Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 23 May 2019[1]

Case C-383/18

Lexitor Sp. z o.o
v
Spółdzielcza Kasa Oszczędnościowo — Kredytowa im. Franciszka Stefczyka z siedzibą w Gdyni,
Santander Consumer Bank S.A. z siedzibą we Wrocławiu,
mBank S.A. z siedzibą w Warszawie

(Request for a preliminary ruling from the Sąd Rejonowy Lublin-Wschód w Lublinie z siedzibą w Świdniku (Lublin-Wschód District Court in Lublin with its seat in Świdnik, Poland))

(Reference for a preliminary ruling — Consumer protection — Directive 2008/48/EC — Article 16(1) — Credit agreements — Early repayment — Right of the consumer to a reduction in the total cost of the credit corresponding to the interest and costs due for the remaining term of the agreement)

1. This case concerns the 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, and corrigenda OJ 2009 L 207, p. 14, OJ 2010 L 199, p. 40, OJ 2011 L 234, p. 46). As will shortly be demonstrated, the meaning of this legislative provision — which concerns the entitlement of a consumer to a reduction in the cost of credit where he or she has fully or partially made an early repayment of a sum due under a credit agreement — is, in some respects at least, obscure and does not easily lend itself to an interpretation which is satisfactory. It may indeed be — possibly by reason of the issues thrown up by this very reference —that the Union legislature might wish at some point to re-visit the wording of this provision.

2. At all events, the request has been made in proceedings between Lexitor Sp. z o.o and Spółdzielcza Kasa Oszczędnościowo — Kredytowa im. Franciszka Stefczyka z siedzibą w Gdyni, Santander Consumer Bank S.A. z siedzibą we Wrocławiu ('Santander Consumer Bank') and mBank S.A. z siedzibą w Warszawie, concerning the application of additional charges and penalties where consumers arrange for the early repayment of their obligations under consumer credit agreements.

3. Before considering this question, it is first necessary to set out the relevant provisions of both Directive 2008/48 and national law.

1 Original language: English.

I. Legal context

A. EU law

1. Directive 87/102

4. Article 8 of 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 (OJ 1987 L 42, p. 48) provided:

'The consumer shall be entitled to discharge his obligations under a credit agreement before the time fixed by the agreement. In this event, in accordance with the rules laid down by the Member States, the consumer shall be entitled to an equitable reduction in the total cost of the credit.'

5. Directive 87/102 was repealed and replaced by Directive 2008/48 with effect from 11 June 2010.

2. Directive 2008/48

6. Recitals 7, 9, 10, 39 and 40 of Directive 2008/48 stipulate:

'(7) In order to facilitate the emergence of a well-functioning internal market in consumer credit, it is necessary to make provision for a harmonised Community framework in a number of core areas. In view of the continuously developing market in consumer credit and the increasing mobility of European citizens, forward-looking Community legislation which is able to adapt to future forms of credit and which allows Member States the appropriate degree of flexibility in their implementation should help to establish a modern body of law on consumer credit.

…

(9) Full harmonisation is necessary in order to ensure that all consumers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market. Member States should therefore not be allowed to maintain or introduce national provisions other than those laid down in this Directive. However, such restriction should only apply where there are provisions harmonised in this Directive. Where no such harmonised provisions exist, Member States should remain free to maintain or introduce national legislation. …

(10) The definitions contained in this Directive determine the scope of harmonisation. The obligation on Member States to implement the provisions of this Directive should therefore be limited to its scope as determined by those definitions. …

…

(39) The consumer should have the right to discharge his obligations before the date agreed in the credit agreement. In the case of early repayment, either in part or in full, the creditor should be entitled to compensation for the costs directly linked to the early repayment, taking into account also any savings thereby made by the creditor. However, in order to determine the method of calculating the compensation, it is important to respect several principles. The calculation of the compensation due to the creditor should be transparent and comprehensible to consumers already at the pre-contractual stage and in any case during the performance of the credit agreement. In addition, the calculation method should be easy for creditors to apply, and supervisory control of the compensation by the responsible authorities should be facilitated. Therefore, and due to the fact that consumer credit is, given its duration and volume, not

financed by long-term funding mechanisms, the ceiling for the compensation should be fixed in terms of a flat-rate amount. This approach reflects the special nature of credits for consumers and should not prejudice the possibly different approach in respect of other products which are financed by long-term funding mechanisms, such as fixed-rate mortgage loans.

