

Case C-88/24

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:

2 February 2024

Referring court:

Juzgado de Primera Instancia n.º 1 de Fuenlabrada (Spain)

Date of the decision to refer:

31 January 2024

Applicant:

A.B.D.

Defendant:

Bankinter Consumer Finance, E.F.C., SA

Subject matter of the main proceedings

‘Revolving credit’ card – Unfairness – Assessment of the unfairness – Consequences of a possible declaration of nullity

Subject matter and legal basis of the request

Article 267 TFEU – Request for a preliminary ruling on interpretation – Consequences of the nullity of an unfair term – Additional compensation for the consumer – Penalties – Proportionality of the penalties – Unfair commercial practices – Assessment of the consumer’s creditworthiness – Annual percentage rate (APR) – Omission of the APR or failure to state the additional assumptions – Consequences

Questions referred for a preliminary ruling

One. Do Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts preclude a judicial interpretation of

national law according to which, the credit agreement having been declared void, the credit institution, in addition to repayment of the capital transferred and the payment of default interest at the statutory rate from the date on which notice is served, is entitled to claim from the consumer interest at the statutory rate on the credit amounts drawn down by the consumer and from when those amounts were drawn down?

Two. Do Article 6(1) and Article 7(1) of Directive 93/13 preclude a judicial interpretation of a national law extending the unfairness assessment to the adequacy of the price, according to which, the credit agreement having been declared void, the consumer is not able to seek compensation from the credit institution beyond reimbursement of any amount in excess of the capital provided, taking into account the total received by the creditor?

Three. Where a term or the agreement is declared void on the basis that it is unfair or because the creditor has not complied with its obligations, is it a proportionate penalty for the purposes of Directive 93/13, and also Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit and 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, to require the creditor to compensate the consumer with an amount which is in no event less than the statutory rate of interest plus five percentage points, or that of the agreement, where that is higher than the statutory rate, also plus five percentage points?

Four. Do Articles 8 and 23 of Directive 2008/48 preclude an interpretation of national law according to which, where the creditor fails to comply with its obligation to assess the creditworthiness of the consumer, the mere fact that administrative penalties are provided for excludes the possibility of declaring the credit agreement void or imposing some other civil consequence?

Five. In accordance with Article 3(1) and Article 4(1) of Directive 93/13, for the purposes of assessing the unfairness of the extended credit option in respect of a 'revolving credit' card, may the fact that the seller or supplier has not offered the consumer the option of payment [in full] at the end of the month, which is also available in the product range, or that it has directed the consumer towards choosing the extended credit option, putting the interests of the seller or supplier before the best interests of the consumer, constitute one of the elements on which the assessment is based?

Six. In accordance with Article 4(2) of Directive 93/13, for the purposes of assessing whether an open-end credit agreement is clear and comprehensible, may the fact that the calculation of the annual percentage rate omits the additional assumptions relied on in order to calculate it, or that they are not mentioned in the agreement itself, constitute one of the elements on which the assessment is based?

Seven. Do Article 6(1) and Article 7(1) of Directive 93/13, together with Article 15 of Directive 87/102 and Article 23 of Directive 2008/48, preclude a national provision according to which, where the contractual information does not include the annual percentage rate or the additional assumptions used to calculate it, the credit institution may claim interest from the consumer at the statutory rate and within the agreed timescales?

Provisions of European Union law relied on

- Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as amended by Council Directive 90/88/ECC, Article 1a(7) and Article 15.
- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, as amended by Directive 2011/83/EU of the European Parliament and of the Council, tenth and twenty-fourth recitals, Article 3(1), Article 4(1) and (2), Article 6(1), Article 7(1), Article 8, the first indent of Article 8a(1), and Article 23.
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 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 ('Unfair Commercial Practices Directive'), as amended by Directive (EU) 2019/2161 of the European Parliament and of the Council, Article 6(1), Article 7(1) and Article 11a(1).
- 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, as amended by Commission Directive 2011/90/EU, recitals 31 and 43, Article 5(1)(g), Article 5(5), Article 8, Article 10(2) and (4), Article 13, the first paragraph of Article 19(5), Article 23, Article 30(2) and Annex I, Part II, point (e).
- Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, as amended by Directive (EU) 2023/2673, Article 16e.
- Regulation (EU) 2021/379 of the European Central Bank of 22 January 2021 on the balance sheet items of credit institutions and of the monetary financial institutions sector (recast) (ECB/2021/2), Annex II, Part 2, instrument categories table, asset categories, point 2 (Loans), sub-point 1(b) and (c).

- Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC, recitals 35, 41, and 73, Article 9(2)(g), Article 18 and Article 31.

Provisions of national law relied on

- Código Civil (Spanish Civil Code; ‘the Civil Code’), Article 6(3), Article 1303 and Article 1896, first paragraph.
- Ley de 23 de julio de 1908 sobre nulidad de los contratos de préstamos usurarios (Law of 23 July 1908 on the nullity of predatory loan agreements), Article 3.
- Ley 3/1991, de 10 de enero, de Competencia Desleal (Law 3/1991 of 10 January on unfair competition), Article 7.
- Ley 7/1995, de 23 de marzo, de Crédito al Consumo (Law 7/1995 of 23 March on consumer credit), Article 13.
- Ley 16/2011, de 24 de junio, de contratos de crédito al consumo (Law 16/2011 of 24 June on consumer credit agreements), Article 10(3)(g), Article 14(2), Article 16(2)(g), Article 21(2), Articles 25 and 34 and Annex I.
- Ley 2/2011, de 4 de marzo, de Economía Sostenible (Law 2/2011 of 4 March on the sustainable economy), Article 29.
- Orden ECC/159/2013, de 6 de febrero, por la que se modifica la parte II del anexo I de la Ley 16/2011, de 24 de junio, de contratos de crédito al consumo (Order ECC/159/2013 of 6 February amending Part II of Annex I to Law 16/2011 of 24 June on consumer credit agreements).
- Circular 8/1990, de 7 de septiembre, del Banco de España (Banco de España [Central Bank, Spain] Circular 8/1990 of 7 September).

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 17 May 2003, the applicant, A.B.D., entered into a credit card agreement with the defendant, the credit institution Bankinter.
- 2 That card (‘the initial card’) had the following characteristics:
 - (a) It was an ‘extended credit’ card (extended card debt), according to the table of categories appearing in Regulation (EU) 2021/379, Annex II, Part 2, instrument categories table, asset categories, point 2 (Loans), sub-point 1(b) (in particular, extended credit). The monthly payment was 5% of the amount drawn down [balance], with a minimum of EUR 30.05, although the applicant could change the

form of payment by telephone to another percentage (higher than 5%) or another fixed amount.

(b) It was an ‘open-end credit’ card.

(c) It was a ‘revolving credit’ card, according to Regulation (EU) 2021/379, Annex II, Part 2, instrument categories table, asset categories, point 2 (Loans), sub-point 1(c) (revolving loans).

(d) The credit limit of the card was at the discretion of the credit institution. Moreover, it had a monthly nominal interest rate (NIR) of 1.52% and an annual percentage rate (APR) of 19.84%. The agreement does not state on what additional assumptions the calculation of the APR in an open-end agreement is based.

