

Case C-409/23**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:**

4 July 2023

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

30 June 2023

Applicant:

Arvato Finance BV

Defendant:

MI

Subject matter of the main proceedings

The dispute in the main proceedings concerns an unpaid debt in the context of an online purchase in which use has been made of a ‘buy now, pay later’ (BNPL) service.

Subject matter and legal basis of the request

This request for a preliminary ruling under Article 267 TFEU concerns claims on the basis of a BNPL service and the question how such claims must be assessed in the light 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 (‘the Consumer Credit Directive’).

Questions referred for a preliminary ruling

1. Do default interest and out-of-court costs belong to the total cost of the credit to the consumer within the meaning of Article 3(g) of the Consumer

Credit Directive and must they be taken into account in the determination of whether there is a credit agreement where the credit is granted ‘free of interest and without any other charges’ or one under the terms of which ‘only insignificant charges are payable’ within the meaning of Article 2(2)(f) of the Consumer Credit Directive?

2. Does the answer to Question 1 differ if the default interest and out-of-court costs are payable by law or stipulated by contract? If the default interest and out-of-court costs are stipulated, does it make any difference if that interest and those costs are higher than what would be payable by law in the absence of the stipulation?

Provisions of EU 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, Articles 2, 3, 5, 10 and 19.

Provisions of national law relied on

Burgerlijk Wetboek (Netherlands Civil Code; ‘the BW’), Articles 6:96 (material damage), 7:57-73 (implementation of Directive 2008/48).

Besluit van 16 oktober 1991 (Decree of 16 October 1991) (Besluit kredietvergoeding (Decree on the credit fee)).

Wet van 28 september 2006, houdende regels met betrekking tot de financiële markten en het toezicht daarop [Wet op het financieel toezicht] (Law of 28 September 2006 containing rules relating to the financial markets and their supervision (Law on financial supervision; ‘the Wft’)), Articles 1:20 (exclusion from scope) and 4:32 et seq. (exclusion from scope).

Besluit van 12 oktober 2006, houdende regels met betrekking tot het gedragstoezicht op financiële ondernemingen (Besluit gedragstoezicht financiële ondernemingen Wft (Law of 12 October 2006 containing rules relating to the conduct of business supervision of financial undertakings (Decree on the conduct of business supervision of financial undertakings under the Wft)), Article 1 (definition of ‘total cost of the credit to the consumer’).

Besluit van 15 november 2006 (Vrijstellingsregeling Wft (Decree of 15 November 2006 (Wft exemption regulation)), Articles 3c and 43 (providing payment deferrals free of charge is exempt from the Wft authorisation requirement).

Besluit van 27 maart 2012 (Besluit vergoeding voor buitengerechtelijke incassokosten (Decree of 27 March 2012 (Decree on compensation for out-of-court collection costs)).

Succinct presentation of the facts and procedure in the main proceedings

- 1 Arvato is the provider of the BNPL service AfterPay. During an online purchase, the customer is presented with AfterPay as one of the payment methods by the online store in question.
- 2 MI, as a consumer, purchased three products from an online store on or around 27 February 2019. She used the payment method AfterPay, in return for payment of a payment fee of EUR 1.
- 3 Arvato's payment terms state, inter alia, that:
 - after acceptance by AfterPay, the customer can effect payment to AfterPay only with discharging effect;
 - the period for payment is 14 days, unless agreed otherwise;
 - if the customer fails to pay within that 14-day period, the amount due becomes payable directly and without further notice;
 - failure to pay within that period leads successively to 1) a reminder, 2) a second written reminder and an additional administrative charge, and 3) a summons and a further additional administrative charge;
 - statutory interest is payable from the date on which the customer defaults, as well as the administrative charges provided for by the wet buitengerechtelijke incassokosten (Law on out-of-court collection costs) (6:96 of the BW).
- 4 On 27 February 2019, Arvato sent MI a payment statement by email. The payment statement shows a total amount including VAT of EUR 38.97, of which EUR 1 corresponds to the payment fee, and a due date of 13 March 2019.
- 5 After sending several payment reminders, on 6 December 2019 Arvato sent MI a demand for payment of the products ordered and the payment fee.
- 6 Arvato claims before the Kantonrechter te Arnhem (Cantonal Court, Arnhem) that MI should be ordered to pay the sum of EUR 80.20 (corresponding to the amount due plus collection costs), plus statutory interest on EUR 38.97 from 9 October 2020. Arvato reduced its claim by waiving the payment fee.
- 7 The Kantonrechter referred 20 questions for a preliminary ruling to the Hoge Raad (Supreme Court), the referring court, which in turn referred two questions to the Court of Justice for a preliminary ruling.