(40) Member States should have the right to provide that compensation for early repayment may be claimed by the creditor only on condition that the amount repaid over a 12-month period exceeds a threshold defined by Member States. When fixing that threshold, which should not exceed EUR 10 000, Member States should for instance take into account the average amount of consumer credits in their market.'

7. Article 1 of Directive 2008/48 is headed 'Subject matter'. It provides:

'The purpose of this Directive is to harmonise certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers.'

8. According to Article 2(1), Directive 2008/48 shall apply to credit agreements.

9. Article 3 of Directive 2008/48 is headed 'Definitions'. It is worded as followed:

'For the purposes of this Directive, the following definitions shall apply:

…

(c) "credit agreement" means an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments;

…

(g) "total cost of the credit to the consumer" means all the costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor, except for notarial costs; costs in respect of ancillary services relating to the credit agreement, in particular insurance premiums, are also included if, in addition, the conclusion of a service contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed;

…'

10. Article 10 of Directive 2008/48 is headed 'Information to be included in credit agreements'. Its paragraph 2 provides:

'The credit agreement shall specify in a clear and concise manner:

…

(r) the right of early repayment, the procedure for early repayment, as well as, where applicable, information concerning the creditor's right to compensation and the way in which that compensation will be determined;

…'

11. Article 16 of Directive 2008/48 is headed 'Early repayment' and is worded as follows:

'1. The consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement. In such cases, he shall be 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.

2. In the event of early repayment of credit the creditor shall be entitled to fair and objectively justified compensation for possible costs directly linked to early repayment of credit provided that the early repayment falls within a period for which the borrowing rate is fixed.

Such compensation may not exceed 1% of the amount of credit repaid early, if the period of time between the early repayment and the agreed termination of the credit agreement exceeds one year. If the period does not exceed one year, the compensation may not exceed 0,5% of the amount of credit repaid early.

3. Compensation for early repayment shall not be claimed:

(a) if the repayment has been made under an insurance contract intended to provide a credit repayment guarantee;

(b) in the case of overdraft facilities; or

(c) if the repayment falls within a period for which the borrowing rate is not fixed.

4. Member States may provide that:

(a) such compensation may be claimed by the creditor only on condition that the amount of the early repayment exceeds the threshold defined by national law. That threshold shall not exceed EUR 10 000 within any period of 12 months;

(b) the creditor may exceptionally claim higher compensation if he can prove that the loss he suffered from early repayment exceeds the amount determined under paragraph 2.

If the compensation claimed by the creditor exceeds the loss actually suffered, the consumer may claim a corresponding reduction.

In this case, the loss shall consist of the difference between the initially agreed interest rate and the interest rate at which the creditor can lend out the amount repaid early on the market at the time of early repayment, and shall take into account the impact of early repayment on administrative costs.

5. Any compensation shall not exceed the amount of interest the consumer would have paid during the period between the early repayment and the agreed date of termination of the credit agreement.'

12. Article 22 of Directive 2008/48 is headed 'Harmonisation and imperative nature of this Directive". Its first paragraph provides:

'Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive.'

B. National legislation

13. The ustawa z dnia 12 maja 2011 roku o kredycie konsumenckim (Law of 12 May 2011 on consumer credit, Dz.U. 2016, position 1528, as amended) ('Consumer Credit Law') transposes Directive 2008/48 into Polish law.

