



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 28 September 2023¹

Case C-536/22

MW,
CY
v

VR Bank Ravensburg-Weingarten eG

(Request for a preliminary ruling
from the Landgericht Ravensburg (Regional Court, Ravensburg, Germany))

(Reference for a preliminary ruling – Consumer protection – Credit agreements for consumers relating to residential immovable property – Directive 2014/17/EU – Early repayment of the credit – National legislation providing for compensation covering the creditor’s loss of profit – Method of calculating loss of profit – Termination of the agreement prior to repayment)

1. Under Article 25 of Directive 2014/17/EU,² consumers have the right to discharge fully or partially their obligations under a credit agreement relating to residential immovable property before that agreement expires.

2. To date, the Court of Justice has ruled on the extent of the reduction (in favour of the consumer) in the total cost of the credit, associated with the early discharge of the consumer’s obligations.³

3. This reference for a preliminary ruling affords the Court the opportunity to address for the first time (unless I am mistaken) the other side of the equation: the creditor’s right to receive ‘fair and objective compensation, where justified’ for possible costs directly linked to early repayment of the credit.

¹ Original language: Spanish.

² Directive of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ 2014 L 60, p. 34).

³ Judgment of 9 February 2023, *UniCredit Bank Austria* (C-555/21, EU:C:2023:78; ‘judgment in *UniCredit Bank Austria*’).

I. Applicable law

A. *European Union law. Directive 2014/17*

4. Recital 66 reads as follows:

‘A consumer’s ability to repay the credit prior to the expiry of the credit agreement may play an important role in promoting competition in the internal market and the free movement of Union citizens as well as helping to provide the flexibility during the lifetime of the credit agreement needed to promote financial stability in line with the recommendations of the Financial Stability Board. ... Member States should therefore ensure, whether through law or other means such as contractual clauses, that consumers have a right to early repayment. ... The conditions set by Member States may provide that the creditor is entitled to fair and objectively justified compensation for potential costs directly linked to early repayment of the credit. In the event where Member States provide that the creditor is entitled to compensation such compensation should be a fair and objectively justified compensation for potential costs directly linked to early repayment of the credit in accordance with the national rules on compensation. The compensation should not exceed the financial loss of the creditor.’

5. Under Article 25:

‘1. Member States shall ensure that the consumer has a right to discharge fully or partially his obligations under a credit agreement prior to the expiry of that agreement. In such cases, the consumer shall be entitled to a reduction in the total cost of the credit to the consumer, such reduction consisting of the interest and the costs for the remaining duration of the contract.

2. Member States may provide that the exercise of the right referred to in paragraph 1 is subject to certain conditions. Such conditions may include time limitations on the exercise of the right, a different treatment depending on the type of the borrowing rate or on the moment the consumer exercises the right, or restrictions with regard to the circumstances under which the right may be exercised.

3. Member States may provide that the creditor is entitled to fair and objective compensation, where justified, for possible costs directly linked to the early repayment but shall not impose a sanction on the consumer. In that regard, the compensation shall not exceed the financial loss of the creditor. Subject to those conditions Member States may provide that the compensation may not exceed a certain level or be allowed only for a certain period of time.

4. Where a consumer seeks to discharge his obligations under a credit agreement prior to the expiry of the agreement, the creditor shall provide the consumer without delay after receipt of the request, on paper or on another durable medium, with the information necessary to consider that option. That information shall at least quantify the implications for the consumer of discharging his obligations prior to the expiry of the credit agreement and clearly set out any assumptions used. Any assumptions used shall be reasonable and justifiable.

5. Where the early repayment falls within a period for which the borrowing rate is fixed Member States may provide that the exercise of the right referred to in paragraph 1 is subject to the existence of a legitimate interest on the part of the consumer.’

