

**Case C-326/22****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:**

13 May 2022

**Referring court:**Sąd Rejonowy dla miasta stołecznego Warszawy w Warszawie  
(Poland)**Date of the decision to refer:**

18 March 2022

**Applicant:**

Z. sp. z o.o.

**Defendant:**

A. S. A.

**Subject matter of the main proceedings**

Request that the defendant (a bank) hand over consumer credit agreements which, in the view of the applicant, are necessary to enable it to bring any claims against the defendant for repayment of non-interest credit costs.

**Subject matter and legal basis of the request**

Interpretation of Article 16(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 (OJ 2008 L 133, p. 66); Article 267 TFEU

**Question referred for a preliminary ruling**

In the context of the principle of the effectiveness of EU law, must Article 16(1) of Directive 2008/48 be understood as meaning that a consumer, or an

undertaking to which a consumer has transferred his/her rights arising from that provision of the directive, may request, pursuant to it, that the creditor hand over a copy of the agreement (as well as the terms of business forming part of the agreement), and information on repayment of the credit which are necessary in order to verify the correctness of the calculation of the sums paid to the consumer as repayment of the proportion of the total cost of the credit in connection with the early repayment thereof and necessary in order to bring a claim for any repayment of the aforementioned amounts?

### **Provisions of EU law and 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: Article 16(1)

Judgment of the Court of Justice of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257

### **Provisions of national law cited**

1. Ustawa z dnia 12 maja 2011 r. o kredycie konsumenckim (Law of 12 May 2011 on consumer credit) (*Dziennik Ustaw* of 2022, item 246); ‘Law on consumer credit’: Article 49(1) and (2)
2. Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Civil Procedure) (*Dziennik Ustaw* of 2021, item 1805); ‘the Code of Criminal Procedure’: Articles 19(1), 98(1), 130(1) and (2), 130<sup>1a</sup>(1) to (3), 187(1)(1) and 248.
3. Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code) (*Dziennik Ustaw* of 2020, item 1740): Article 123(1)(1)

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The defendant (a bank) concluded consumer credit agreements with several of the applicant’s predecessors in law (consumers).
- 2 The amounts of credit taken out by individual consumers were repaid early.
- 3 The consumers who concluded individual consumer credit agreements with the defendant effectively transferred to the applicant, pursuant to contracts of assignment, claims for the reimbursement of amounts owed under Article 49(1) and (2) of the Law on consumer credit, in conjunction with Article 5(6)(a) and (b) thereof (repayment of non-interest credit costs), to which they are entitled vis-à-vis the defendant.

- 4 The applicant, which acquired those claims, is requesting that the defendant hand over to it the abovementioned consumer credit agreements, together with the terms of business applicable to each of those agreements and the ancillary agreements, including insurance agreements and the general terms and conditions thereof, and provide certain information, as the consumers in question do not have copies of those agreements (have lost them).
- 5 In addition, the applicant has requested that the defendant be ordered to take a certain course of action by providing certain information relating to the credit agreement concluded.

### **The essential arguments of the parties in the main proceedings**

- 6 It is common ground that the defendant and the applicant's predecessors in law were parties to consumer credit agreements.
- 7 The defendant refuses to grant the applicant's request and argues that there are no legal bases for handing over to the applicant (or to its predecessors in law) the documents requested in the form of agreements, even if the consumers – as in this case – have released the defendant from the requirement to maintain banking secrecy and have authorised the applicant to request that the credit agreements between the defendant and individual consumers concerned be handed over.

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

- 8 In the view of the referring court, a question has arisen which requires an interpretation of EU law, namely of Article 16 of Directive 2008/48, in conjunction with the principle of the effectiveness of EU law. There is also no doubt that both the EU legislature and the national legislature, in seeking to ensure strong protection for consumers, made provision for them to recover a proportion of the costs incurred in concluding a consumer agreement in the event of early repayment. However, under national law the existence of such a claim must be demonstrated by the applicant (consumer), and this cannot be done without submitting to the court evidence in the form of the agreement.
- 9 It would appear that, without an agreement and information on how the credit was repaid, it is impossible for the consumer to make an assessment, firstly, of the correctness of the lender's calculation of the non-interest credit costs to be reimbursed and, secondly, of the cost-effectiveness of bringing a claim. This in turn raises serious doubts as to the effectiveness of the right conferred on the consumer to reimbursement of a proportion of the non-interest consumer credit costs in the case where that consumer is entirely unable to verify whether, and in what amount, he/she is entitled to reimbursement of non-interest credit costs.
- 10 The referring court notes that the consumer is not required to keep a copy of the agreement. However, normally it is not technically possible for consumers to

secure permanently copies of concluded agreements since parties to the agreements covered by Article 49 of the Law on consumer credit are generally persons on low incomes who take out numerous short-term loans which meet the definition of consumer credit. In those circumstances, it is possible that consumers will lose copies of the agreements handed over to them and that at the time of the early repayment of consumer credit many of them may no longer possess a copy of the agreement, a fact which prevents them from effectively verifying the claims which they have against the creditor under Article 49 of the Law on consumer credit.