14. Pursuant to Article 49(1) of this Law, in the case of repayment of the total amount of credit before the date indicated in the agreement, the total cost of the credit is reduced by the costs related to the period by which the duration of the contract has been shortened, even if the consumer incurred those costs before the repayment.

II. Facts

15. The request for a preliminary ruling concerns three cases which the referring court has joined in order for them to be examined and ruled upon collectively. All these cases essentially follow the same pattern, which is described below.

16. The defendants, which are credit institutions, concluded consumer credit agreements with consumers for given periods, and they charged a commission for granting the credit in question. In all three cases the amount of the commission did not depend on the duration of the credit agreements. The consumers all repaid the full amount of the credit granted before the date indicated in the agreements.

17. Subsequently, agreements were concluded between these consumers and the applicant assigning their claims related to the full early repayment of their credit, including the reimbursement of the previously paid commission. The applicant sent notifications to the defendants concerning the assignment of the claims in question, at the same time requesting that they voluntarily pay the disputed amount, consisting of a part of the commission in proportion to the repayment period, together with statutory interest for late payment.

18. As the defendants did not comply with those requests, the applicant instituted proceedings before the referring court, seeking an order requiring the defendants to pay the disputed amounts together with statutory interest for late payment.

III. The request for a preliminary ruling

19. The referring court is uncertain whether the consumer's right to a reduction in the total cost of credit provided for by the national legislation transposing Article 16(1) of Directive 2008/48 must be interpreted as including costs that do not depend on the duration of the credit agreement. In this respect, the referring court points out that Polish courts have adopted divergent interpretations. In particular, it cited two judgments from two different Polish courts which held that the Consumer Credit Act only confers the right to reimbursement of part of the costs depending on the duration of the contract. In a third judgment, however, a different court ruled, on the basis of an interpretation of national law in the light of Article 16 of Directive 2008/48, that the consumer's right to costs reduction includes costs which are independent of the duration of the credit agreement.

20. Under these circumstances, the Sąd Rejonowy Lublin-Wschód w Lublinie z siedzibą w Świdniku (Lublin-Wschód District Court in Lublin with its seat in Świdnik, Poland) has decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 16(1), read in conjunction with Article 3(g), of [Directive 2008/48] to be interpreted as meaning that a consumer who has redeemed his obligations under the credit agreement early is entitled to a reduction in the total cost of the credit, including costs for which the amount does not depend on the duration of the credit agreement?'

IV. Analysis

A. Jurisdiction of the Court and the admissibility of the preliminary reference

21. On the side of the defendants, Santander Consumer Bank, claims, in essence, that the question asked is inadmissible. Indeed, it maintains that Article 16(1) of Directive 2008/48 is inapplicable, since the dispute in the main proceedings is between two persons acting for purposes of their business.

22. In this respect, it must be recalled that the procedure established in Article 267 TFEU is an instrument of cooperation between the European Court of Justice and national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate.[2] It is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.[3]

23. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not receive the factual or legal material necessary to give a useful answer to the questions submitted.[4] Yet the fact that one of the parties in the main proceedings disputes the relevance of the question referred for a preliminary ruling for the resolution of the dispute in the main proceedings cannot, in itself, justify the conclusion that these questions should be declared inadmissible.

24. In the present case, it should be noted that the scope of application of Directive 2008/48 depends on the identity of the parties not to the dispute, but to the credit. Indeed, according to Article 2(1) of Directive 2008/48, this directive applies to 'credit agreements', a term which is defined by Article 3(c) of that directive, as meaning 'an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments'. In the present case, it is not disputed that the credits in question were granted to consumers.

2 Judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 16).

3 Judgment of 1 July 2010, *Sbarigia* (C-393/08, EU:C:2010:388, paragraphs 19 to 20).

4 Judgment of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraph 37).

25. Under these circumstances, it is not that obvious from the presentation of the case made by the referring court that Article 16(1) of Directive 2008/48 is not applicable in the situation at issue in the main proceedings. Accordingly, I consider that the Court should not rule that the question asked is inadmissible.

