

Case C-472/23**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:**

25 July 2023

Referring court:

Sąd Rejonowy dla m.st. Warszawy w Warszawie (Poland)

Date of the decision to refer:

21 June 2023

Applicant:

L. sp. z o.o.

Defendant:

A.B.S.A.

Subject matter of the main proceedings

Consumer credit agreement – Interest charged by a bank not only on the capital drawn down but also on the costs of the credit – Situation in which the annual percentage rate of charge would be lower than that stated in the agreement if interest were charged only on the capital drawn down – Failure to fulfil the obligation to provide information – Claim by the legal successor to the creditor for interest and costs relating to the conclusion of the consumer credit agreement – Proportionality of a penalty providing that, in the event of failure to fulfil the obligation to provide information, irrespective of the type of failure, the credit is considered to be free of interest and charges

Subject matter and legal basis of the request

Article 10(2)(g) of Directive 2008/48/EC – Unfair term in a consumer credit agreement – Failure to fulfil the obligation to provide information in a case where the annual percentage rate of charge stated by the creditor is higher than that in the case where the contractual term is considered to be not binding – Article 10(2)(k)

of Directive 2008/48/EC – No possibility for the consumer to verify whether there is a situation giving rise to an increase in charges relating to performance of the agreement – Compatibility with Article 23 of Directive 2008/48/EC of the only penalty laid down in national law for failure by the creditor to fulfil the obligation to provide information under which the credit is deemed to be free of interest and charges

Questions referred for a preliminary ruling

1. Must Article 10(2)(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, read in the context of recitals 6, 8 and 31 thereof, be interpreted as meaning that where, because some of the terms of a consumer credit agreement are deemed to be unfair, the annual percentage rate of charge stated by the creditor on conclusion of the agreement is higher than if it is assumed that the unfair contractual term is not binding, the creditor has failed to fulfil its obligation under that provision?
2. Must Article 10(2)(k) 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, read in the context of recitals 6, 8 and 31 thereof, be interpreted as meaning that it is sufficient to inform the consumer of how often, in what situations, and by what maximum percentage charges related to performance of the agreement may be increased, even if the consumer is unable to verify whether a particular situation arises and the charge may consequently be doubled?
3. Must Article 23 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, read in the context of recitals 6, 8, 9 and 47 thereof, be interpreted as precluding national law which provides for only one penalty for failure to fulfil the obligation imposed on the creditor to provide information, irrespective of the degree of the failure to do so and the effect thereof on the consumer's decision to conclude the credit agreement, where that penalty involves making the credit free of interest and charges?

Provisions of EU law [and EU case-law] cited

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: recitals: 6, 8, 9, 19, 31 and 47; Articles 10(2)(g), 10(2)(k), and 23.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: Article 6(1).

Judgment of the Court of Justice of 9 November 2016, C-42/15, *Home Credit Slovakia* (EU:C:2016:842).

Provisions of national law cited

Article 385¹(1) and (2) of the Kodeks cywilny (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 out in a manner that is contrary to good practice and grossly infringes his or her interests (unlawful 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.

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.’

Article 30(1)(7) and (10) of the Ustawa z dnia 12 maja 2011 r. o kredycie konsumenckim (Law of 12 May 2011 on consumer credit):

‘7. Subject to Articles 31 to 33, a consumer credit agreement must indicate the annual percentage rate of charge and the total amount payable by the consumer set on the date on which the credit agreement is concluded, also mentioning all the assumptions used in order to calculate that rate.

[...]

10. Subject to Articles 31 to 33, a consumer credit agreement must set out information on the other costs which the consumer is required to pay in connection with the consumer credit agreement, in particular charges, including charges for maintaining one or several accounts recording both payment transactions and drawdowns, together with charges for using a means of payment for both payment transactions and drawdowns, charges, margins and the costs of ancillary services, in particular insurance, if known to the creditor, and the conditions under which those costs may change’.

Article 45(1) of the Law of 12 May 2011 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’.

