract proposed to a consumer by a contracting party.
4. The burden of proving that a term has been agreed individually shall rest with the person relying thereon.

Article 385<sup>2</sup> of the Civil Code:

The compliance of contractual terms with good practice shall be assessed according to the state of affairs at the time of conclusion of the contract, taking into account its content, the circumstances in which it was concluded and also

other contracts connected with the contract which contain the provisions being assessed.

Article 245 of the Code of Civil Procedure:

A private document drawn up in a written or electronic form constitutes proof that its signatory has made the statement contained therein.

Article 253 of the Code of Civil Procedure:

A party who denies the authenticity of a private document or claims that the statement contained therein by the person who signed it is not his or her own shall be obliged to prove such allegations. However, where a dispute concerns a private document originating from a person other than the person who denies its authenticity, the authenticity of such document shall be proven by the party who wishes to use that document.

Article 316(1) of the Code of Civil Procedure:

Having closed proceedings, the court shall issue a judgment on the basis of the actual state of affairs at the time of the closing of the proceedings; in particular, the fact that a claim becomes due while a case is pending shall not be an obstacle to the awarding of such claim.

## 11 Provisions of European Union law

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, 'Directive 2008/48/EC'): 'borrowing rate' means the interest rate expressed as a fixed or variable percentage applied on an annual basis to the amount of credit drawn down;

Article 10(2) of Directive 2008/48/EC: The credit agreement shall specify in a clear and concise manner:

(f) 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;

Article 3 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, 'Directive 93/13/EEC'):

1. 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. 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of that term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of the contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

Article 4(1) of Directive 2008/48/EC: 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 5 of Directive 93/13/EEC: In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. The rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).

### **III. Legal doubts of the national court and their significance for the resolution of the legal issue**

#### **A. Relevance of the Court's ruling to the main proceedings**

- 12 By order dated 28 October 2022, the Sąd Rejonowy dla Krakowa-Podgórze w Krakowie (District Court for Kraków-Podgórze in Kraków) referred two questions to the Court of Justice for a preliminary ruling (Case C-678/22), the first of which concerned the issue covered by the question in the present case. However, by order of 5 December 2023, the case was removed from the Court's registry under Article 100 of the Rules of Procedure of the Court of Justice due to the fact that by order of 20 November 2023, the District Court for Kraków-Podgórze in Kraków reported that the main proceedings had been discontinued.
- 13 The essence of the issue presented for consideration by the Court is the amount of credit granted by the creditor that can be covered by the interest charged under the credit agreement. In the circumstances of the present case, the loan granted to the respondent included two main elements: the loan in the strict sense (PLN 27 155.04) and the credited costs of granting the loan (commission,

insurance premiums, and so forth, amounting to PLN 11 631.31). The total amount on which interest was calculated was PLN 38 786.35; after capitalisation, interest for the entire term of the agreement was to amount to PLN 10 783.99.

- 14 If it is assumed, contrary to the appellant's claims which rely on the agreement between the parties, that interest could only be calculated on the loan in the strict sense, this has a significant impact on the assessment of the appellant's claim, which also includes interest on amounts that constitute the costs of the loan granted, while under the above assumption the interest stipulated in the agreement could only be calculated on the amount of PLN 27 155.04.

