

Case C-755/22

Request for a preliminary ruling

Date lodged:

13 December 2022

Referring court:

Okresní soud Praha-západ (Czech Republic)

Date of the decision to refer:

1 August 2022

Applicant:

Nárokuj s.r.o.

Defendant:

EC Financial Services, a.s.

[...]

ORDER

The Okresní soud Praha-západ (District Court Prague – West, Czech Republic) has ruled [...] in the case of the

Applicant: **Nárokuj s.r.o.**, [...], having its registered office at [...] Veselí nad Moravou [...]

v
Defendant: **EC Financial Services, a.s.**, [...] having its registered office at [...] Dolní Břežany [...]

Concerning the payment of CZK 35,000 plus associated amounts and interest,

as follows:

[...] [national proceedings]

The District Court Prague – West hereby submits the following question to the Court of Justice of the European Union for a preliminary ruling, pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU):

Is the purpose 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 to penalise credit providers for a failure to fully examine a consumer’s creditworthiness, even in cases when the consumer fully paid up the credit and raised no objections against the agreement while paying?

Grounds:

I. Subject of the dispute and decisive facts

- 1 The subject of the dispute is the relinquishment of unjust enrichment of CZK 35,000 plus default interest at the statutory rate of 8.5% per annum from 23 September 2021 until payment. The applicant acquired the receivable from a consumer who entered into a consumer credit agreement with JET Money s.r.o. for CZK 50,000. Prior to entering into the agreement, the consumer presented his identification document and driver’s licence, payment slips from his employer to document his wage in the three months preceding the conclusion of the credit agreement; documentation of the costs of services linked to the use of his flat, television, and internet fees, also in the three months preceding the conclusion of the credit agreement; and a sworn affidavit concerning the amount of his contribution to shared household expenses; furthermore, he stated in his application that he had no other, prior commitments, is single, and shares a household with his grandmother. He subsequently paid off the loan plus associated amounts and interest, with the amount paid being CZK 85,000. The claimed amount – of CZK 35,000 – represents the difference between the loan principal and the amount paid. As concerns the change in the loan provider, this occurred on 28 September 2018 due to a transfer of a part of the firm to the present defendant.
- 2 There is no dispute between the parties as to the fact that a credit agreement was been entered into, or as to the amount paid by the consumer. In terms of the facts of the case, the situation is to all intents and purposes uncontested.
- 3 The parties do not, however, agree on the legal assessment. According to the applicant, the credit provider breached its obligations by failing to adequately examine the consumer’s creditworthiness, and the agreement is therefore void. The examination of creditworthiness was not conducted with professional care, as the credit provider did not in any credible manner test the actual amount of expenses. According to the applicant, it is logical that the consumer was unable to contest the invalidity of the agreement at a time when legal advice from his lawyer was unavailable to him. On the contrary, the defendant maintains that the assessment of creditworthiness was adequate. According to the defendant,

consumer protection cannot be applied, given that the receivable is no longer held by a consumer, but rather a business corporation.

- 4 The court informed the parties that it was considering referring the above question to the Court of Justice of the European Union, as it deems it pivotal for the court's decision. The applicant did not agree to the making of the reference, on the ground that the issue has been resolved by national case-law, which is evident from the judgment of the Městský soud v Praze (Prague City Court) of 5 January 2022, [...], according to which consumer protection has a preventative function as well as a function of safeguarding public policy. Furthermore, the applicant pointed to the judgment of the Krajský soud v Praze (Regional Court, Prague) of 9 January 2020, [...] according to which a creditworthiness assessment protects the consumer from risky credit and from increasing household indebtedness; this purpose is not lost even in respect of credit that has been repaid in full, since the consequences of agreeing to take out risky credit may become manifest at a later point.
- 5 The defendant agreed to the reference, without providing further grounds.

II. Applicable EU legislation

- 6 Recital 26-28 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 should take appropriate measures to promote responsible practices during all phases of the credit relationship, taking into account the specific features of their credit market. Those measures may include, for instance, the provision of information to, and the education of, consumers, including warnings about the risks attaching to default on payment and to over-indebtedness. In the expanding credit market, in particular, it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so. Without prejudice to the credit risk provisions of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, creditors should bear the responsibility of checking individually the creditworthiness of the consumer. To that end, they should be allowed to use information provided by the consumer not only during the preparation of the credit agreement in question, but also during a long-standing commercial relationship. The Member States' authorities could also give appropriate instructions and guidelines to creditors. Consumers should also act with prudence and respect their contractual obligations.*

