

Case C-339/23**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:**

30 May 2023

Referring court:

Sąd Rejonowy w Siemianowicach Śląskich (Poland)

Date of the decision to refer:

28 April 2023

Applicant:Horyzont Niestandardowy Sekurytyzacyjny Fundusz
Inwestycyjny Zamknięty**Defendant:**

LC

Subject matter of the main proceedings

Application for payment of an amount of PLN 41 177.24 (approximately EUR 8 761), together with default interest, in respect of non-repayment by the defendant, LC, of consumer credit.

Subject matter and legal basis of the request

Interpretation of Article 8 of Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

Article 267 of the Treaty on the Functioning of the European Union.

Question referred for a preliminary ruling

Must Article 8 of Directive 2008/48/EC of 28 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC be interpreted as meaning

that the obligation on the creditor to assess the creditworthiness of the consumer (borrower), as set out therein, is equivalent to the other obligations laid down in that directive (in particular the obligations to provide information set out in Articles 10 et seq.), and therefore the penalties referred to in Article 23 of the directive cannot be different, that is to say, cannot provide for different legal consequences for infringement of each of those obligations separately?

Provisions of European Union law relied on

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 8(1) and (2) and Article 23.

Provisions of national law relied on

Kodeks cywilny z dnia 23 kwietnia 1964 r. (Civil Code of 23 April 1964): Article 58(1), (2) and (3) and Article 481(1), (2), (2¹), (2²), (2³), and (2⁴).

Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. (Code of Civil Procedure of 17 November 1964): Article 505⁴.

Ustawa o kredycie konsumenckim z dnia 12 maja 2011 r. (Law on consumer credit of 12 May 2011): Articles 9(1) to (4), 30(1), 31(1) and (2), 32, 33, and 45(1) to (5).

Ustawa prawo bankowe z dnia 29 sierpnia 1997 r. (Law on banking of 29 August 1997): Article 70(1) and (2) and Article 78a.

Succinct presentation of the facts and procedure

- 1 On 28 September 2017, the defendant, LC, (the consumer) concluded with Nest Bank S.A in Warsaw a debt consolidation credit agreement for an amount of PLN 49 148.06 (EUR 10 457).
- 2 Under the credit agreement, the defendant undertook to repay the borrowed amount in 60 equal monthly instalments by 3 October 2022, to pay a ‘disbursement commission’ of PLN 7 323.06 (approximately EUR 1 558), and to repay PLN 8 365 (EUR 1 779) in contractual interest for use of the principal in the amount of 9.9% (at a floating rate) per annum.
- 3 Part of the credit made available to the defendant was used to repay another loan. The remaining amount was used for consumption purposes.
- 4 The credit agreement specifies that: ‘The total amount of credit’ is PLN 33 460; ‘The total cost of the loan’ is PLN 29 113.16; ‘The total amount to be paid’ is

PLN 62 573.16. The monthly instalment to be paid by the defendant was PLN 1 042 (around EUR 221).

- 5 At the time the agreement was concluded, the defendant was a pensioner, but she was also employed part-time. In the credit agreement, the defendant stated that her average monthly net income was PLN 1 755.62 (approximately EUR 373) and she was also still repaying another loan, the instalment of which was PLN 320 (approximately EUR 68).
- 6 The credit agreement did not lay down a specific method for guaranteeing repayment of the credit.
- 7 As a result of the defendant being in arrears, the creditor brought an action for payment. The creditor was later replaced by the applicant, which acquired the claim under a claim assignment agreement.
- 8 The court of first instance upheld the action in its entirety and issued an order for payment.
- 9 The defendant lodged an objection to that order, in which she requested that enforcement be stayed or that the claim covered by the order for payment be paid in instalments.
- 10 In the course of the proceedings, the defendant repaid part of the credit totalling PLN 25 928 (approximately EUR 5 516).