- 3 Nor has the defendant shown that it had previously assessed the creditworthiness of the applicant. The agreement only records that the applicant is a pensioner and in receipt of an invalidity pension of EUR 468, that she is married under the rules for separate ownership of property during marriage, that she has a single home of which she is the owner and that she has two further debit/credit cards.
- 4 Furthermore, the Reglamento de las Tarjetas de Crédito Bankinter (Bankinter Credit Card Regulations) stipulated that there were two types of card, one to be paid off at the end of the month and the other providing extended credit (the initial card was of the latter type). It may be deduced from the claim – and the defendant has not provided any evidence to the contrary – that the defendant did not offer the applicant the option of payment [in full] at the end of the month.
- 5 On 18 March 2021, the applicant entered into a new, open-end and revolving, credit card agreement (‘the second card’), with a credit limit of EUR 6 200 and providing extended credit. The NIR was 16.38% and the APR was 17.67%. The applicant took out the second card online. The online interface gave less prominence to the option of payment at the end of the month and more prominence to the payment option associated with the initial card or the option of extended credit on new terms. The applicant chose new terms, with a fixed payment of EUR 100 and a minimum payment of 3% of the balance. The applicant argues that the legal relationship is the same and that the second card is simply a modification of the initial card.
- 6 On 17 March 2023, the applicant brought a claim against the defendant before the Juzgado de Primera Instancia n.º 1 de Fuenlabrada (Court of First Instance No 1, Fuenlabrada, Spain).

The essential arguments of the parties in the main proceedings

- 7 The applicant is principally seeking a declaration of nullity in respect of the clause on non-penalty interest and the form of payment (‘system of repayment’) on the

basis that it is unfair within the meaning of Directive 93/13/EEC. She maintains that the terms of the agreement are illegible and, moreover, that they are not clear and comprehensible (they are not ‘transparent’). Secondly, she is seeking a declaration of nullity in respect of the clause on late payment fees, also on the basis that it is illegible or that it is unfair. In both cases, as a consequence of the nullity [of those clauses], she is seeking the application of Article 1303 of the Civil Code.

- 8 The defendant disputes the applicant’s claims.

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

Preliminary considerations

- 9 Spanish courts may not be applying national law in a manner consistent with Directive 93/13/EEC and with the directives on consumer credit agreements (Directive 87/102/EEC, Directive 2008/48/EC and, still in its transposition period, Directive (EU) 2023/2225).
- 10 With regard to the applicant’s principal claim, in which a declaration of nullity in respect of the cards is sought on the basis of an infringement of Directive 93/13/EEC, there is deep division within the Audiencias Provinciales (Provincial Courts, Spain) – even between the different divisions of the Audiencia Provincial de Madrid (Provincial Court, Madrid, Spain) specialising in credit agreements containing unfair terms – regarding whether, as a general rule, the revolving system of repayment is clear and comprehensible or whether, conversely, it is not, or whether a case-by-case analysis would be required, taking into account all of the circumstances.

First and second questions referred. Rules relating to restitution under Directive 93/13

- 11 The ruling in the judgment of the Court of Justice of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)* (C-520/21, ‘the judgment in *Bank M.*’, EU:C:2023:478), states as follows:

‘Article 6(1) and Article 7(1) of [Directive 93/13/EEC] must be interpreted as:

- not precluding a judicial interpretation of national law according to which the consumer has the right to seek compensation from the credit institution going beyond reimbursement of the monthly instalments paid and the expenses paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served, provided that the objectives of Directive 93/13 and the principle of proportionality are observed and,