The essential arguments of the parties in the main proceedings

- 8 The request for a preliminary ruling contains no information in this regard.

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

- 9 Default interest and out-of-court costs refer to interest and compensation for the costs of obtaining satisfaction out of court that become payable – either under the credit agreement or by law – if the borrower defaults on his or her payment obligation under the credit agreement.
- 10 Under Article 6:96(2)(c) of the BW, debtors who are required to pay compensation by law are also required to reimburse the reasonable costs of obtaining satisfaction out of court. If the debtor is a natural person who is not acting in the course of a professional or business activity, Article 6:96(5) of the BW does not permit compensation to be charged for those costs that is higher than that resulting from the Decree on compensation for out-of-court collection costs. This compensation amounts to a percentage of the principal sum, and the higher the principal sum, the lower the percentage; the compensation may be at least EUR 40 and at most EUR 6 775.
- 11 In the case of credit agreements to which the Consumer Credit Directive applies and which therefore do not fall within the exception provided for in Article 2(2)(f) of the Consumer Credit Directive (Article 7:58(2)(e) of the BW), Article 7:76(4) of the BW prohibits the creditor from stipulating or charging a higher fee for the credit than that provided for by the Decree on the credit fee. This maximum permitted credit fee relates also to default interest and out-of-court costs. The creditor cannot therefore claim, on the basis of the Decree on compensation for out-of-court collection costs, compensation for out-of-court collection costs in excess of the maximum permitted credit fee.
- 12 It cannot be inferred from the Consumer Credit Directive or from the case-law of the Court of Justice on that directive *inter alia* whether the questions as to whether default interest and out-of-court costs are to be regarded as part of the cost of the credit and whether they must be taken into account in determining whether there is a credit agreement where the credit is granted ‘free of interest and without any other charges’ or one under the terms of which ‘only insignificant charges are payable’ should be answered in the affirmative or in the negative. Aside from points of reference in favour of an affirmative answer, there are also considerations which militate in favour the opposite conclusion.
- 13 The following two factors suggest that Question 1 should be answered in the affirmative:
 - I) According to the settled case-law of the Court, Article 3(g) of the Consumer Credit Directive contains a broad definition of the concept of ‘total cost of the credit to the consumer’, without any limitation concerning the type or justification of costs which may be imposed on the consumer in the context of the credit agreement (see, for example, Case C-84/19).
 - II) It is apparent from the pre-contractual information that must be provided under Article 5 of the Consumer Credit Directive that that directive assumes

that, when concluding the credit agreement, default interest and charges payable for default may be included among the ‘costs ... which the consumer’ (in the event of late payment) ‘is required to pay in connection with the credit agreement and which are known to the creditor’, within the meaning of Article 3(g) of that directive.

- 14 The following three factors suggest that Question 1 should be answered in the negative:
- I) The exception relating to ‘credit agreements where the credit is granted free of interest and without any other charges’ in Article 2(2)(f) of the Consumer Credit Directive would be rendered devoid of purpose if the interest and charges covered by that exception included the interest and out-of-court costs already payable by law in the event of default.
 - II) An answer in the affirmative could have the consequence that a supplier of goods which stipulates, in its general terms and conditions, that default interest and out-of-court costs are payable falls within the scope of the Consumer Credit Directive if it grants the consumer a payment period on the invoice.
 - III) There is reason for default charges to be included in the ‘total cost of the credit to the consumer’ only if the conditions under which the credit was granted and the other circumstances of the case provide grounds for assuming that the liability for default charges forms part of the creditor’s business model.
- 15 If Question 1 must be answered in the affirmative and, all the more, if Question 2 must be answered in the negative, credit agreements which are concluded with consumers by the providers of BNPL services are not, as a general rule, exempted from the application of the Consumer Credit Directive, as implemented in Section 1 of Title 7.2A of the BW.
- 16 An answer to those questions is therefore necessary in order to determine which costs Arvato may claim from MI under national law.