

**Case C-536/22**

**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:**

10 August 2022

**Referring court:**

Landgericht Ravensburg (Germany)

**Date of the decision to refer:**

8 August 2022

**Applicants:**

MW

CY

**Defendant:**

VR Bank Ravensburg-Weingarten eG

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**Subject matter of the main proceedings**

Action for repayment of compensation for early repayment of a loan, in the context of a consumer credit agreement relating to immovable property

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

Interpretation of EU law, Article 267 TFEU

**Questions referred for a preliminary ruling**

1. Must the concept of ‘fair and objective compensation ... for possible costs directly linked to the early repayment’ in Article 25(3) of Directive 2014/17/EU be interpreted as meaning that the compensation also covers the creditor’s loss of profit, in particular the future interest payments lost as a result of the early repayment?

2. If Question 1 is answered in the affirmative:

Does EU law, specifically Article 25(3) of Directive 2014/17/EU, contain guidelines for the calculation of the income which the creditor receives from its reinvestment of a consumer loan relating to immovable property which has been repaid early – income to be taken into account in the context of loss of profit – and if so, what are those guidelines?

In particular:

- a) Must the national rules for that calculation be linked to the manner in which the creditor actually uses the amount which was repaid early?
  - b) May a national rule allow the creditor to calculate the compensation for early repayment on the basis of a notional reinvestment in safe capital market securities with maturities corresponding to the term of the credit agreement ('asset/liability method')?
3. Does the scope of Article 25 of Directive 2014/17/EU also cover the case where the consumer first terminates a consumer credit agreement relating to immovable property on the basis of a right of termination provided for by the national legislature before repaying the loan to the creditor early?

**Provisions of European Union law relied on**

Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ 2014 L 60, p. 34), Article 25(3)

**Provisions of national law relied on**

Bürgerliches Gesetzbuch (Civil Code; 'the BGB'), in particular Paragraph 252, Paragraph 490(2), Paragraph 500(2), Paragraph 502, Paragraph 812

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

- 1 On 11 January 2019, the applicants concluded a consumer credit agreement relating to immovable property ('the credit agreement') with the defendant for a net loan amount of EUR 236 000.00 for the purpose of purchasing a rented apartment. According to the credit agreement, the borrowing rate of the loan is fixed until 30 January 2029.
- 2 The credit agreement states that the borrower may discharge fully or partially his or her liabilities early during the period of the fixed borrowing rate only if he or she has a legitimate interest in doing so.

- 3 According to the credit agreement, compensation is payable in the event of early repayment of the loan. In that respect, the credit agreement states that the bank is to be compensated for the damage which it suffers as a result of the early repayment. The credit agreement further provides that the calculation of that damage is to be based on the asset/liability method, which has been found to be permissible by the Bundesgerichtshof (Federal Court of Justice, Germany) and in which it is assumed that the funds released by the repayment are invested in mortgage bonds for a period corresponding to the term of the credit agreement. In that calculation, account must be taken of, inter alia, the damage caused by the deterioration in interest, representing the financial disadvantage arising from the early repayment of the loan, that is to say the difference between the remunerative interest under the agreement and the yield of mortgage bonds with maturities corresponding to the remaining term of the loan to be repaid. In addition, according to the credit agreement, reasonable compensation is payable for the administrative expenses associated with the early repayment of the loan.
- 4 By contract of sale of 19 May 2020, the applicants sold the rented immovable property for a purchase price of EUR 255 000.00. One of the applicants, a fixed-term soldier, had been transferred by his employer. The applicants terminated the credit agreement on 30 June 2020. By letter of 9 June 2020, the defendant notified the applicants of the compensation for early repayment, in the amount of EUR 27 614.17, which it was claiming due to the early repayment of the loan on 30 June 2020. The applicants paid that compensation for early repayment.
- 5 By letter of 19 April 2021, the applicants demanded that the defendant repay the compensation for early repayment, and they seek repayment of that amount by the present action.
- 6 The applicants take the view that the defendant is not entitled to payment of the compensation for early repayment because the credit agreement does not contain sufficient information concerning, inter alia, the calculation of the compensation for early repayment. They submit that, in addition, it follows from Directive 2014/17 that compensation for early repayment can serve only as compensation for costs actually incurred and cannot include losses of interest or profit suffered by the creditor. The applicants further consider that a hypothetical calculation based on formulae deriving from financial mathematics is impermissible.
- 7 The defendant takes the view that the agreement contains all the information prescribed by law to a sufficient extent. With regard to the amount of compensation claimed, the defendant refers to settled case-law of the Federal Court of Justice, according to which, in the case where a loan secured by a charge on immovable property is paid off for good reason, the creditor is entitled to the losses connected directly with the early repayment if, at the time of repayment, the borrower owes interest at a fixed borrowing rate. The defendant submits that banks usually have to refinance themselves when granting loans and enter into long-term commitments of their own with the refinancer.