- precluding a judicial interpretation of national law according to which the credit institution is entitled to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served.’
- 12 In Spanish case-law, there is an absence of unanimity as regards which national provision should apply when a declaration of nullity is made in respect of a revolving credit agreement. The different provisions which could apply are the following:
- (a) Article 1303 of the Civil Code, which states: ‘When an obligation has been declared void, the contracting parties must restore to one another those things that formed the subject matter of the contract, together with the profits derived therefrom, and the price together with interest, subject to the provisions of the following articles.’
 - (b) Article 3 of the Law of 23 July 1908 on the nullity of predatory loan agreements (‘the Predatory Lending Law’), which provides: ‘When, in accordance with this law, an agreement has been declared void, the borrower shall be obliged to hand over only the sum received; and where the borrower has repaid part of that sum and the interest due, the lender shall, taking into account the total received, return to the borrower any amount in excess of the capital provided.’ With regard to this law, it should be borne in mind that it is a national law intended to prevent predatory lending, which extends the unfairness assessment to the adequacy of the price or remuneration, within the meaning of Article 8a(1), first indent, of Directive 93/13.
 - (c) Article 1896, first paragraph, of the Civil Code, which states: ‘Anyone accepting an undue payment, where it is the result of bad faith, must pay the statutory interest, in the case of capital sums, or the profits received or which should have been received, where the thing received [by way of undue payment] produces them.’
- 13 The case-law in favour of declaring agreements void on the basis that the revolving payment option lacks transparency holds that the relationship should be settled in accordance with Article 1303 of the Civil Code (e.g. judgment 466/2023 of 26 October 2023 of the Madrid Provincial Court, paragraph 25 *bis*, ES:APM:2023:16355). The application of Article 1303 of the Civil Code has not been problematic when declaring particular terms of the loan to be unfair, without annulling the agreement in its entirety. However, when the agreement is annulled in its entirety, Article 1303 implies reciprocal restitution whereby not only does the seller or supplier [creditor] pay interest on the payments and expenses, but the borrower would also be obliged to pay interest on the amounts drawn down as well. The obligations performed and the interest paid by both contracting parties are offset against each other in the sum required to achieve restitution (for example, judgment 356/2023 of 8 March 2023 of the Tribunal Supremo (Supreme

Court, Spain), ES:TS:2023:1097). However, reciprocal *restitutio in integrum* is not consistent with the case-law of the judgment in *Bank M*.

- 14 For its part, Article 3 of the Predatory Lending Law is limited to transforming the loan into an interest-free loan and does not provide for the additional compensation to which the consumer is entitled. The case-law applies the article literally, without awarding other sums (judgment 20/2024 of 10 January 2024 of the Supreme Court, ES:TS:2024:19).
- 15 Furthermore, in Spanish law, the rules relating to incidental restitution (interest) attach importance to bad faith on the part of the person receiving the undue payment, specifically in Article 1896, first paragraph, of the Civil Code, within the section headed ‘Charging of undue amounts’. In principle, the Supreme Court holds that Article 1303 of the Civil Code is the provision governing restitution in the case of reciprocal performance of obligations, but where the restitution of payments received by third parties by reason of the annulled clause (for example, notarial or registration expenses) is sought, it has also ruled that ‘in order to give effect to the oft-mentioned Article 6(1) of the Directive, as regards the interest which the sums due to the consumer must accrue, Article 1896 of the Civil Code is similarly applicable, since determining the term to be unfair is comparable to finding bad faith on the part of the person setting the terms of the agreement’ (judgment 725/2018 of 19 December 2018 of the Supreme Court, ES:TS:2018:4236). Another strand of case-law (judgment 842/2011 of 25 November of the Supreme Court, ES:TS:2011:7981) held directly that nullity as a result of the contravention of consumer legislation ‘makes what has been paid by the consumers undue and returnable’.
- 16 In the opinion of the referring court, Article 1303 of the Civil Code is an excessively simple provision on settlement (‘technical lacuna’). Consequently, it must – and especially here – be supplemented with the provisions on the payment of undue amounts, because those provisions, by distinguishing between good and bad faith on the part of the person receiving the payment, allow the seller or supplier responsible for the nullity of the clause, or of the agreement, to be dealt with more appropriately, limiting its right to restitution. In fact, precisely under the heading ‘Undue charging’, Article 25 of Law 16/2011 of 24 June 2011 on consumer credit agreements (‘Law 16/2011’), which is a specific law and subsequent to the Civil Code and the Predatory Lending Law, provides for the consumer’s right to a minimum amount of compensation.
- 17 In that context, the Court of Justice has found that it is for the Member States, by means of their national legislation, to define the detailed rules under which the unfairness of a contractual clause is established and the actual legal effects of that finding are produced. However, that finding must allow the restoration of the legal and factual situation that the consumer concerned would have been in if that unfair term had not existed, by, inter alia, **creating a right to restitution of advantages wrongly obtained**, to the consumer’s detriment, **by the seller or supplier concerned** on the basis of that unfair term. Such regulation by national

law of the protection guaranteed to consumers by Directive 93/13 may not adversely affect the substance of that protection (judgment of 30 June 2022, *Profi Credit Bulgaria (Offsetting ex officio in the event of an unfair term)*, C-170/21, EU:C:2022:518, paragraph 43).