B. National law

6. Several provisions of the Bürgerliches Gesetzbuch (German Civil Code; ‘the BGB’) are relevant to the present case, in particular, Paragraph 252 (‘Loss of profit’); subparagraph 2 of Paragraph 490 (‘Extraordinary right to terminate the agreement’); subparagraph 2 of Paragraph 500 (‘Borrower’s right to termination; early repayment’); Paragraph 502 (‘Compensation for early repayment’); and Paragraph 812 (‘Right to restitution’).

II. Facts, dispute and questions referred for a preliminary ruling

7. On 11 January 2019, MW and CY concluded a mortgage loan agreement with VR Bank Ravensburg-Weingarten eG (‘VR Bank’) for the outright purchase of residential property. They agreed on a fixed loan rate until 30 January 2029.

8. Under the agreement, the borrower could only discharge his or her obligations early during the term of the fixed rate if he or she could demonstrate a legitimate interest.

9. The agreement included the following clauses:

- VR Bank would be entitled to compensation for any resulting loss in the event of early repayment of the loan. That loss would be calculated using the ‘asset/liability method’, held to be permissible by the Bundesgerichtshof (Federal Court of Justice, Germany).⁴
- The borrowers would be required to pay fair compensation for the administrative expenses associated with early repayment of the loan.

10. On 19 May 2020, MW and CY sold the property (which they had acquired the year before)⁵ and terminated the loan agreement with effect from 30 June 2020.

11. On 9 June 2020, VR Bank claimed compensation from MW and CY in respect of loss resulting from early repayment of the loan, which they paid.

12. On 19 April 2021, MW and CY called on VR Bank to return the compensation for early repayment. They have made the same claim in the action pending before the referring court.

13. In the applicants’ view, VR Bank was not entitled to compensation because the loan agreement did not provide sufficient information on how compensation was to be calculated. They also submit that, under Directive 2014/17, compensation can only cover costs actually incurred, not loss of interest or loss of profit sustained by the creditor. Furthermore, they maintain that a hypothetical calculation based on formulae deriving from financial mathematics is not permissible.

14. VR Bank contested the action and put forward the following arguments:

- The agreement provides all the information required by law.

⁴ That method is based on the assumption that the funds released by repayment are invested in mortgage bonds with maturities corresponding to the term of the loan. As part of that calculation, the damage caused by the reduction in interest is factored in as the financial loss arising from early repayment of the loan. It is equivalent to the difference between the interest under the agreement and the yield of mortgage bonds with maturities corresponding to the remaining term of the discharged loan.

⁵ One of them, a professional soldier, had been relocated by his employer.

- The amount of compensation is consistent with the settled case-law of the Bundesgerichtshof (Federal Court of Justice) concerning situations where a loan secured by a charge on immovable property is discharged for good reason. According to that case-law, the creditor is entitled to compensation for loss directly linked to early repayment if, at that time, interest is payable by the borrower at a fixed borrowing rate.
- When granting loans, banks usually have to refinance themselves and enter into long-term commitments as a result. If borrowers were able to withdraw from the agreement at any time, without paying compensation for the loss caused by termination, the cost of mortgage-backed loans would increase considerably, as that risk would then be included in the price.

15. In those circumstances, the Landgericht Ravensburg (Regional Court, Ravensburg, Germany) has referred the following questions to the Court of Justice for a preliminary ruling:

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

(2) If Question 1 is answered in the affirmative:

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

In particular:

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

III. Proceedings before the Court

16. The request for a preliminary ruling was received at the Court on 10 August 2022.

17. Written observations were submitted by VR Bank, the German Government and the European Commission. It was not considered necessary to hold a hearing.

IV. Analysis

18. Directive 2014/17 lays down ‘a common framework for certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers secured by a mortgage or otherwise relating to residential immovable property’.⁶

19. With a few exceptions, the harmonisation carried out by Directive 2014/17 is minimal. As regards its material scope:

- in relation to matters subject to uniform regulation, it allows Member States to maintain or introduce provisions affording consumers greater protection;⁷
- in relation to other matters, it confers legislative powers on the national legislature, assuming from the outset the consequences of there being no uniform rules.