- *Despite the pre-contractual information to be provided, the consumer may still need additional assistance in order to decide which credit agreement, within the range of products proposed, is the most appropriate for his needs and financial situation. Therefore, Member States should ensure that creditors provide such assistance in relation to the credit products which they offer to the consumer. Where appropriate, the relevant pre-contractual information, as well as the essential characteristics of the products proposed, should be explained to the consumer in a personalised manner so that the consumer can understand the effects which they may have on his economic situation. Where applicable, this duty to assist the consumer should also apply to credit intermediaries. Member States could determine when and to what extent such explanations are to be given to the consumer, taking into account the particular circumstances in which the credit is offered, the consumer's need for assistance and the nature of individual credit products.*
 - *To assess the credit status of a consumer, the creditor should also consult relevant databases; the legal and actual circumstances may require that such consultations vary in scope. To prevent any distortion of competition among creditors, it should be ensured that creditors have access to private or public databases concerning consumers in a Member State where they are not established under non-discriminatory conditions compared with creditors in that Member State.*
- 7 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, according to which *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.*
- 8 Article 22(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, according to which *in so far as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive.*
- 9 Article 22(2) 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, according to which *Member States are to ensure that consumers may not waive the rights conferred on them by the provisions of national law implementing or corresponding to this Directive.*

- 10 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, according to which *Member States are to lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and are to take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.*

III. Applicable national legislation

- 11 Paragraph 86(1) of zákon č. 257/2016 Sb., o spotřebitelském úvěru (Law 257/2016 on consumer credit) as amended, according to which *a provider shall, prior to the conclusion of a consumer credit agreement or prior to a change in an obligation arising from such an agreement, which consists of a significant increase in the total consumer credit amount, assess the consumer's creditworthiness on the basis of necessary, reliable, sufficient, and appropriate information obtained from the consumer and, where necessary, on the basis of a consultation of a database that makes it possible to assess the creditworthiness of the consumer or on the basis of other sources. The provider shall provide the consumer credit only if the results of the creditworthiness assessment show that there is no reasonable doubt as to the consumer's ability to repay the consumer credit.*
- 12 Paragraph 86(2) of Law 257/2016 on consumer credit, as amended, pursuant to which *in assessing a consumer's creditworthiness, the provider shall assess, in particular, the consumer's ability to pay the agreed regular consumer credit repayments, on the basis of a comparison of the consumer's income and expenses and the manner of repayment of his or her existing debts. The value of assets shall be taken into account only if it follows from the consumer credit agreement that the consumer credit is to be paid off, in part or in full, from the proceeds of the sale of the consumer's assets, rather than by regular repayments, or if it follows from the consumer's financial position that he or she will be able to repay his consumer credit regardless of his or her income.*
- 13 Paragraph 87(1) of Law 257/2016 on consumer credit, as amended, according to which *if a provider provides consumer credit to a consumer in violation of Paragraph 86(1), second sentence, the agreement is void. A court shall take the agreement's invalidity into account of its own motion. The consumer shall return the consumer credit principal within a period appropriate to his or her abilities.*
- 14 Paragraph 2054(1) of zákon č. 89/2012 Sb., občanský zákoník (Law 89/2012, the Civil Code), as amended ('CC'), according to which *the payment of interest shall be deemed to constitute a recognition of the debt in respect of the amount on which the interest is paid.*
- 15 Paragraph 2054(2) of the CC, according to which *if a debtor fulfils his debt in part, the partial performance shall serve as recognition of the rest of the debt, as*

long as it can be inferred from the circumstances that the debtor recognised the rest of the debt by such performance.

- 16 Paragraph 574 of the CC, according to which: *Legal transactions are preferably to be considered valid rather than invalid.*
- 17 Paragraph 580(1) of the CC, according to which: *‘Legal transactions that run contrary to good morals shall be void, as well as legal transactions that contravene a statute, if so required by the meaning and purpose of the statute.*

IV. Grounds for the submission

- 18 In the opinion of the referring court, in order to render a decision in the matter, it is necessary to find out whether the purpose of Directive 2008/48/EC of 23 April 2008 is to penalise credit providers for failing to fully examine the consumer’s creditworthiness, even in cases when the consumer has paid off the credit in its entirety and did not raise any objections in the performance of his or her contractual obligation.
- 19 Certain national courts of appeal hold that the answer to the above question is in the affirmative; this court, however, holds that the issue at hand has not yet been addressed by the Court of Justice of the European Union and that the answer also allows for the opposite interpretation, based on a balance of the interest of both parties to the agreement, and also with a view to the fact that the consumer is responsible for his actions.
- 20 This court also took into account the principle that a binding interpretation of EU law may be laid down only by the Court of Justice of the European Union as well as the principle that a national court, albeit a court of first instance, is entitled to make a reference of such a question, in search of such an interpretation, directly pursuant to Article 267 of the Treaty on the Functioning of the European Union (formerly Article 234 of the Treaty [establishing the European Community]).
- 21 It is evident from the recitals of the Directive (in particular recitals 26 to 28, quoted above), that its purpose is to protect the consumer against an ill-considered taking out of credit which could result in his or her inability to pay off the debt or his or her insolvency.
- 22 In simple terms: the purpose of Article 8 of the Directive is to keep a consumer out of financial trouble in repaying his or her credit.
- 23 In a situation when a consumer pays off his or her entire debt without raising any objections while doing so, it is impossible to infer any harmful consequence in respect of which the consumer is protected under the Directive.
- 24 The credit provider’s obligation to examine the consumer’s creditworthiness is not the main purpose of the Directive, but rather a means whereby its purpose is to be attained.