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

- 8 The decisive question for the resolution of the dispute in the main proceedings is whether the applicants are entitled, under Paragraph 812 of the BGB (which governs entitlement to restitution in the event of unjust enrichment), to repayment of the compensation for early repayment which they had paid. This would be the case if the defendant had not been entitled to compensation for early repayment.

#### ***Question 1***

- 9 The defendant's entitlement to payment of compensation for early repayment could arise from Paragraph 502(1) of the BGB. However, if that provision were incompatible with EU law, in particular with Article 25(3) of Directive 2014/17, in so far as the creditor is granted full compensation for his or her loss, including loss of profit, as compensation for early repayment, the defendant would not be entitled to the loss of profit. The action for repayment of the compensation for early repayment would have to be upheld in that respect.
- 10 Paragraph 252 of the BGB provides that the damage to be compensated also includes loss of profit.
- 11 In accordance with Paragraph 500(2), the borrower may discharge fully or partially his or her obligations under a consumer credit agreement early at any time (first sentence). However, in the case of a consumer credit agreement for which a fixed borrowing rate has been agreed, this is possible during the period of the fixed borrowing rate only where the borrower has a legitimate interest in doing so (second sentence).
- 12 Under Paragraph 502(1) of the BGB, the creditor is entitled to 'reasonable compensation for early repayment' where the loan is repaid early. That provision has also applied to consumer credit agreements relating to immovable property since Directive 2014/17 was transposed into German law. However, Paragraph 502 of the BGB does not define exactly what is meant by reasonable compensation for early repayment.
- 13 The German legislature refrained from expressly transposing the requirements contained in the first and second sentences of Article 25(3) of Directive 2014/17, under which only 'objective' compensation may be claimed and the compensation 'shall not exceed the financial loss of the creditor'.
- 14 The national case-law proceeds on the assumption that the damage suffered by the creditor pursuant to Paragraph 502(1) of the BGB must continue to be determined in accordance with principles of compensation law, with the result that the interest lost by the creditor is recoverable as lost profit in accordance with Paragraph 252 of the BGB, even following the transposition of Directive 2014/17.
- 15 The referring court considers that various indications for interpretation can be derived from the wording and scheme of Article 25 of Directive 2014/17.

- 16 In accordance with the second sentence of Article 25(1) of Directive 2014/17, Member States must ensure that, in the event of early repayment, the consumer is entitled to a reduction in the total cost of the credit, such reduction consisting of the interest and the costs for the remaining duration of the contract. This is likely to mean that the interest and the costs for the remaining duration of the contract are to cease to exist.
- 17 A further argument militating against taking into account the interest that would have accrued in the absence of the early repayment is that, in accordance with the first sentence of Article 25(3) of Directive 2014/17, only costs *directly* linked to the early repayment of the loan can be claimed. It would appear to be doubtful whether that is to be understood as referring to interest which would have accrued only in the absence of the early repayment.
- 18 Furthermore, the restrictive wording ‘for *possible* costs’ in the first sentence of Article 25(3) of Directive 2014/17 might also preclude interest from being taken into account (recital 66 of that directive contains the similar restriction ‘*potential* costs’). This is because, in the event of early repayment, the creditor necessarily – not only *possibly* – loses entitlement to further interest payments.

### ***Question 2***

- 19 If EU law, in particular Article 25(3) of Directive 2014/17, does not preclude the bank’s entitlement to full compensation, including loss of profit, in accordance with Paragraph 502(1) of the BGB, but cannot be reconciled with the method for calculating the abovementioned entitlement to compensation, approved by the national case-law, the action would likewise have to be upheld, since entitlement to payment of compensation for early repayment is excluded under point 2 of Paragraph 502(2) of the BGB where the consumer was not informed of the method of calculation upon conclusion of the contract. Point 2 of Paragraph 502(2) of the BGB provides that entitlement to compensation for early repayment is excluded where, ‘in the contract, the information concerning the term of the contract, the borrower’s right of termination or the calculation of the compensation for early repayment is insufficient’. In the present case, the defendant informed the applicants merely of a calculation according to the ‘asset/liability method’. Therefore, the defendant could not subsequently calculate its losses according to a different method.
- 20 From the point of view of the referring court, various factors regarding the calculation of the compensation for early repayment can be inferred from Article 25 of Directive 2014/17.
- 21 The requirement of ‘objective’ compensation in the first sentence of Article 25(3) of Directive 2014/17 militates in favour of the view that only actual costs concretely incurred can be included in the calculation. Therefore, a fictitious calculation based on values deriving from financial mathematics or on statistical values might be impermissible. This might also be supported by the wording

‘where justified’ in the first sentence of Article 25(3) of Directive 2014/17, especially in so far as that additional element relates to the requirement of objectivity in the English version (‘objective compensation, where justified’) and French version (‘objective, lorsque cela s’avère justifié’).