Succinct presentation of the facts and procedure in the main proceedings

- 1 D.K. concluded a credit agreement with the defendant for credit amounting to PLN 40 000. The total amount payable as at the date of the agreement was PLN 64 878.45 and included the total amount of the credit and the total cost of the credit. The total cost of the credit consisted of interest in the amount of PLN 19 985 and commission in the amount of PLN 4 893.38. The annual credit rate was set at 11.18%.
- 2 The agreement states that the bank levies charges and commissions, as provided for in the agreement and the tariff of charges and commissions, for activities related to serving the credit and changes in the terms of the agreement. Changes in charges and commissions may occur if at least one of the following conditions obtains: a change in the amount of the minimum wage and the level of indicators published by the Główny Urząd Statystyczny (Polish Central Statistical Office): inflation, the average monthly remuneration in the corporate sector, changes in the prices of energy, telecommunications, postal services, interbank settlements and interest rates set by the Narodowy Bank Polski (National Bank of Poland), changes in the prices of services and operations used by the bank in carrying on individual banking and non-banking activities, changes in the scope or form of services provided by the bank (including changes or addition of new functionality relating to the servicing of a particular product), in so far as such changes affect the costs incurred by the bank or have an impact on the costs incurred by the bank in connection with performance of the agreement, a change in tax law and/or rules on accounting applied by the bank, in so far as such changes affect the costs incurred by the bank in connection with performance of the agreement, and the variation or delivery of new court rulings, rulings of administrative authorities, instructions or recommendations issued by authorised bodies, in so far as such changes affect the costs incurred by the bank in connection with performance of the agreement.
- 3 The charges are set in the ‘A.B.S.A. Tariff of Charges and Commissions for Individual Customers’. That table details the charges such as the charge for issuing a bank opinion, certificate, or credit account history, sending letters to customers, including reminders and letters of formal notice, and letters sent with acknowledgement of receipt. The tariff also sets out one-off charges related to drawing down the loan, which are one-off and not charged (they are set at ‘0’) and also charges for concluding an addendum and a charge for failure to pick up cash ordered for a payment in zlotys.
- 4 That table also lays down a mechanism for increasing charges, under which changes in the amount of charges and commissions may take place no more frequently than four times a year, charges and commissions may not decrease or increase by more than 200% of the amount of the previous charge or commission (that restriction does not apply to charges which previously did not exist or were calculated at ‘0’), a change in the amount of a particular charge or commission is to take place no later than six months after the condition for introducing such a

change is met, and the setting of the rates of charges or commissions for activities for which the bank has not charged charges/commissions thus far and the setting of the amount of charges/commissions for new products or services is to take account of the degree of labour-intensiveness of the activities carried out in that connection and the level of costs incurred by the bank.

- 5 The evidence provided shows that, in the course of performing the credit agreement, the bank charged interest not only on the amount that was disbursed directly to the consumer, but also on the total cost of the credit. If interest had been charged only on the total amount of the credit, the annual percentage rate would have been lower than that stated in the credit agreement.
- 6 L. sp. z o.o. acquired from D.K. all claims that the latter may have against the creditor, including claims arising from the application of the penalty relating to free credit under Article 45 of the Law on consumer credit.
- 7 L. sp. z o.o. is seeking payment from the defendant of the amount of PLN 12 905.80, plus statutory interest, from 29 April 2021 to the date of payment, by way of costs and interest related to a consumer credit agreement, in conjunction with the penalty laid down in Article 45 of the Law on consumer credit.

The essential arguments of the parties in the main proceedings

- 8 In the view of the applicant, there has been an infringement of the provisions of the law concerning the obligation to provide information [Article 30(1)(7) of the Law on consumer credit, transposing Article 10(2)(g) of Directive 2008/48/EC] and concerning the total amount payable when the agreement was concluded since the creditor charged the interest due not only on the amount made available to the borrower, but also on the costs of the credit. The defendant failed to state precisely the conditions under which the charges relating to the credit agreement could be increased [infringement of Article 30(1)(10) of the Law on consumer credit, transposing Article 10(2)(k) of Directive 2008/48/EC].

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

- 9 The court is uncertain whether an infringement of Article 10(2)(g) of Directive 2008/48/EC, consisting in an overstatement of the annual percentage rate of charge in the agreement and failure to fulfil the obligation to provide information under Article 10(2)(k) of that directive, justifies the application of the penalty introduced pursuant to Article 23 thereof, that penalty being to declare that the credit is free of charges (without interest and costs) pursuant to Article 45 of the Law on consumer credit.
- 10 The court has doubts as to whether the mere listing of the conditions under which the charges are increased, and also stating the mechanisms for increasing those

charges, is sufficient for the view to be taken that the obligation to provide information has been fulfilled. If not, the court seeks to ascertain whether it can be concluded that the provision of insufficient information constitutes a lack of information justifying the application of the penalty under Article 45 of the Law on consumer credit.