B. On the substance

26. With regard to the question asked, in essence, the referring court wishes to know whether or not Article 16(1) of Directive 2008/48 is to be interpreted as meaning that, where a consumer has made an early repayment, the reduction in the costs of credit to which that consumer is entitled may concern costs for which the amount does not depend on the duration of the credit agreement.

1. Content of Article 16(1) of Directive 2008/48

27. According to Article 16(1) of Directive 2008/48, a 'consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement. In such cases, he shall be 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'.

28. It follows therefore from the wording of Article 16(1) of Directive 2008/48 that, in the event of early repayment, Member States shall provide that consumers are entitled to a reduction which, first, is to be made in the total cost of the credit and, second, consists of the interest and the costs for the remaining duration of the contract.

29. With regard to the first part of that provision, it specifies the type of costs which, due to their nature, may be reduced. Indeed, since Article 16(1) provides that the reduction has to be made in the total cost of the credit, only the costs which are part of the total cost of the credit can be reduced.

30. The total cost of a credit is defined in Article 3(g) of Directive 2008/48 as 'all the costs … which the consumer is required to pay in connection with the credit and which are known to the creditor, except for notarial costs; costs in respect of ancillary services relating to the credit agreement, in particular insurance premiums, are also included if, in addition, the conclusion of a service contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed'. Accordingly, notarial costs are excluded from the right to claim a reduction in case of an early repayment under Article 16(1) of Directive 2008/48.

31. Concerning the second part of Article 16(1), it provides that the applicable reduction shall consist of 'the interest and the costs for the remaining duration of the contract'. It flows from this that, first, the reduction must concern both interest and costs and, second, it must be related to the 'remaining duration of the contract'.

32. It follows from the foregoing that Article 16(1) lays down certain core principles — namely, those I have just set out — which must be respected by Member States. I propose now to consider the extent to which Directive 2008/48 amounts to a harmonisation measure.

2. Scope of the harmonisation achieved by Directive 2008/48

33. Admittedly, the first sentence of recital 9 mentions that 'full harmonisation is necessary'. However, the degree of harmonisation pursued by a directive should not be confused with the scope of this harmonisation. Therefore, the full harmonisation referred to in recital 9 does not necessarily concern all aspects of consumer credit mentioned in Directive 2008/48. I would also note that the third

sentence of that same recital expressly states that the prohibition on Member States maintaining or introducing national provisions other than those laid down in that directive 'should only apply where there are provisions harmonised in this directive. Where no such harmonised provisions exist, Member States should remain free to maintain or introduce national legislation'.

34. The fact that Directive 2008/48 aims at achieving full harmonisation only with regard to some aspects of consumer credit is confirmed by Article 1 of that directive. According to that provision, the objective of Directive 2008/48 is to 'harmonise *certain* aspects of the laws … concerning agreements covering credit for consumers'. Moreover, Article 22 of Directive 2008/48 merely provides that it is only 'insofar as this Directive contains harmonised provisions [that] Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive'.

35. Finally, one might also observe that the Court has already accepted, in the context of a directive aimed at achieving harmonisation in full, that all the aspects mentioned in that directive were not harmonised. For example, the Court has held, regarding the Sixth Council Directive on VAT[5] that, when the Member States make use of certain options provided for in the third subparagraph of Article 17(5) of the Sixth Directive, they may apply a calculation method different from the one referred to in that directive, subject to the condition, in particular, that the method used guarantees a more precise determination of the deductible proportion of the input VAT than the one provided in the directive.[6]

36. So far as Article 16(1) of Directive 2008/48 is concerned, it may be noted that since this provision does not lay down the method of calculation to be used, I believe that the intention of the Union legislature is to give Member States a certain latitude in that matter. In addition, recital 10 stipulates that the scope of harmonisation intended by Directive 2008/48 is determined by the specific definitions contained in Article 3(g) of the directive. It is, accordingly, significant to note that the term 'reduction' which is used in Article 16(1) is not defined by this directive.

