

Case C-598/21

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:

28 September 2021

Referring court:

Krajský súd v Prešove (Slovakia)

Date of the decision to refer:

13 September 2021

Applicants:

SP

CI

Defendant:

Všeobecná úverová banka, a.s.

WORKING DOCUMENT

Subject matter of the main proceedings

Consumer protection – Default on repayment – Accelerated repayment – Proportionality in relation to the amount of credit – Credit granted without an agreed purpose – Enforcement of a lien by way of a voluntary (private) auction of immovable property – Loss of right of ownership

Subject matter and legal basis of the reference

The questions referred for a preliminary ruling concern the compatibility with the Charter of Fundamental Rights, with Council Directive 93/13/EEC, Directive 2005/29/EC of the European Parliament and of the Council, with Directive 2008/48/EC of the European Parliament and of the Council and with the case-law of the Court of Justice of the European Union of enforcement of a lien on immovable property in the form of a voluntary auction, accelerated repayment of the credit, repeated conclusion of new loan agreements for repayment of the preceding loans and of the costs on the credit.

Questions referred

1. Does Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), in conjunction with Articles 7 and 38 thereof, Directive 92/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13/EEC on unfair terms'), Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Directive 2005/29/EC on unfair commercial practices') and the principle of effectiveness of EU law preclude legislation such as Paragraph 53(9) and Paragraph 565 of the Občiansky zákonník (Slovak Civil Code), pursuant to which in the event of accelerated repayment no account is taken of the proportionality of that transaction, in particular the gravity of the infringement by the consumer of his or her obligations in relation to the amount of the credit and its term?

2. If the answer to Question 1 is in the negative (it is not precluded), the national court asks the following questions:

2.(a) Does Article 47 the Charter, in conjunction with Articles 7 and 38 thereof, Directive 93/13/EEC on unfair terms, Directive 2005/29/EC on unfair commercial practices and the principle of effectiveness of EU law preclude case-law which does not preclude the enforcement as to its substance of a lien by means of a

private auction of immovable property, consisting of the home of consumers or of other persons and which simultaneously does not have regard to the gravity of the infringement by the consumers of their obligation in relation to the amount of the credit and its term, even where there is another way in which the credit provider's claim may be satisfied through judicial enforcement, in the context of which the sale of the home over which the lien has been granted does not take precedence ?

2.(b) Is Article 3(1) of Directive 2005/29/EC on unfair commercial practices to be interpreted as meaning that the protection of consumers against unfair commercial practices in the granting of credit to consumers extends to all forms of satisfaction of the credit provider's claim, including the agreement on a new loan granted for repayment of the obligations arising from an earlier loan?

2.(c) Is Directive 2005/29/EC on unfair commercial practices to be interpreted as meaning that the conduct of a credit provider who repeatedly grants credit to a consumer who is incapable of repaying the credit such that the result is a chain of credit, which the supplier does not in reality pay to the consumer but itself receives for the repayment of the previous loans and the total costs on the credit, is also regarded as an unfair commercial practice?

2.(d) Must Article 2(2)(a) of Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers and repealing Council Directive 87/102/EEC ('Directive 2008/48/EEC on consumer credit'), read in conjunction with recital 10 thereof, be interpreted as not excluding the application of that directive even in the case of loan having all the characteristics of consumer credit, where the purpose of the loan has not been agreed upon, the entirety of which loan, with the exception of an insignificant part thereof, the credit provider used to ensure payment of previous consumer loans and as security for which a lien over immovable property was agreed upon ?

2.(e) Is the judgment of the Court of Justice of the European Union in Case C-377/14 of 21 April 2016, *Radlinger and Radlingerová*, ECLI:EU:C:2016:283 to be interpreted as meaning that it also applies to a loan agreement granted to a consumer where, under that agreement, part of the credit granted was designated for the repayment of the credit provider's costs?

Provisions of EU law and the case-law of the Court of Justice relied on

EU Charter: Articles 7, 38 and 47

Council Directive 93/13/EEC on unfair terms in consumer contracts: twelfth to fourteenth recitals thereof, sixteenth, twentieth, twenty-first and twenty-fourth recitals thereof; Articles 1 and 3, 4(1), 6(1), 7 and 8.

Directive 2008/48/EC of the European Parliament and of the Council on consumer credit: recital 10 thereof, Articles 1, 2(2)(a), 3(g),(h) and (l) and Article 23.

Directive 2005/29/EC of the European Parliament and of the Council on unfair commercial practices: Articles 2(c) to (e) and (k), Articles 3, 5, 6, 7, 11 and 13.