The essential arguments of the parties in the main proceedings

- 11 At the hearing on 16 June 2020, the defendant clarified the pleas, alleging that the creditor had failed to assess her creditworthiness at the time the agreement was concluded. In addition, she raised other pleas concerning the assessment of the terms of the agreement from the point of view of their unfairness.
- 12 The applicant withdrew the action in part in so far as concerns the amounts repaid by the defendant during the proceedings. As to the remainder, the applicant maintains the claim for payment of the principal, plus default interest.

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

- 13 In the light of Article 8(1) of Directive 2008/48 and recital 28 thereof, the creditor is required, before the conclusion of the credit agreement, to assess the consumer's creditworthiness, in particular on the basis of sufficient information obtained from the consumer. That obligation, which is also expressed in Article 9 of the Polish Law on consumer credit, helps to meet the general objectives of the directive as regards ensuring that all consumers in the European Union enjoy a high and equivalent level of protection of their interests and facilitating the emergence of a well-functioning internal market in consumer credit.

- 14 Other burdens on creditors, in particular the obligations to provide information set out in Articles 5 and 10 of that directive, also help meet those objectives.
- 15 In the light of the case-law of the Court of Justice, both the assessment of the borrower's creditworthiness and obligations to provide information, before and at the time of concluding an agreement, are of fundamental importance for a consumer (see judgments of the Court of Justice of 21 April 2019, *Radlinger*, C-377/14, ECLI:EU:C:2016:283, paragraphs 61 and 64; of 10 June 2021, *Ultimo Portofolio Investment (Luxembourg)*, C-303/20, ECLI:EU:C:2021:479, paragraph 29; and of 5 March 2020, *OPR-Finance s. r. o.*, C-679/18, ECLI:EU:C:2020:167, paragraph 21).
- 16 As is clear from the evidence gathered, the bank failed to fulfil its obligation to assess creditworthiness. However, in the view of the referring court the defendant did not meet the conditions for taking out a loan as she was not creditworthy. A comparison of the consumer's total monthly income with the burden arising from the loan instalment leads to the conclusion that the repayment of the monthly instalment puts the consumer in a situation where her basic, existential needs are at risk. In that respect, the defendant's unfavourable financial situation was not temporary in nature.
- 17 Under Article 23 of Directive 2008/48, Member States are to lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to that directive and to take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.
- 18 When implementing Directive 2008/48, the Polish legislature did not introduce appropriate penalties for infringement of the obligation to examine the creditworthiness of a consumer wishing to take out consumer credit. As is clear from the judgment of the Court of Justice in Case C-303/20, the penalties for infringement of the obligation to examine the creditworthiness of a consumer set out in [Article] 138c of the Kodeks Wykroczeń (Code relating to minor offences) are not adequate. Those shortcomings apply to both the Law on consumer credit and the Law on banking.
- 19 The Polish civil law system provides for a number of solutions which make it possible for penalties to be applied for infringement of private law. One such solution is Article 45 of the Law on consumer credit which provides for a 'free credit penalty', inter alia, for an infringement by the creditor of its obligation to provide the consumer with information. However, that provision applies to the infringements strictly listed therein, which do not include an infringement of the obligation to examine the consumer's creditworthiness.
- 20 To date, the prevailing view in the case-law of Polish courts has been that an infringement of the obligation to examine creditworthiness under Article 9 of the Law on consumer credit does not provide grounds for drawing any legal

consequences affecting the contractual relationship between the parties. However, in the light of the case-law of the Court of Justice to date, such an assumption cannot be permitted.