37. As I have pointed out earlier, this does not, of course, mean that Member States can pick any method they wish. They must respect the principles laid down in Article 16(1) regarding the obligation to cover both interest and costs. However, as regards the determination as to which part of the interest and costs can be reduced, none of these principles require, as asked the referring court, that the *amount* of the costs concerned depends on the duration of the credit agreement. Although Article 16(1) of the directive specifies that such part corresponds to interest and costs '[due] for the remaining duration of the contract', that provision remains relatively vague since it could mean that the interest and costs concerned would be those arising after the repayment date.[7]

38. In view of the above, it seems clear to me that Directive 2008/48 does not harmonise the method of calculation to be used to determine the applicable reduction in the event of an early repayment of the credit, but sets out principles that Member States must respect when determining that method.

5 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

6 Indeed, no provision of the Sixth VAT Directive expressly mentioned that it is possible for Member States to derogate from that method. See judgment of 8 November 2012, *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 24).

7 The French and Italian versions of Directive 2008/48 use the adjective 'due' (the 'intérêts et frais *dus* pour la durée résiduelle', '*dovuti* per la restante durata'). However, apart from the fact that this qualifier is not found in other language versions, it does not seem to me to contradict what I have just described, as the term can be understood in the sense of expired. In any case, the English version does not contain such adjective ('interest and the costs for the remaining duration'), while the Spanish and German versions use rather generic terms, respectively 'correspondientes a la duración' and 'für die verbleibende Laufzeit des Vertrags richtet').

3. Analysis of the compatibility of the different proposed interpretations with Article 16(1)

39. In the main proceeding, the wording of the Law of 12 May 2011 on consumer credit appears to be relatively open, which is confirmed by the fact that the Polish courts have interpreted it in different ways, as mentioned by the referring court.

40. Therefore, since the referring court is required to interpret its national legislation in accordance with Union law, I propose to examine the requirement imposed on the Member States pursuant to the phrase 'for the remaining duration of the contract' laid down in Article 16, paragraph 1, of Directive 2008/48 to which the question asked relates. [8]

41. In this respect, it may be noted that the referring court proposes two different interpretations of the phrase.

42. The *first interpretation* relies on the idea that the phrase 'for the remaining duration of the contract' would aim to limit the reduction only to costs related to the duration of the credit. Therefore, the term 'costs' refers to the expenses that the credit institution has to incur in relation to the credit granted. [9] In essence, therefore, Article 16(1) would exempt consumers from paying, in respect of 'costs', the expenses related to the remaining contract period. The point here is that since the credit institution will not bear these expenses, the consumer should be entitled to have them deducted from the total cost of the credit. [10]

43. The *second interpretation* is to consider that the total credit cost must be reduced in proportion to the remaining contract period. In essence, the terms 'for the remaining duration of the contract' would only be an indication of how the reduction is calculated, namely in proportion to the remaining duration of the contract'.

44. In addition, two others interpretations need to be considered.

45. The *third* one, which is the one proposed by the defendants, is to consider that costs that can be deducted from the total cost of the credit are only those formally presented in the credit agreement as depending on the duration of the credit agreement itself. By contrast, since the service provided, which is to grant the credit, is carried out in full as soon as the money is made available to the consumer, the credit institution's profit margin should remain intact.

46. According to the *fourth* and last interpretation, the reduction to which the consumer would be entitled corresponds to the one-off or recurring payments not yet fallen due when the early repayment was made.

47. In order to determine which of these interpretations are compatible with Article 16(1) of Directive 2008/48, it is necessary to take into consideration the principles that this provision has laid down, as these principles can be inferred, in accordance with the Court's methods of interpretation, from the context in which this provision is mentioned, its objectives and its wording. [11]

8 See, for example, judgment of 27 March 2019, *Pawlak* (C-545/17, EU:C:2019:260, paragraph 83).

9 According to that interpretation, supported by the defendants in the main proceedings and by the Spanish Government, the one-off cost could not be reduced in the case of an early repayment. Only recurrent costs which occur after the repayment would be concerned by that reduction.