Judgment of the Court of Justice of 21 April 2016, C-377/14, ECLI:EU:C:2016:283, paragraph 3 in particular;

Relevant provisions of national law

Občiansky zákonník (the Civil Code)

Paragraph 53 unfair terms in consumer contracts.

Paragraph 151h(6), Paragraph 151j(1) and Paragraph 151m govern certain conditions for the enforcement of a lien.

Paragraph 565 provides for payment of the entire claim for failure to comply with any monthly instalment.

Zákon č. 129/2010 o spotrebiteľských úveroch a o iných úveroch a pôžičkách pre spotrebiteľov a o zmene a doplnení niektorých zákonov (Law No 129/2010 on consumer credit and other forms of credit and loans for consumers, amending and supplementing certain other laws)

Zákon č. 258/2001 Z.z. o spotrebiteľských úveroch (Law No 258/2001 on consumer credit) (First Law on consumer credit)

Paragraph 4(2) governs the specific terms of the consumer credit agreement.

The last sentence of Paragraph 4(3) provides for a penalty for failure to mention specific terms of the consumer credit agreement.

Zákon 527/2002 Z.z. o dobrovoľných dražbách (Law No 527/2002 on Voluntary Auctions)

The first sentence of Paragraph 6(1) defines the auctioneer.

Zákon 160/2015 Z.z. Civilný sporový poriadok (Law 160/2015 on the Code of Civil Procedure)

Paragraph 325(1)(2)(d) – regulation of interim measures

Zákon 233/1995 Z.z. Exekučný poriadok (Law 233/1995 on the Enforcement Code)

Article 61g – request by the person liable to pay in instalments. Paragraph 63 – means of execution of enforcement.

Outline of the facts and the main proceedings

- 1 The defendant, the Všeobecná úverová banka, a.s.. ('VUB Bank') and the company Consumer Finance Holding a.s. ('CFH') were economically linked in the past. CFH managed loans for VUB Bank. Both VUB Bank and CFH had, in the past, granted consumer credit to the applicants. As far back as 2004, Ms SP and Mr CI ('the applicants') had subscribed to consumer credit with CFH. Subsequently, other consumer credit was taken out. The applicants were not able to repay the loans and VUB Bank therefore granted them new loans, not paying them to the applicants but using them directly for the repayment of the claims arising from the earlier consumer credit. VUB Bank unilaterally fixed the amount of the debts.
- 2 Whereas, in 2004, the applicants took out consumer credit, still in the former currency, of 18000 Slovak kronor (EUR 597.49), the most recent credit granted to them by VUB Bank was by an agreement dated 9 February 2012, entitled 'Hypo Pôžička', and amounted to EUR 30 221.50 for the period up to 2032 ('the loan at issue').
- 3 VUB Bank used almost the whole of the loan at issue to repay the previous consumer loans granted since 2004, that is to say, both VUB Bank's consumer loans and those granted by CFH. VUB Bank used a part of the loan at issue for CFH 'to pay the costs connected with providing the loan at issue'. The purpose of the loan at issue is not set out in the loan agreement. VUB Bank submits that the loan at issue does not enjoy the protection provided for by the rules on consumer credit.
- 4 Even in respect of the period prior to 2012, VUB Bank granted loans to the applicants which were used for the payment of earlier debts. For example, by a consumer credit agreement of 23 November 2009, VUB Bank granted the applicants a loan of EUR 25 156.98 in respect of interest and charges of EUR 24 593.60, and that loan is also mentioned in the agreement for the loan at issue. There are doubts as to the legitimacy of interest charged, inter alia, for failure to fulfil the terms of an agreement under Law No 258/2001 (First Law on Consumer Credit).
- 5 The special feature of the loan at issue by VUB Bank is that it is secured by a lien on immovable property – a detached house in which the applicants and other persons have their home. Following the grant of the loan at issue (on 9 February 2012), the applicants defaulted on the payment of instalments amounting to EUR 1 106.50. VUB Bank, on the ground of non-repayment, announced the repayment date of the loan of its entirety (13 January 2013). The contractual terms of the loan at issue provided for the accelerated repayment of the loan. That agreed term was set out in Article VI., points 42 and 42.1 [of the loan agreement]. The law provides for a single condition for announcement of accelerated repayment, namely there is a default on repayment of three months of instalments, and then provides for an additional period of 15 days notice. Subsequently, on

12 April 2013, VUB Bank served notice of enforcement of the lien in the form of a voluntary auction for the sale of the applicants' house, the value of which is at least **30 times higher** than the sum for which the bank had activated the accelerated repayment of the loan and the subsequent sale of the house.