- 11 It is common practice to repay credit early by taking out new credit. In that situation, no funds are transferred to the consumer's account and thus he/she has no precise information as to when the debt was repaid.
- 12 The consumer's situation is not improved by the fact that he/she can call upon private undertakings which provide information on debt status. This involves additional fees which may prevent him/her from pursuing his/her claim under EU law. Moreover, such information is incomplete and does not necessarily include information on all the debts entered into.
- 13 It is true that, under national procedural law, it is possible for a court to order a designated person to hand over certain documents (Article 248 of the Code of Civil Procedure); such an obligation cannot, however, serve to specify the claim and will apply only after an action has actually been brought.
- 14 At the same time, in order to bring an action the claim must be precisely defined (Article 187(1)(1) of the Code of Civil Procedure), which is not possible if the consumer or his/her successor in law does not have the credit agreement and information on the date on which the debt was repaid. In that situation, the presiding judge will have to request that the formal shortcomings in the application be remedied (Article 130(1) of the Code of Civil Procedure) and consequently, if these cannot be remedied, the claim may be dismissed, which will mean that it will have none of the effects which the law attaches to its raising (Article 130(2) of the Code of Civil Procedure).
- 15 A consumer represented by a professional representative will also risk his/her application being dismissed without being called upon to rectify it (Article 130<sup>1a</sup> of the Code of Civil Procedure) together with any right to rectify the application within one week of the dismissal order being served (Article 130<sup>1a</sup>(3) of the Code of Civil Procedure).
- 16 If, on the other hand, the consumer were to draw up his/her claim arbitrarily, then, in the event of a request exceeding the amount actually due, that consumer would incur the risk of losing the case and having to bear the costs. In Polish judicial practice, it has been held that an applicant who withdraws his/her application or has his/her application dismissed loses the case, with the exception of the situation in which the defendant makes payment in the course of the proceedings.

- 17 Of course, in national judicial practice it is accepted that the applicant can demonstrate that bringing the action was necessary to assert his/her rights and in that case he/she will not be burdened with the above costs. However, a situation such as that at issue in the present case is not covered by established judicial practice and it is therefore possible that some courts may, in such a situation, find that, since the agreement has been lost, the consumer him/herself is at fault for not being able to establish the amount of the claims and should therefore bear the costs. Non-imposition of costs on the person bringing the action, who subsequently withdraws part of the application, is an exception to the principle of liability for the outcome of proceedings (Article 98(1) of the Code of Civil Procedure). That exception is subject to a strict interpretation, which creates considerable uncertainty for the consumer with regard to the bringing an action.
- 18 If the consumer were to bring a claim for a lower amount than that due to him/her, he/she could run the risk of the remaining amount due to him/her becoming time-barred. In settled national judicial practice it is accepted that Article 123 of the Civil Code, which determines when a limitation period is interrupted, provides that, as a rule, the bringing of an action interrupts the limitation period, but only as regards the part of the claim set out in the application.
- 19 The exception to that rule concerns only claims which cannot be quantified at the time when the action is brought since they arise from the valuation of a specific asset carried out by the court at a particular time. That is not the situation in the present case.
- 20 The absence of the agreement also prevents the consumer from assessing whether it is cost-effective for him/her to assert his/her claims at all and from checking whether his/her credit has been correctly settled following early repayment. The consumer is the weaker party to the agreement and, unlike undertakings, does not have facilities which enable him/her to store intact all the documents that he/she requires. The loss of the copy of the agreement at the time when it was concluded therefore means that the consumer is deprived of an actual possibility of asserting his/her claims under Article 49(1) and (2) of the Law on consumer credit (and therefore claims based directly on Article 16 of Directive 2008/48) and the possibility of considering the merits of those claims.
- 21 It follows from the established case-law of the Court of Justice that national courts are required to ensure the effectiveness of EU law. That requirement also means that, where necessary, the courts are empowered to take measures which are not provided for in the rules of national law (judgment of the Court of Justice of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257). The referring court is uncertain whether, in light of the principle of the effectiveness of EU law, Article 16 of Directive 2008/48 establishes a right to request documents such as an agreement on consumer credit which was repaid early and information on the date and amount of the credit repayment where obtaining those documents is necessary in order to assess the merits of bringing an action, without running the

risk of having to reimburse the opponent for the costs of the proceedings or of part of the claim becoming time-barred.

- 22 If the consumer did not have such a claim, the assertion of his/her rights under Article 16 of Directive 2008/48 would be seriously impeded. Bringing an action would entail a significant risk, which could deter him/her from pursuing the above claim.
- 23 The very absence of the agreement also deprives the consumer of the right to assess whether taking legal action is at all necessary or cost-effective. The consumer or person who enters into his/her rights (as the result of a contract of assignment) therefore has no possibility of definitively establishing his/her situation, which may also deter him/her from bringing a claim against the lender. All of those circumstances mean, on the one hand, that the abovementioned persons are unable to establish their rights vis-à-vis the lender and, on the other, that the assertion of those rights is seriously impeded, if, despite the lack of an unequivocal assessment of the merits of their claims, they decide to bring an action (on account of the serious risks involved for the applicant in bringing an action).