- 18 Moreover, according to the referring court, an interpretation *a contrario sensu* of Article 1896, first paragraph, of the Civil Code implies that a culpable seller or supplier should be deprived of the possibility of claiming interest from the consumer. Such a solution is aligned with the European proposals for the harmonisation of restitution in relation to illegal contracts (Article 15:104 read together with Article 15:102 of the Principles of European Contract Law) and is consistent with the case-law of the Court of Justice.

Third question referred. Consumer credit directives and the proportionality of the penalties

- 19 In Spanish law, Article 25 ('Undue charging') of Law 16/2011 provides: '1. Any amount unduly charged under a credit agreement shall immediately begin to accrue interest at the statutory rate. Where the contractual rate of interest is higher than the statutory rate, it shall immediately begin to accrue the former. 2. Where the undue amount has been charged as a result of fraud or negligence on the part of the creditor, the consumer shall be entitled to compensation for the damage caused, which in no event shall be less than the statutory rate of interest plus five [percentage] points, or that of the contract, where that is higher than the statutory rate, also plus five [percentage] points.' Article 13 of Law 7/1995 of 23 March 1995 on consumer credit ('Law 7/1995'), the predecessor to Law 16/2011, had practically identical wording.
- 20 These provisions are more stringent in relation to the creditor, within the meaning of Article 15 of Directive 87/102, than the Predatory Lending Law or the Civil Code. They are also more stringent provisions within the meaning of Directive 93/13.
- 21 Also, as the Court has already noted, the national court must, so far as possible, apply its national law in such a way as to draw all the consequences which, under national law, result from a finding that the term at issue is unfair, in order to achieve the result laid down in Article 6(1) of the directive, namely that the consumer is not bound by an unfair term (judgment of 30 May 2013, *Jörös*, C-397/11, EU:C:2013:340, paragraphs 52 and 53). Furthermore, Article 10(2) of Directive 2008/48/EC must be interpreted as imposing an obligation on a national court hearing a dispute concerning claims arising from a credit agreement, within the meaning of that directive, to examine **of its own motion** whether the obligation to provide information laid down in that provision has been complied with and to establish the consequences which follow under national law from any infringement of that obligation, provided that the penalties satisfy the requirements of Article 23 of that directive (judgment of 7 November 2019, *Profi Credit Polska*, C-419/18 and C-483/18, EU:C:2019:930, paragraph 69).

- 22 The Spanish courts, however, have been reluctant to apply Article 13 of Law 7/1995 and Article 25 of Law 16/2011. Together with the application of the Civil Code out of inertia, that seems to be influenced by the apparent disproportion of the penalty for the creditor, especially if it is held to have acted in bad faith. Certainly, the wording of Law 16/2011 comes from Law 7/1995, which was adopted in a context of higher interest rates. However, in other spheres, EU law provides for even more costly penalties.
- 23 That being so, the questions arises of whether applying those provisions is consistent with the principle of proportionality.