20. Under the heading ‘Early repayment’, Article 25 of Directive 2014/17 ensures that consumers have the right to discharge their contractual obligations before the end of the stipulated period. However, that right is neither unconditional nor without its drawbacks: those include the possibility of having to compensate the creditor for potential costs directly incurred as a result of early repayment of the credit.

21. Member States are required to establish the consumer’s entitlement to the early repayment of credit relating to residential immovable property, with the attendant reduction (in the consumer’s favour) in the total cost of the credit. Directive 2014/17 lists the items to which that reduction applies.

22. By contrast, Directive 2014/17 does not, in itself, ensure that creditors have the right to compensation for loss sustained as a result of early repayment. The directive merely allows each national legislature to introduce and regulate that right, laying down the conditions governing it.⁸ However, if compensation is permitted under national law, it must satisfy certain minimum requirements set by Directive 2014/17.

⁶ Article 1.

⁷ Provided that those provisions are consistent with Member States’ obligations under EU law (Article 2(1) of Directive 2014/17).

⁸ The diversity which existed prior to the directive on that point is likely to be what stood in the way of achieving greater harmonisation. See the Commission staff working document accompanying the White Paper on the integration of EU mortgage credit markets, SEC(2007) 1683, p. 56. According to the report *Evaluation of the Mortgage Credit Directive (Directive 2014/17/EU)* by Risk & Policy Analysts (RPA), 2021, Annex I, Table 163, in October 2020 20 Member States had adopted provisions for compensating creditors in the event of early repayment, 4 had not done so, and no information was available on the others.

A. First question referred

23. The referring court enquires whether fair and objective compensation for possible costs directly linked to early repayment also covers the creditor's loss of profit.⁹ It includes within that concept, in particular, interest which the creditor expected to be paid in the future but which it will no longer receive.¹⁰

24. In my view, since Directive 2014/17 does not preclude that interest being taken into account when calculating the compensation payable, the first question referred for a preliminary ruling must be answered in the affirmative. In the considerations set out below, I will, to that end, interpret Article 25(3) of that directive in accordance with the usual criteria.

1. Literal criterion

25. At first sight, Article 25(3)¹¹ might give rise to some doubts:

- Article 25(3) of Directive 2014/17 refers to compensation for *costs*. According to paragraph 1 thereof (in which the conjunction 'and' appears between 'interest' and 'costs'), the concept of *costs* covers something other than *interest*.
- Article 25(3) mentions *possible* costs linked to early repayment. The interest that would have accrued had repayment not occurred would not be in the nature of costs since, as a consequence of repayment, it would *necessarily* be lost.
- Article 25(3) is concerned with costs *directly* linked to repayment. It could be argued that they are limited to costs relating to specific transactions, carried out by credit institutions in order to process repayment.¹²

26. However, I do not think that a literal interpretation of Article 25(3) of Directive 2014/17 militates against my proposed approach.

⁹ That appears to be common practice in Germany where, under the case-law, the creditor's loss is determined in accordance with the principles governing the right to damages. Consequently, unpaid interest may be compensated as loss of profit (Paragraph 252 of the BGB) by applying the national provisions transposing Article 25(3) of Directive 2014/17.

¹⁰ The wording of the question may lead to confusion. In so far as it equates loss of profit with such future interest, an unqualified affirmative answer would mean that the creditor would be able to obtain from the consumer, as compensation under Article 25(3) of Directive 2014/17, *all* the interest which would have accrued under the loan had the contractual relationship continued until the date initially agreed to, even though the reduction provided for in Article 25(1) thereof applies to that interest. The second question, concerning how loss of profit should be calculated for the purpose of compensating it, qualifies the approach and, therefore, that assertion.

¹¹ The referring court refers to a number of academic interpretations based on that provision. Comparing different language versions calls for caution to be exercised with this criterion of interpretation.