- 6 The applicants brought an action before the Okresný súd Prešov (District Court, Prešov, Slovak Republic) for an injunction prohibiting enforcement of the lien by way of voluntary auction. The applicants allege that the Bank, inter alia, infringed their rights guaranteed by EU law when the credit agreements were concluded. By a first judgment, the Okresný súd (District Court, Prešov) dismissed the action. According to the Okresný súd (District Court, Prešov), in essence, there were no obstacles to the sale of the applicants' house in the context of an extra-judicial procedure.
- 7 On appeal by the applicants, the Krajský súd v Prešove (Regional Court, Prešov, Slovak Republic) set aside the judgment and found that the ground of lack of proportionality precluded the voluntary auction of the applicants' house. According to the Krajský súd (Regional Court, Prešov), the sale of the applicants' house is disproportionate, since there is another means of enforcing the lien, in the context of [judicial] enforcement proceedings in which VUB Bank's claim may be satisfied and the applicants do not lose ownership of the house. The Krajský súd (Regional Court, Prešov) took account of the infringement of consumer law.
- 8 In a second judgment, the Okresný súd (District Court, Prešov) again dismissed the action. It referred to the judgment of the Court of Justice of the European Union in Case C-34/13, according to which even unfair contract terms do not preclude the applicants' home from being sold in the context of an extrajudicial lien enforcement process. The Okresný súd (District Court, Prešov) gave precedence to the decision of the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) in another case, in which the Najvyšší súd (Supreme Court) did not accept *ex ante* consumer protection by refraining from the extra-judicial sale of consumers' homes by voluntary auction.
- 9 The applicants brought an appeal seeking an injunction against enforcement of the lien by voluntary auction and stress, inter alia, infringement of their consumer rights and infringement of their right to accommodation in the event of the sale of their house.

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

- 10 There is no explicit requirement under Slovak law, in connection with the enforcement of a lien, to have regard also to the circumstances which Court of Justice stated to be significant in the judgment in Case C-415/11 *Mohamed Aziz*, paragraph 73: *'In particular, with regard, first, to the term concerning acceleration, in long-term contracts, on account of events of default occurring within a limited specific period, it is for the referring court to assess in particular, as stated by the Advocate General in points 77 and 78 of her Opinion, whether the*

right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the relevant applicable rules and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.'

- 11 The referring court considers that the institute of sale by voluntary (private) auction is relevant, including in cases concerning consumer rights. The issue is that of the proportionality of voluntary auctions, which is not settled by the case-law. Were the principle of proportionality not to be observed, the voluntary sale by auction of the consumer's immovable property, including his home, would be tolerated in the event of any breach, even minor, of the consumer's obligation.
- 12 It is indisputable that consumer protection is not absolute. Despite [the fact that these may constitute] unfair contract terms (C-34/13), consumers' homes may be sold even in the absence of legal proceedings.
- 13 The Slovak Republic has two methods of enforcement of a lien. The first is the sale of the pledged property by means of a voluntary auction. That sale is carried out by a private person, a trader. The creditor unilaterally determines the amount of the claim. Another trader – the auctioneer – normally sells the consumers' home without any legal proceedings and without any objective assessment of the amount of the claim and of the proportionality of the sale by auction of the consumer's home. Despite the consumers' opposition, the law describes that auction as 'voluntary'.
- 14 The second means allowed for enforcement of a lien is the court enforcement procedure under Law 233/1995 on the Enforcement Code. That procedure is preceded by the judicial review of the terms of the agreement, in which the court may authorise repayment in instalments and the court must therefore raise of its own motion the protection of the consumer under all the Directives hitherto mentioned. The creditor may give the subsequent court judgment to a bailiff, who may also authorise repayment in instalments, who may seize the consumer's movable assets, seize his or her money in bank accounts and other claims, he may order sums to be withheld from the consumer's wages and may also order the sale of the immovable property in which the consumer has his or her home.
- 15 Even prima facie there is a considerable difference between those methods of enforcement. In the context of both operations the consumer's home may be sold, but, in the context of court enforcement proceedings the consumer may be permitted to pay the debt in instalments and penalties may be added for delay. In the case of long-term loans in particular, it is thus possible to generate the level of the initial credit instalments until the end of the credit period. Thus, the creditor

may have his or her debt satisfied by the same point as that agreed with the consumer and the consumer may retain his or her home.