Fourth question referred. Civil penalties for failing to assess creditworthiness

- 24 The Court of Justice has ruled that Articles 8 and 23 of Directive 2008/48 must be interpreted as imposing an obligation on a national court to examine, **of its own motion**, whether there has been a failure to comply with the creditor's pre-contractual obligation to assess the consumer's creditworthiness, provided for in Article 8 of that directive, and to draw the consequences arising under national law of a failure to comply with that obligation, on condition that they satisfy the requirements of Article 23 (judgment of 5 March 2020, *OPR-Finance*, C-679/18, EU:C:2020:167, paragraph 46).
- 25 In the present dispute, while the obligation to assess [the consumer's] creditworthiness did not exist as such on the date when the initial card was taken out, EU and national legislation (for 'revolving credit' cards as well) provide for a dynamic obligation which is renewed prior to significantly increasing the total amount of credit. Over the course of the intervening years, the credit limit of the initial card has changed significantly, but the defendant has not shown that it carried out a creditworthiness assessment. Moreover, it is doubtful that the cards were suitable for the applicant, given her personal and financial situation.
- 26 For infringements of the duty to assess creditworthiness, Spanish law provides for administrative penalties (Article 34 of Law 16/2011), which, to date, are purely theoretical and ineffective, but it does not provide for civil penalties, at least not expressly. However, failure to comply with the obligation to assess creditworthiness must entail civil penalties. According to the Court of Justice, for a penalty to be effective and dissuasive, those responsible must be deprived of the economic benefits derived from their infringement. Also, the penalty is not capable of ensuring, in a sufficiently effective manner, the protection of consumers against the risks of over-indebtedness and insolvency, sought by Directive 2008/48, if it has no effect on the situation of a consumer to whom credit was granted in breach of Article 8 of that directive [judgment of 10 June 2021, *Ultimo Portfolio Investment (Luxembourg)*, C-303/20, EU:C:2021:479, paragraph 32].
- 27 Moreover, according to the Court of Justice, Articles 8 and 23 of Directive 2008/48 must be interpreted as not precluding, where the creditor has

failed to fulfil its obligation to examine the consumer's creditworthiness, that creditor from being penalised, in accordance with national law, by the consumer credit agreement being void and its entitlement to payment of the agreed interest being forfeited, even though that agreement has been fully performed by the parties and the consumer has not suffered any harmful consequences as a result of that failure to fulfil the obligation (judgment of 11 January 2024, *Nárokuj*, C-755/22, EU:C:2024:10, paragraph 52).

- 28 In that regard, it appears that Spanish law does not comply with Directive 2008/48, because it does not provide for civil consequences for failing to assess creditworthiness.

Fifth question referred. Unfair commercial practices

- 29 The defendant has not shown that, when the initial card was taken out, it offered the applicant a card of the type to be paid off at the end of the month. It appears that it only offered her the type providing extended credit. Strictly speaking, Directive 2008/48 does not require different options for the repayment of revolving credit to be offered. It only requires the statement specified in Article 5(5) and Article 10(4) of that directive, and Directive 2023/2225, which does require a range of options to be offered, is still in its transposition period. All the same, the defendant's practice could be unfair on the basis that it is misleading. In fact, some legal systems (for example, the French legal system; see Article L 312 62 of the Code de la consommation (Consumer Code)) require an alternative amortised loan to be offered as well. In Spain, the problem has already been noted: 'institutions should not, by default, choose the minimum amount stipulated in the agreement for repayment of the credit' (Banco de España, *Proyecto de Guía de transparencia del crédito revolving 2023* (Draft guide to transparency in relation to revolving credit 2023), accessible at <https://www.bde.es/wbe/es/entidades-profesionales/operativa-gestiones/consultas-publicas/consultas-publicas-banco-espana/>).
- 30 Also, even though Directive (EU) 2023/2673 is not applicable to the present case, when the second card was taken out at a distance, the design choices for the interface could be considered 'exploitative' within the meaning of recital 41 of that directive, because they direct the consumer to choices or actions that benefit the trader, but which may not be in the consumer's interests, by presenting choices in a non-neutral manner, such as giving more prominence to certain choices through visual, auditory, or other components, when asking the consumer for a decision.
- 31 Furthermore, the Court of Justice has already ruled that a finding that a commercial practice is unfair, within the meaning of Directive 2005/29, is one element among others on which the competent court may base its assessment of the unfairness, within the meaning of Directive 93/13, of the contractual terms relating to that practice in the contract binding the seller or supplier and the

consumer (judgment of 10 June 2021, *Ultimo Portfolio Investment (Luxembourg)*, C-303/20, EU:C:2021:479, paragraph 44).