**B. Doubts about the interpretation of the underlying laws**

- 15 In the context of the facts presented, interpretative doubts are raised with respect to Article 3(j) of Directive 2008/48/EC, which states that the borrowing rate means the interest rate expressed as a fixed or variable percentage applied on an annual basis to the amount of credit drawn down. An identical rule has been introduced by the Polish legislature in the Law on Consumer Credit: under Article 5 of that law, the borrowing rate is the interest rate expressed as a fixed or variable percentage rate applied to the amount disbursed under the credit agreement on an annual basis.
- 16 The doubts of the referring court, also in the context of discrepancies present in the case-law of Polish courts, concern whether, in 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 non-interest credit costs, which are credited by the supplier (lender).
- 17 For several years, there has been a dispute in Polish case-law about whether interest may be charged on the portion of the principal intended to cover the credited costs. Numerous judgments support the permissibility of that practice (for example, the judgment of the Regional Court in Poznań of 27 May 2022, Ref. No XIV C 210/22, LEX No 3440970; judgment of the District Court for the Capital City of Warsaw of 27 June 2022, Ref. No I C 284/22, LEX No 3501043; judgment of the Regional Court in Gliwice of 25 October 2022, Ref. No I C 257/22, LEX No 3550333; judgment of the District Court for Warszawa-Mokotów in Warsaw of 27 December 2022, Ref. No II C 3085/22, LEX No 3505069; judgment of the District Court in Ciechanów of 25 January 2023, Ref. No I C 185/22, LEX No 3504213; judgment of the Regional Court in Warsaw of 31 March 2023, Ref. No V Ca 3217/22, LEX No 3553822), but it has also been challenged in many judgments (for example, the judgment of the District Court in Bartoszyce of 4 November 2021, Ref. No I C 983/20, LEX No 3280686; judgment of the Regional Court in Toruń of 25 May 2022, Ref. No VIII Ca 169/22, LEX No 3369969; judgment of the District Court in Słupca of 27 June 2022, Ref. No I C 146/22, LEX No 3561755; judgment of the District Court in Gdynia of 6 July 2022, Ref. No II C 64/2022, LEX No 3580501;

judgment of the Regional Court in Sieradz of 11 January 2023, Ref. No I Ca 478/22, LEX No 3550701; judgment of the Regional Court in Kielce of 1 February 2023, Ref. No II Ca 1858/22, LEX No 3511122; judgment of the Regional Court in Sieradz of 3 February 2023, Ref. No I Ca 601/22, LEX No 3550176). In one of its orders in which it refused to accept an appeal on a point of law, the Sąd Najwyższy (Supreme Court, Poland) indirectly allowed interest to be calculated on the portion of the principal intended to cover the credited commission (see the Supreme Court order of 15 June 2023, Ref. No I CSK 4175/22, LEX No 3569756; case-law cited after: T. Czech, *Kredyt konsumencki. Komentarz*, 3<sup>rd</sup> edition, Warsaw 2023).

- 18 In reference to the wording of Article 10(2)(f) read in conjunction with Article 3(j) of Directive 2008/48/EC, as well as to the general civil law principle of freedom of contract, the provisions cited 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 a loan, which will be repaid by the borrower at the time of repayment of the loan, and are credited by the lender at the stage of granting the loan. If the borrower (consumer) agrees to such an arrangement – even tacitly – by concluding a contract drawn up by the lender (supplier), and the literal wording of the provisions of Directive 2008/48/EC and the Law on Consumer Credit does not explicitly prohibit this, such a contractual provision should be considered to be not prohibited by law.
- 19 The view expressed in that regard in Polish legal doctrine is that the provisions of the Law on Consumer Credit do not give grounds for adopting different rules for charging loan interest, including in particular on the basis of the purpose for which the loan is intended (J. Gil, M. Szlaszyński, ‘Problematyka odsetek od kredytowanych kosztów bankowego kredytu konsumenckiego’ [‘The issue of interest on credit costs of consumer credit issued by banks’], *Monitor Prawa Bankowego* (Banking Law Review), 2022, No 6, pp. 59–74, LEX).
- 20 However, a teleological interpretation may lead to a different conclusion, since for reasons of equity it can be argued that capital interest is to reward the lender only for providing the borrower with the principal of the loan, and not for also crediting the non-interest costs of the loan, in particular, a commission that by its nature constitutes additional remuneration for the lender for granting the loan. It appears that such an interpretation could also be supported by paragraphs 81–91 of the judgment of the Court in Case C-377/14 (ECLI:EU:C:2016:283).
- 21 Therefore, in light of the above interpretation, it should be considered that capital interest is to reward the lender only for providing the borrower with the principal, 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 lender for granting the loan, or insurance premiums that are paid to a third party.
- 22 For the above reasons, the Regional Court referred the question to the Court of Justice for a preliminary ruling.

[...]

WORKING DOCUMENT