- 22 By contrast, the wording of the second sentence of Article 25(4) of Directive 2014/17 militates in favour of fictitious losses also being compensable. According to that provision, the information provided to the borrower must ‘quantify the implications ... of discharging ... obligations prior to the expiry of the credit agreement and clearly set out any assumptions used. Any assumptions used shall be reasonable and justifiable.’ It might be concluded from that wording that the compensation also includes factors determined by means of assumptions.

### *Question 3*

- 23 The defendant’s entitlement to compensation for early repayment could also arise from the third sentence of Paragraph 490(2) of the BGB because the applicants not only repaid the loan early, but also gave notice of termination beforehand. If Question 3 is answered in the negative, the defendant would be entitled to the loss of profit. If Question 3 were to be answered in the affirmative, on the other hand, the same questions would arise in the context of the interpretation of Paragraph 490(2) of the BGB as arise in relation to the application of Paragraph 502(1) of the BGB (Questions 1 and 2).
- 24 Under Paragraph 490(2) of the BGB, the borrower may terminate a credit agreement early where the borrowing rate is fixed and the loan is secured by, inter alia, a charge on immovable property, if his or her ‘legitimate interests’ so require (first sentence). Such an interest exists, in particular, where the borrower has a need to put to a different use the property used to secure the loan (second sentence). The borrower must compensate the creditor for the damage caused to the latter as a result of the early termination (third sentence). In accordance with settled case-law of the Federal Court of Justice, the calculation of that compensation for early repayment is likewise subject to the principles of compensation law, with the result that a loss of profit must also be compensated, in accordance with Paragraph 252 of the BGB.
- 25 In the context of national law, it is disputed whether the requirements relating to the right of termination under Paragraph 490(2) of the BGB are stricter than those relating to early repayment under Paragraph 500 of the BGB and whether Article 25 of Directive 2014/17 also has an impact on the interpretation of Paragraph 490 of the BGB. The prevailing view to date is that, for the purposes of the interpretation of the concept of ‘legitimate interest’ within the scope of Paragraph 490(2) of the BGB, there must be a connection with the preservation of the borrower’s economic freedom of action with regard precisely to the immovable property used to secure the loan. By contrast, against the background of an interpretation in conformity with the directive, it is assumed that other

legitimate interests (for example, divorce or unemployment) can also justify early repayment within the framework of Paragraph 500 of the BGB.

- 26 The referring court takes the view that there is good reason to assume that Article 25 of Directive 2014/17 is also applicable where the consumer terminates the consumer credit agreement relating to immovable property in accordance with Paragraph 490(2) of the BGB before repaying the loan early. Article 25 of Directive 2014/17 is intended to ensure a minimum standard of consumer protection in the event of early repayment. The circumstance of whether a right of termination existing under the national legislation is additionally exercised before such repayment cannot play a role in that regard. As a general rule, a consumer will not even know that his or her national law contains different provisions for those two situations. Even if he or she is aware of the two possibilities, he or she may possibly terminate 'just to be on the safe side'. If the directive were not applied to those cases, many consumers would not benefit from their right to early repayment of the loan under Article 25 of Directive 2014/17.
- 27 This would be the case, in particular, if the Court, in answering Questions 1 and 2, were to conclude that the principles hitherto applied under national law with regard to the calculation of compensation for early repayment within the framework of Paragraphs 500 and 502 of the BGB are wholly or partly incompatible with Article 25 of Directive 2014/17. If the compensation for early repayment in the case where the right of early termination under Paragraph 490(2) of the BGB is exercised were calculated differently than in the context of early repayment under Paragraphs 500 and 502 of the BGB, the result would be that a consumer who terminates his or her loan early might be worse off than a consumer who exercises his or her right of early repayment without terminating the loan. Due to the objective of consumer protection pursued by that right, it would therefore appear necessary for Article 25 of Directive 2014/17 also to apply in the case where termination is declared before the loan is repaid.