- 21 Since Article 45 of the Law on consumer credit does not directly address the issue of infringement of the obligation to examine the consumer's creditworthiness, it is necessary, first of all, to look for other provisions which permit a solution in accordance with the objectives pursued by Directive 2008/48. Such a rule could be Article 58 of the Civil Code, which provides for the most severe penalty, namely the penalty of declaring a legal act invalid. The referring court takes the view that that provision could also be applied in the context of infringement of the obligation to assess the consumer's creditworthiness.
- 22 Although the choice of the system of penalties remains within the discretion of the Member States, the system chosen should ensure that the general objectives of Directive 2008/48, as referred to in paragraph 13 above, are achieved.
- 23 The referring court is therefore uncertain whether, if the obligations imposed on the trader and designed to achieve those objectives, as laid down in Articles 8 and 10 of Directive 2008/48, were to be equivalent, that means that the penalties applied by the Member State concerned, to which Article 23 of Directive 2008/48 refers, may be different for different infringements.
- 24 Since, in paragraph 35 of its judgment in Case C-303/20, the Court of Justice indicated the scope of the court's discretion in the application and, in particular, in the choice of a measure appropriate to the seriousness of the infringement of an obligation found to have occurred, must it therefore be concluded that that measure must be equivalent to the penalties laid down for infringements of other obligations arising from legislation adopted in the implementation of Directive 2008/48?
- 25 If there has been an infringement of the obligation under Article 8 of Directive 2008/48 (Article 9 of the Law on consumer credit or Article 70 of the Law on banking), may the penalty applied be more or less severe than that laid down for infringements of, for example, the obligations to provide information set out in Article 10 of that directive? Is the discretion to assess the equivalence of the penalty provided for by national law left exclusively to national law, or is it a consequence of the assessment of the equivalence of the obligations laid down in the directive?
- 26 The above doubts arise in the present case. If the penalty laid down in Article 58 of the Civil Code is applied, the agreement becomes invalid and therefore all the terms thereof cease to be binding on the parties. On the other hand, the penalty laid down in Article 45 of the Law on consumer credit does not give rise to invalidity, but does allow the consumer not to be charged interest and other costs of the loan.

- 27 As is generally accepted in practice, however, the penalty of free credit does not include penalties concerning contractual interest for a delay in performance. This means that where Article 45 of the Law on consumer credit applies, the interest for a delay in performance will be determined on the basis of the agreement (and will amount in the present case to 24.5% per annum), whilst in the case of the penalty under Article 58 of the Law on consumer credit, the level of the interest for delay will be as provided for by law (the interest will then amount to 12.25% per annum).
- 28 The referring court notes in that regard that the case-law of the Court of Justice to date has not called into question the effectiveness, proportionality or dissuasive effect of any of those penalties according to the criteria laid down in Article 23 of Directive 2008/48.
- 29 It must, however, be emphasised that the cases examined by the Court of Justice relating to the application of those penalties concern the national legal systems of the various Member States, and the Member States exercise their autonomy in that regard. However, is such a differentiation in penalties in the light of Article 23 of Directive 2008/48 to be regarded as permissible in the national law of a single State, where the obligations under that directive must be assessed as equivalent, that is to say of similar rank and pursuing the same objectives?
- 30 In order to ensure that penalties are consistent with the criteria set out in Article 23 of Directive 2008/48, the referring court must take into account the fact that the law as it now stands is neither sufficiently precise nor clear and that the ability of the average consumer, who does not have the relevant legal knowledge, to assess it is, at the very least, inadequate.
- 31 The coexistence of multiple penalties in national law not only renders unclear and imprecise the legal bases for asserting rights under EU law, leading to a reduction in their effectiveness (*effet utile*), but also, crucially, introduces a distinction in terms of the proportionality of penalties for failure to comply with obligations under a single EU act, namely Directive 2008/48.
- 32 By obtaining an answer from the Court of Justice, the referring court will learn whether the variety of penalties (in the sense described above) is permissible where obligations under Directive 2008/48 are infringed. However, that court wishes to emphasise that it is not seeking an indication as to which provision of national law should be applied, but – if the Court of Justice considers it appropriate – an interpretation of the provisions of EU law to the extent set out above.
- 33 The Court of Justice has not yet ruled on the issues raised in the question referred for a preliminary ruling. The answer to that question will be of direct relevance to the outcome of the present case, that is to say, to the assessment of the appropriate (taking into account the criteria in Article 23 of Directive 2008/48) consequences of a bank's failure to comply with its obligation to assess a consumer's

creditworthiness, in particular with regard to the assessment of the effectiveness and proportionality of the penalties and their dissuasive effect.

WORKING DOCUMENT