- 11 The court's uncertainties also concern the proportionality of the penalty which may be imposed irrespective of the type of failure to comply with the obligation to provide information and the effect of the failure to do so on the consumer's decision to conclude the agreement.
- 12 The court shares the uncertainties and considerations of the referring court set out in Case C-678/22 currently pending before the Court of Justice, concerning the unfairness of a contractual term allowing the creditor to charge interest not only on the amount of credit disbursed but also on the cost of the credit. If such a term were to be considered unfair and therefore invalid, it would have to be concluded that the annual percentage rate of charge is lower than that originally stated in the agreement.
- 13 The referring court takes the view, however, that, although in such a situation incorrect information about the annual percentage rate of charge and, consequently, also about the total amount payable by the consumer, is incorporated into the consumer credit agreement, that action cannot have had any real effect on the consumer's decision. While an offer which understates the annual percentage rate of charge set out in the agreement, relative to reality, would deprive the consumer of that opportunity and could lead him or her to enter into the agreement in the belief that the terms thereof are more favourable to him or her than they actually are, such a situation does not arise if the creditor overstates the amount thereof, in which case its offer is less attractive to the consumer and cannot encourage him or her to enter into the agreement.
- 14 In this connection, the court is uncertain whether incorrect information concerning the annual percentage rate of charge, where it does not make the creditor's offer more attractive, can be regarded as equivalent to a lack of information or a failure to fulfil the obligation to provide information justifying the application of a penalty. On the one hand, the consumer is informed that his or her liability is higher than it actually is, but, on the other, that does not necessarily have a negative effect on the process by which the consumer chooses an offer. At the same time, the consumer has available legal instruments arising under the directive relating to unfair terms in consumer contracts in order to obtain protection in respect of incorrectly charged interest.
- 15 Since the objective of the consumer credit directive is not only to protect consumers, but also to protect the internal market and to ensure that all creditors enjoy comparable conditions under which to operate on that market, as is clear from recitals 6, 8 and 9 of Directive 2008/48/EC, the referring court takes the view that Article 10(2)(g) must be interpreted as meaning that a failure to fulfil the

obligation to provide information, consisting in an overstatement of the annual percentage rate of charge and, consequently, an overstatement of the total amount payable, cannot be regarded as justifying application of the penalty referred to in Article 45(1) of the Law on consumer credit, which implements Article 23 of that directive.

- 16 In the present case, the court is uncertain whether the statement in the consumer credit agreement as a reason justifying a change in the amount of the charges of such elements, which are not verifiable by the consumer, fulfils the condition referred to in Article 30(1)(10) of the Law on consumer credit, which transposes Article 10(2)(k) of Directive 2008/48/EC. When the agreement was entered into, and subsequently performed, the consumer has no knowledge of the prices of the services used by the bank, and the agreement does not impose an obligation on the creditor to state which costs have increased and how those costs relate to the increase in the charge. The reference to court rulings which may have an effect on the costs related to performance of the agreement is even more wide-ranging since it cannot be ruled out that, as a result of certain contractual terms being declared unfair, the creditor will incur higher costs related to performance of the agreement, which should not, however, justify passing those costs on to the consumer.
- 17 The court is uncertain whether, in the light of Article 10(2)(k) of the directive, the mention of the reasons enabling an increase in charges and the limits on a one-off increase are sufficient to conclude that the consumer has been informed of the rules governing increases in charges related to the credit agreement concluded. A statement by the creditor of reasons which justify an increase in charges, the existence of which is not verifiable, without stating directly in the agreement the obligation to refer to those reasons, and also without the possibility of checking the effect of a particular reason on the amount of the charges, does not constitute fulfilment of the obligation contained in that provision. In the view of the court, it does not seem sufficient to point out to the consumer in a separate document that the charges can only be changed four times a year and that there is an upper limit for a single change. Although, literally, the creditor has stated the conditions under which an increase in charges may occur, the consumer essentially does not know, and has no guarantee, that he or she will be informed that the condition has been met and that that condition has caused an increase in costs justifying a change in the charge.
- 18 The court is uncertain whether it can be considered sufficient under EU law where national law provides for only one penalty irrespective of the type of infringement in relation to the information contained in the credit agreement. In the view of the court, it seems likely that the issues relating to the charges in question, since they concern ancillary issues, the technical servicing of the credit, and also in particular the mechanism for increasing or abolishing them, are not of significant importance to the consumer when entering into the agreement.

- 19 In the context of the foregoing, the court is uncertain whether Article 23 of the directive, in particular in the light of the obligation relating to the proportionality of the penalty imposed, precludes the national legislation transposing that provision of the directive, which national legislation lays down only one penalty for failure by the creditor to fulfil the obligations to provide information when the agreement is entered into, irrespective of the type and degree of failure to fulfil the obligation imposed by the provisions transposing the directive into the national legal order. If it is found that the penalty is disproportionate, the referring court seeks to ascertain whether, in such a situation, it should confine itself to refusing to apply it or whether it may apply it in part.

WORKING DOCUMENT