10 Accordingly, the costs to be deducted from the total cost of the credit would be small: they consist essentially in costs related to the preparation and the transmission of periodic information to the consumer in accordance with the applicable EU and national provisions. Indeed, the vast majority of the costs generated by a loan are one-time costs, such as costs for compiling and processing the applicant's file or searching for information on the consumer's creditworthiness. In practice, the expenses concerned are those recurring that would have occurred after the date of the early repayment, as one-off costs are generally independent of the duration of the contract.

11 Judgment of 4 May 2010, TNT Express Nederland (C-533/08, EU:C:2010:243, paragraph 44).

48. *Concerning the context*, it may be observed that several parties have proposed to adopt a systematic interpretation of Article 16(1) of Directive 2008/48 in the light of Article 16(2). Therefore, since credit institutions are entitled under Article 16(2) to 'fair and objectively justified' compensation for 'possible costs directly linked to early repayment of credit provided that early repayment falls within a period for which the borrowing rate is fixed', the scope of the reduction provided for in Article 16(1) should be interpreted broadly and in a way which favours the consumer.

49. For my part, however, I find myself unpersuaded by this approach. Indeed, contrary to the argument advance by the Polish Government, I do not believe that in order to give full effect ('*effet utile*') to Article 16(2), Article 16(1) of Directive 2008/48 should be interpreted as necessarily involving a reduction in the profit of the credit institution. Indeed, contrary to what seems to be a widespread interpretation, Article 16(2) is not intended to offset the profit that the lender could have made if the early repayment of the credit had not taken place. Admittedly, even if the credit institution lends the repaid sums again, its profit margin will not necessarily be the same as it would have been if the initial credit had continued to run.[12] This, however, should not obscure the fact that the wording of Article 16(2) refers to 'costs' and not to 'losses' borne by the institution, which, moreover, must be 'directly linked to early repayment of credit'. It follows, therefore, that the compensation which can be claimed under that provision is intended only to offset the expenses incurred as a result of the early repayment of the credit when specific operations must be undertaken by the credit institution for this purpose.[13]

50. The possibility of claiming compensation for lost profit as a result of the early repayment of a credit arrangement is indeed provided for by Directive 2008/48: it is, however, provided under Article 16(4)(b) and *not* under Article 16(2). However, as Article 16(4)(b) is optional, Member States must have provided for such possibility in the national legislation transposing the directive. Moreover, Article 16(4)(b) of that directive provides that such compensation can only be exceptionally claimed if the credit institution can prove that the loss it suffered exceeds the threshold provided for in the second subparagraph of Article 16(2). Consequently, the risk that a credit institution might receive compensation even though its profit has not been significantly reduced is relatively limited.

51. *Regarding the objectives* pursued by Article 16(1) of Directive 2008/48, it is true that recital 7 provides that the directive aims at facilitating 'the emergence of a well-functioning internal market in consumer credit'. However, contrary to the argument put forward by the defendants, it cannot be inferred from it that the objective pursued by Article 16(1) is to protect credit institutions against the consequences of early repayment. Indeed, this recital expressly mentions that the emergence of a well-functioning internal market is to be achieved by making provision for a harmonised Union framework in a number of core areas and not by protecting credit institutions against the consequences of early repayment.

52. In contrast, one cannot ignore the fact that recital 39, which is the one which specifically addresses the objectives pursued by Article 16(1), does not make any reference to that reduction but rather provides only that 'the consumer should have the right to discharge his obligations before the date agreed in the credit agreement'. This suggests indeed that the EU legislature considered that this reduction is conceived as the simple consequence of early repayment and, therefore, as something

12 If the credit institution lends the repaid sums again, the refinancing conditions (either by using the interbank market or the depositors' money if the credit institution is a bank) may have changed. However, in that situation, in principle, the interest rate applicable to credit agreements will also be different. Therefore, the profit margin will change first and foremost if the competition on the market has evolved since the conclusion of the contract.