- 25 Hence, the question arises whether a separate purpose of the Directive is to penalise credit providers if a negative consequence has not occurred or if there is no evidence of a harmful consequence occurring (there is merely a hypothesis that the consumer may become insolvent in the future; this was not either claimed or proven in the present case). Furthermore, the receivable is currently being claimed by a business corporation.
- 26 If a sanction were permitted even in the contested case and invalidity inferred in respect of an agreement that has been fulfilled without any objection having been made, it is appropriate to point to the position of other consumers in respect of which the entrepreneur conducted a creditworthiness test pursuant to Article 8 of the Directive (a proper examination of assets and liabilities) but the consumers later did not fulfil their obligation under the agreement. In such cases, the invalidity of the agreement due to a breach of Article 8 of the Directive cannot be inferred and the consumers are liable for their entire obligation, including the agreed associated amounts and interest, unless a different ground for the invalidity of the credit agreement were to be established.
- 27 From this, this court infers inequality between consumers, as in the case of those who have fulfilled the agreement without the occurrence of an adverse consequence in respect of which the Directive is intended to provide protection, the agreement will be invalid (solely due to the entrepreneur failing to duly complete the procedure), whereas in the case of those consumers who have become insolvent but with respect to whom the entrepreneur has conducted a creditworthiness test in full in line with Article 8 of the Directive, the agreement's invalidity due to breach of that article will not be inferred.
- 28 Hence, this court is of the opinion that creditworthiness cannot be assessed in isolation, based solely on what an entrepreneur requests from a consumer, but also on the basis of how the entire contractual relationship developed in terms of the protective purpose of the Directive.
- 29 In the opinion of the referring court, the question at hand must also be viewed through the lens of general legal principles that have formed European legal culture for millennia and played a decisive role in the establishment and development of contractual law in individual EU Member States. These include, above all, good faith and legal certainty, which are to benefit both contracting parties, regardless of whether they are entrepreneurs or consumers, as observance of those principles is directly linked to trust in the law.
- 30 If the creditor arranged a credit with a consumer, which was later provided and which the consumer repaid in a due fashion, the creditor may trust that, by his payments, the consumer was paying off the debt arising from the agreement.
- 31 Even implied (tacit) legal transactions establish good faith and legal certainty for the other party. In the Czech legal system, this institution can be found in the provisions of Paragraph 2054 of the CC, quoted above; this institution has been

well known in Czech law for a long time (formerly embodied in Paragraph 407 of zákon č. 513/1991 Sb., obchodní zákoník (Law 513/1991 Commercial Code), which was in effect from 1 January 1992 to 31 December 2013, or Paragraph 97 of zákon č. 141/1951 Sb., občanský zákoník (Law 141/1951, the Civil Code), or Paragraph 1497 of zákon č. 946/1811 Sb., obecný zákoník občanský (Law 946/1811, General Civil Code) (ABGB)).

- 32 The above provisions attributed meaning to legal transactions made implicitly, either by laying down an assumption with respect to recognition of an obligation or leading to an interruption of the periods for the limitation and prescription of a right. In other words: implicit actions had and have a direct link to the trust of the other party to the legal relationship, unless it could be inferred from the circumstances that the party acting had no intention of giving rise to such trust.
- 33 A principle applied in Czech civil law is to view legal transactions preferably as valid rather than invalid, as parties to private law transactions enjoy freedom – and also bear responsibility – for the creation of their own legal relations; therefore, private law should respect the feature of freedom and responsibility in transactions and look for ways of interpretation to maintain it, rather than to negate it.
- 34 A sanction is meaningful if a protected interest has been violated and if the sanction is required to remedy its consequence or to dissuade the offender from future harmful transactions. The application of a sanction solely for preventative reasons, without a harmful consequence having occurred, makes no sense; it is unnecessary and runs contrary to the principle of freedom.
- 35 It is unclear from the Directive whether its purpose is to sanction the credit provider for failing to observe the given obligation if the situation for the purpose of which the Directive in fact came into being has not arisen.
- 36 In practice, cases such as this are beginning to arise (the relinquishment of the entire interest on credit is being sought after the repayment of a loan in full). This question has yet to be addressed at the EU level, and the referring court deems it desirable for the Court of Justice of the European Union to address it, in order to ensure uniform interpretation.

[...] [national proceedings]

Prague, 1 August 2022

[...]