Sixth and seventh questions referred. Calculation of the APR

- 32 According to Article 10(2) of Directive 2008/48, ‘the credit agreement shall specify in a clear and concise manner: ... (g) the annual percentage rate of charge and the total amount payable by the consumer, calculated at the time the credit agreement is concluded; all the assumptions used in order to calculate that rate shall be mentioned’. Indeed, the first subparagraph of Article 19(5) of Directive 2008/48 provides: ‘Where necessary, the additional assumptions set out in Annex I may be used in calculating the annual percentage rate of charge.’
- 33 For open-end credit, including revolving credit, Annex I, Part II, point (e), of Directive 2008/48 was introduced by Commission Directive 2011/90/EU of 14 November 2011 amending Part II of Annex I to Directive 2008/48/EC of the European Parliament and of the Council providing additional assumptions for the calculation of the annual percentage rate of charge. Spanish law transposed the additional assumptions of Directive 2011/90 literally. For its part, Article 21 of Law 16/2011 provides that, where the APR is not mentioned in the contractual document, the consumer is only obliged to pay the statutory rate of interest and within the agreed timescales.
- 34 The Court of Justice has ruled that, as stated, in essence, in recitals 31 and 43 to Directive 2008/48, informing the consumer of the total cost of credit, in the form of an interest rate calculated according to a single mathematical formula, is of **critical importance** in this regard. Firstly, that information contributes to the openness of the market in that it enables the consumer to compare offers of credit. Secondly, it enables the consumer to assess the extent of his commitment (judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 90). It has also ruled that a credit agreement ... which contains only a mathematical formula for the calculation of the APR **without the information necessary** to make that calculation **must be treated in the same way as a case in which the credit agreement fails to mention the APR** (judgment of 20 September 2018, *EOS KSI Slovensko*, C-448/17, EU:C:2018:745, paragraph 66).
- 35 Similarly, the Court of Justice has held that, [indicating] in a credit agreement an APR lower than the real rate must be regarded as ‘misleading’ within the meaning of Article 6(1) of Directive 2005/29 in so far as it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. It is for the national court to ascertain whether that is the case in the main proceedings. A finding that such a commercial practice is unfair is one element among others on which the competent court may, pursuant to Article 4(1) of Directive 93/13, base its assessment of the unfairness of the contractual terms relating to the cost of the loan granted to the consumer (judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 47).

- 36 In the present case, the agreement relating to the initial card did not specify the assumptions used to calculate the APR. It only contained a reference to Banco de España Circular 8/1990 of 7 September 1990. The agreement relating to the second card did not specify the assumptions used to calculate the APR either. However, the agreement referred to the formula laid down in Annex I to Law 16/2011, which does contain those assumptions. Given that, with different variations, credit institutions are using such clauses providing for the calculation of the APR by reference [to external sources of information], it is necessary to clarify whether such clauses are acceptable or whether, conversely, obtaining that information requires the performance of a step which, falling within the scope of legal research, could not reasonably be expected of an average consumer (judgment of 13 July 2023, *Banco Santander (Reference to an official index)*, C-265/22, EU:C:2023:578, paragraph 60).
- 37 Finally, if the APR is of exceptional importance and the omission of the additional assumptions [used for its] calculation must be treated in the same way as a case in which the credit agreement fails to mention the APR, it is reasonable to ask whether a national provision which allows the credit institution to claim interest at the statutory rate on the amounts drawn down diminishes the dissuasive effect and infringes on the principle of effective consumer protection, in accordance with Directive 93/13. Indeed, such a provision may not be consistent with the case-law resulting from the judgment in *Bank M* and, moreover, may not comply with the requirement under Article 23 of Directive 2008/48 that, for infringements of national provisions, the Member States are to establish penalties which are effective, proportionate and dissuasive in nature.
- 38 The question is especially relevant because, in the present case, in order to deprive the defendant of the interest, it may be necessary not only to interpret the Civil Code and the Predatory Lending Law differently, but also to exclude the application of the national provision especially established (*lex specialis*) for contractual defects relating to the manner in which the APR is expressed.