13 The reasons why the lost profit is not covered by the compensation provided for in Article 16(2) of Directive 2008/48 can be deduced from recital 39, since the latter stresses that 'consumer credit is, given its duration and volume, not financed by long-term funding mechanisms'. Indeed, in such circumstances, lost profit, even if possible, remains relatively limited unless the market reverses completely.

that is easy to calculate. Besides, the idea that the consequences of early payment must be easy to assess is expressed also in that same recital, when the wording refers, this time, to the compensation that a credit institution is entitled to. Indeed, according to recital 39, in such situation: '… the calculation method should be easy for creditors to apply …'.

53. From that perspective, while the first interpretation, according to which the reduction should correspond to the expenses that the credit institution will not have to bear because of the early repayment, appears superficially relatively simple — and thus in turn quite appealing — its practical implementation is likely to raise significant practical difficulties. Indeed, as the referring court has pointed out in its request, credit institutions rarely specify which of the expenses that they bear are covered by the costs that they charge consumers and, even when they do so, the consumer would still have the right to dispute the accuracy of these specifications.

54. The amount of the fees charged is also not of much assistance. Indeed, even when the costs charged have been calculated by reference to the duration of the credit, it should be noted that they may serve to partly compensate recurring costs and partly one-off costs, including those costs that have arisen exclusively before the early repayment. The same applies when such charges have been calculated in relation to the amount of credit granted, as not all variable costs are necessarily recurring costs. Lastly, any charges or fees consumers are asked to pay may include a portion of profit, as no rule obliges credit institutions to achieve their profit margin solely through interest charged to consumers.

55. Thus, in practice, the only way to have a precise idea of the amount that the credit institution will save is to require it to engage in cost accounting, the purpose of which is precisely to identify and evaluate the elements constituting its net operating income. Indeed, in the case of a credit institution, these elements include the expenses arising from the duration of the credits granted. Yet cost accounting has not been made mandatory for credit institutions by Directive 2008/48, nor even, it would seem, by any other Union act.[14] If, therefore, the first approach were to be adopted by the Court, it would mean that cost accountancy would in practice become mandatory, even though such an obligation is not otherwise provided for. In addition, in the event of a dispute over the amount of the reduction to which the consumer is entitled when making an early repayment, national courts will have to call on accounting experts, even if the costs involved are, by their very nature, relatively small.

56. Whatever the theoretical merits of this possible interpretation are, given the practical difficulties involved which, as I have just mentioned, are likely to be considerable, I consider that this interpretation is incompatible with the idea implied in recital 39 of Directive 2008/48 that the consequences of early repayment must be simple to assess.

57. More decisive still is *the wording* of Article 16(1). Indeed, in this respect, both the first and third interpretations are inconsistent with the reference made in that article to the term 'interest'. I will start with the third interpretation.

58. According to this interpretation, only costs, provided that they have been formally presented as depending on the duration of the contract, could be reduced. One may note, however, that since the Union legislature considered it necessary to refer to both interests and costs, the reduction referred to in Article 16(1) of Directive 2008/48 must accordingly be interpreted as concerning both elements and not only, as considered in the third interpretation, costs.

14 Such an obligation exists only in certain very specific circumstances. See, for example, Article 34 of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ 2014 L 257, p. 1) and Article 11 of Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports (OJ 2017 L 57, p. 1).

59. In addition, even if the third interpretation were also to be applied in the case of interest, this could in practice not work without using anything other than the second or the fourth interpretation.[15] Therefore, retaining the third interpretation would presuppose the application of two separate calculation methods, respectively one for the interest and one for the costs. Yet this would be inconsistent with the very wording of Article 16 (1).