¹² See, to that effect, Opinion of Advocate General Hogan in *Lexitor* (C-383/18, EU:C:2019:451, point 49), concerning Article 16(2) 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). I am of the view that that paragraph is intended to compensate for the return which the creditor could have obtained if early repayment of the credit had not occurred (although, depending on the time that has elapsed, a percentage-based limit is placed on the amount of compensation, for the reasons set out in recital 39 of Directive 2008/48).

27. The concept of ‘costs’ used in that directive¹³ is not a precise one and its content is not unambiguous.¹⁴ On its face, it treats interest as ‘costs’, for example in Article 14 on pre-contractual information.¹⁵

28. Furthermore, since ‘costs’ are part of the ‘total cost of the credit’ to the consumer in Article 25(1) of Directive 2014/17 and, therefore, the ‘costs’ to be borne by him or her,¹⁶ ‘interest’ also constitutes ‘costs’ within the meaning of ‘total cost of the credit’.¹⁷

29. Article 25(3) of Directive 2014/17 further states that compensation ‘shall not exceed the financial loss of the creditor’.¹⁸ It thus suggests that the loss of future interest should be viewed as a cost which falls (or could fall, as the case may be) on the creditor as a result of repayment being brought forward, and is compensatable if the national legislature so decides.

30. The use of the words ‘possible costs’ also does not prevent loss of profit from being regarded as part of the compensation payable to the creditor. The creditor no longer receives the agreed interest (that is to say, interest which, under the agreement, would have accrued over the entire contractual period) as a result of early repayment of the credit. That is precisely why loss of interest may be classified as a financial consequence *directly* linked to repayment.

31. From that point of view, the assertion that interest is *inevitably*, not just *possibly*, lost is, in general terms, correct. However, the situation may arise whereby a variable-rate loan ceases to accrue interest before and independently of repayment (in certain market conditions).¹⁹

32. It may also transpire that, in practice, early repayment of the capital does not result in loss to the creditor in respect of interest it will not receive, if the creditor reinvests the amount in question and the interest rate applicable after reinvestment is to its benefit. In those circumstances, it is not certain *ex ante* whether or not the loss will materialise.

¹³ Directive 2014/17 and its annexes mention various categories of costs: property valuation costs; costs of opening and maintaining a bank account; land registration costs; costs of access to credit databases on consumers; costs linked to repayment; costs related to securing the credit; credit agreement costs; costs referred to in Article 17(2) thereof; costs not included in the total cost of the credit; costs associated with appraisal of the property; costs applicable to the credit agreement offer; costs of using a means of payment for transactions and drawdowns; other costs relating to payment transactions; costs incurred as a result of default; one-off costs; regular costs; costs associated with the loan; costs incurred for breaches of contractual obligations; costs not known to the creditor; costs included in the instalment.

¹⁴ As illustrated by the case which gave rise to the judgment in *UniCredit Bank Austria*, concerning Article 25(1) of Directive 2014/17. Also see judgment of 11 September 2019, *Lexitor* (C-383/18, EU:C:2019:702), concerning Article 16(1) of Directive 2008/48, worded in almost identical terms.

¹⁵ The exact wording is ‘borrowing rate or other costs applicable to the offer’. Another example of ‘costs’ covering interest is found in Article 3(5) of Directive 2014/17, read together with Article 5(3)(c) thereof.

¹⁶ Article 4(13) of Directive 2014/17, which refers to Article 3(g) of Directive 2008/48.

¹⁷ Ibid. Under Article 3(g) of Directive 2008/48, the total cost of the credit means ‘all the costs, *including interest*’ (emphasis added). From the consumer’s perspective, listing ‘interest’ and ‘costs’ as separate items as regards the right to reduction triggered by early repayment serves a clarificatory purpose: it dispels in advance any doubt as to whether that reduction is restricted to one category or another (and removes any temptation to limit the reduction). From the creditor’s perspective, construing those items as mutually exclusive is inconsistent with other references in Article 25(3) of Directive 2014/17: see point 29 below.