- 16 The process of sale by voluntary auction does not offer such guarantees. Nor do court proceedings on unfair contract terms stop the process of sale by voluntary auction. If the sale by auction proceeds, the consumer loses ownership of his or her home and must vacate it without delay. Ex post (post-auction) proceedings seeking that the auction be found invalid, after the loss of rights of ownership, are particularly emotional for consumers.
- 17 Protection against disproportionate interference with consumers' rights, including their homes, is however particularly important *ex ante* before the auction is held and, since substantive law does not provide for any other possibility of *ex ante* protection, only an **action for an injunction against enforcement of the lien** during a voluntary auction process is conceivable. The order for payment, first, does not have the force of *res judicata* and, secondly, allows the creditor another means to enforce the lien by auction in enforcement proceedings.
- 18 Creditors refer to the speed at which an item is sold in the voluntary auction process, but the spirit and purpose of a credit agreement are not trade in immovable property, but the grant of a loan to consumers without unfair contract terms and without unfair commercial practices in order to ensure a better quality of life for the consumer.
- 19 Slovak legislation makes it possible to declare accelerated repayment **without examining whether the consumer has failed to fulfil a obligation which is of essential importance**, whether such a breach is **sufficiently serious in the light of the term and the amount of the loan and whether national law provides for adequate and effective means enabling the consumer to remedy the effects of the loan being called in.**
- 20 The referring court considers that, if the law required, for the purposes of accelerated repayment, circumstances such as those referred to by the Court of Justice in paragraph 73 of the judgment in *Aziz*, C-415/11, the creditor could thus apply penalties, he or she could also claim and enforce lower repayment instalments, but he or she definitely would not be able, for a small breach of payment obligations, to commence the sale of the applicants' house.
- 21 More proportionate rules would also allow for the possibility of asserting rights and of *ex officio* review of unfair contract terms and unfair commercial practices. However, according to the decision-making practice referred to above, the sale of a house in the form of a voluntary auction cannot be stopped by an injunction brought against that auction.
- 22 The referring court states that the loan at issue and earlier consumer credit were used to repay earlier loans. It is clear that the applicants were repeatedly granted consumer credit even though they did not have sufficient income.

- 23 The national court does not see a reason for the exclusion of circumstances such as the repayment of the consumer credit in the present case from the sphere of practice falling within the scope of Directive 2005/29. It is furthermore of the opinion that such unfair consumer practices should not be exempt from review by a court under Directive 2005/29. The opposite scenario would lead to an inconsistency of logic, since the period during which unfair practices fall to be assessed in commercial transactions for consumer credit would expire before the actual repayment of the consumer credit. The referring court notes that Article 3 of Directive 2005/29/EC provides for protection not only before and during a commercial transaction, **but also after the transaction**. If the repayment of consumer credit does not fall within the period ‘during the commercial transaction’, then it should fall within the period ‘after the completion of the commercial transaction’. That court adds that although potentially unfair commercial practices do not directly affect the nullity of a legal act, they affect the assessment of the unfairness of contractual terms as one of the circumstances within the meaning of Article 4(1) of Directive 93/13.
- 24 According to the referring court, it should not be the purpose of consumer credit that the credit is repeatedly not paid out to the consumers but retained by the creditor to repay its own claims on previous loans. Such grant of credit is meaningless in the light of the objective of Directive 2008/48/EC.
- 25 The referring court notes that the agreement for the credit at issue did not define the purpose of the credit and that it contains the terms of a consumer credit agreement. The single circumstance that is supposed to exempt the loan at issue from the scope of that directive is the security over the immovable property.
- 26 The loan at issue is not a mortgage and nor is it a credit which would be followed by investments in real estate or housing. The purpose of the security on the property is to repay the previous consumer credits.
- 27 The national court sees no practical difference in terms of economic meaning between the loan at issue and the consumer credit agreements which preceded the loan at issue. If the loan at issue is to be used to repay the earlier consumer credit, there is a very close connection in terms of the purpose of the conclusion of the agreements between the loan at issue and the earlier consumer credit for the repayment of which the loan at issue was agreed.
- 28 As regards the last question, as to whether the judgment of 21 April 2016 in Case C-377/14 *Radlinger and Radlingerová* must be interpreted as meaning that it also applies to an agreement providing a consumer with credit where, by such an agreement, part of the credit granted was intended to reimburse the credit provider’s costs, that will be one of the circumstances determining the amount of the debt in respect of which the process of selling the applicants’ home was commenced. VUB Bank regards the sums at issue as having genuinely been paid to the applicants and has included them in the amount of the loan at issue actually granted to the applicants.