60. With regard to the first interpretation, I note that the term 'interest' refers to an element of the credit institution's remuneration that is precise and readily ascertainable, since it is calculated by applying an annual percentage. Like any other element of its remuneration, the payment of interest naturally assists the profitability of the credit institution, but it is also used to pass on to consumers the expenses incurred by banks in respect of credits. As a consequence, interpreting the term 'costs' mentioned in Article 16(1) of Directive 2008/48 as referring to the costs incurred by the credit institution as suggested by the first and third interpretation could result in a double reduction of the same element, since interest is also concerned. For my part, however, I do not consider that this is what the Union legislature had in mind.

61. Since the term 'interest' is connected with the one of 'costs' by the conjunction 'and', it seems more logical to me to consider that both are related to payments that need to be made by the consumer. Accordingly, the term 'costs' in Article 16(1) does not refer, as the first interpretation assumes, to the expenses borne by the credit institution, but rather to payments claimed from consumers in addition to interest.

62. In other words, the term '[due] for the remaining duration of the contract' should be understood as meaning that the reduction provided for in Article 16(1) depends not on the purpose of the costs charged to consumers, as proposed by the first and third interpretations, but rather on the date on which the payment of costs is requested from consumers.

63. In my opinion, only the second or fourth interpretations are consistent with such a finding. I accept that both interpretations have disadvantages, yet, as I have already had occasion to observe, there is, candidly, no interpretation of Article 16(1) of Directive 2008/48 available which is fully satisfactory.

64. In particular, I recognise that both interpretations could lead to an imbalance in the creditor/lender relationship. Indeed, in the case of the second interpretation, if the repayment is made very early, the fixed expenses borne by the credit institution might not have been fully amortised by the fees and interest paid by the consumer and, consequently, the credit institution may incur a loss. So far as the fourth interpretation is concerned, it leaves open the possibility for credit institutions, by passing on all their recurrent costs to consumers at the beginning of the contract, to circumvent the consequences of cost reduction in case of an early repayment. However, both interpretations have the distinct advantage that the consumer will obtain a reduction in both interest and costs as a result of early repayment in a manner which is (relatively) proportionate to the extent to which the credit agreement has been repaid early.

65. Moreover, I am not convinced that the Union legislature has necessarily intended to achieve a perfect balance between the interests of credit institutions and those of consumers. Indeed, it also follows from Article 16(5) of Directive 2008/48 that, to some extent, the legislature did not intend to exclude the possibility that the consumer would have to pay the same amount as he would have had to pay in the absence of early payment.[16]

15 Moreover, this implies considering, and therefore imposing, that a part of the profit can be attributed to the remaining period. However, a profit margin is not necessarily linear.

16 Moreover, it should be stressed, first, that under Article 10 (2) (r) of the Directive 2008/48, credit institutions must inform consumers of the procedure for early repayment and as such, of the terms and conditions for such early repayment. Therefore, those terms and conditions are also an element that consumers can consider before taking the decision to subscribe to a credit with one particular credit institution rather than another.

66. Although the wording of Article 16(1) of Directive 2008/48 might, with advantage, have been expressed with greater clarity on this very point, not only are the second and fourth interpretations compatible with the principles laid down in Directive 2008/48, but they are also likely to reflect what the Union legislature must have had in mind.

67. In my view, therefore, Member States may choose, inter alia, to transpose this provision or, at least, where appropriate, interpret their national law in accordance with one or the other of these two interpretations.

V. Conclusion

68. For the reasons explained above, I propose that the Court should answer the question referred by the Sąd Rejonowy Lublin-Wschód w Lublinie z siedzibą w Świdniku (Lublin-Wschód District Court in Lublin with its seat in Świdnik, Poland) as follows:

Article 16(1), read in conjunction with Article 3(g) 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, is to be interpreted as meaning that, where a consumer has made an early repayment, the reduction to which that consumer is entitled may concern costs for which the amount does not depend on the duration of the credit agreement. However, a Member State cannot limit — and a national court cannot interpret its national legislation — this reduction simply to the amount of expenses saved by the credit institution as a result of the early repayment.