¹⁸ Similarly, recital 66 (‘financial loss of the creditor’).

¹⁹ I recall that the Council’s preparatory documents relating to the current directive included, in what would be recital 55, reference to early repayment without charge (‘free of charge for the consumer’) specifically as regards variable-rate loans: see footnote 24 below. That is not the case where compensation for early repayment concerns only fixed-rate loans, as is the case here.

33. Other references in Article 25 of Directive 2014/17 confirm that it is correct to classify interest which will no longer be received as an integral part of the compensation payable to creditors, since such compensation is not limited to mere management costs:

- The compensation, which must be ‘fair and objective’, must be ‘justified’:²⁰ that clarification would not be needed if such compensation related to the payment of services alone (such as repayment processing services) which are always objectively justified.
- The closing sentence ‘[compensation may] be allowed only for a certain period of time’ points in the same direction, since repayment processing costs do not extend over time.

34. Lastly, Section 9 (‘Early repayment’) of Part B in Annexe II to the European Standardised Information Sheet (ESIS) contained in Directive 2014/17, concerning the information to be contained in that sheet, states that ‘When the amount of compensation would depend on different factors, such as ... the prevailing interest rate at the moment of the early repayment’. It thus underscores that interest which will no longer be received is one of the elements that may be taken into account when calculating compensation.

2. Preparatory documents

35. In the course of examining the preparatory documents relating to Directive 2014/17, I did not find any references to compensation for early repayment aimed at harmonising its calculation or the eligible heads of compensation. There are, however, indications that consideration was given to the possibility of including the creditor’s loss of profit in that compensation.

36. In its report on the Commission’s proposal, the European Parliament suggested that, when setting the amount of compensation, account should be taken not only of the creditor’s costs, but also of any savings made by the creditor as a result of repayment.²¹ In the enacting terms, it also limited the maximum amount of compensation to the economic loss incurred by the creditor.²²

37. In some documents of the Council of the European Union, compensation is envisaged as separate from ‘other additional costs’, such as administrative costs or the costs of closing the file.²³

38. Furthermore, in addition to the possibility for Member States to lay down rules governing early repayment with compensation to the creditor for the associated costs, the Council made provision for reimbursement without charge (‘free of charge for the consumer’), citing

²⁰ The wording of recital 66 of Directive 2014/17 is somewhat different: ‘In the event where Member States provide that the creditor is entitled to compensation such compensation should be *a fair and objectively justified compensation* for potential costs ...’ (emphasis added). To my mind, that wording makes it clearer that costs are the rationale for the compensation, as well as the criterion for calculating it.

²¹ Report on the proposal for a directive of the European Parliament and of the Council on credit agreements relating to residential property, COM(2011)0142 – C7-0085/2011 – 2011/0062(COD), of 11 October 2012, amendment 35. That amendment was not adopted: see European Parliament document of 10 September 2013 on that proposal, P7_TA(2013) 0341 (OJ 2016 C 93, p. 295).

²² Report on the proposal for a directive of the European Parliament and of the Council on credit agreements relating to residential property, COM(2011)0142 – C7-0085/2011 – 2011/0062(COD), of 11 October 2012. Amendment 87 adopted by the Parliament on 10 September 2013, document P7_TA(2013) 0341 (OJ 2016 C 93, p. 295). I would point out that those amendments were replaced by the Position of 10 December 2013, document P7_TC1-COD(2011) 0062, the wording of which reflects that of the final legislative act, namely Directive 2014/17.

²³ As from the document of 3 November 2011, 13625/11. The distinction appeared in (what was then) Section 8 of the Instructions to complete the ESIS.

variable-rate loans as an example.²⁴ That provision seems to me to be indicative of the fact that, for the Council, compensation could cover the interest which would no longer be received following early repayment.

3. Teleological criterion

39. As I have indicated, Directive 2014/17 does not, in itself, confer on creditors a right to receive compensation for early repayment of the credit. The decision whether or not to establish that right is a matter for each national legislature, which must, however, respect the purpose of Article 25 of that directive.

40. A national system which takes account of the creditor's loss of profit when calculating compensation for early repayment may, in my view, be consistent with that purpose.

41. In its judgment in *UniCredit Bank Austria*, the Court, after linking the right to early repayment to Article 1 of Directive 2014/17, read together with recital 15 thereof, recalled that that directive seeks to ensure that agreements covering credit for consumers secured by a mortgage or other credit relating to immovable property for residential use 'enjoy a high level of protection'.²⁵

42. It has been argued that excluding the creditor's loss of profit from the compensable costs would be the approach that best protects the consumer (since it removes obstacles to the exercise of his or her right to early repayment).²⁶ From that point of view, the reduction in interest and costs entailed by the right to reimbursement under Article 25(1) of Directive 2014/17 would prevent compensation from covering future interest which will no longer be received.²⁷

43. In line with that approach, assimilating the creditor's loss of profit to the return it would have received if the agreement had remained in force would remove part of the appeal of the right to early repayment, namely to make savings, and would undermine the purpose of that right. Without specific justification or some kind of limitation, such assimilation would not be compatible with Directive 2014/17.

44. However, I do not think that that is the position which results from Directive 2014/17. At the same time as imposing the right to early repayment (which, as such, is non-derogable), it allowed each Member State to incorporate that right into its legal system in a way which preserved the particularities of that system and took account of the specific features of its credit market relating to immoveable property.²⁸

²⁴ Based on the Note from the General Secretariat of the Council to the Delegations (Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property – Compromise proposed by the Presidency) of 15 November 2011, document No 16948/11, recital 50. It no longer appeared in the text provisionally agreed with the Parliament on 22 April 2013 after negotiations had been completed: see the Note from the General Secretariat of the Council to the Delegations (Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property – Compromise proposed by the Presidency) of 3 May 2013, document No 8895/13.

²⁵ Judgment in *UniCredit Bank Austria*, paragraph 29.

²⁶ The *Study on switching of financial services and products* of 2019, ordered by the Commission, points to the amount of compensation payable to the creditor, especially in fixed-rate mortgage loans, as one of the factors that may discourage consumers and deter them from exercising the right to repayment. Also see the Report from the Commission to the European Parliament and the Council on the review of Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property, COM(2021) 229 final.

²⁷ Order for reference, Part D, paragraph I.2.b(bb) and paragraph I.3.a, with reference to academic opinions.

²⁸ Directive 2014/17 recognises and accepts the resulting diversity in recital 66 thereof.

45. Where, in availing itself of that possibility, a Member State confers on creditors the right to compensation, it is required to comply with certain minimum conditions,²⁹ but nothing prevents it from taking into account the creditor's loss of profit for the purposes of calculating the compensation payable.

46. Directive 2014/17 does not define what is meant by 'fair' compensation,³⁰ which must be given a uniform interpretation and denotes the 'why and wherefore' of the compensation as well as its 'quantum'. As in other areas of EU law,³¹ the term 'fair', applied to compensation for early repayment of the credit, refers both to reparation of the damage sustained by a party and to the balance between the opposing interests of the consumer and the creditor:

- For consumers, repayment entails advantages, as they are released from their contractual obligation with a reduction in the agreed price.
- For creditors, early repayment may entail disadvantages, as they must not only process the repayment, but also reinvest the capital at new market prices (or simply bear the interest lost).³²

47. In that context, including loss of profit as one of the heads of compensation may further the objectives of Directive 2014/17, which are not limited only to ensuring a high level of consumer protection. Another of its stated objectives is to create an efficient and competitive internal market in credit agreements relating to residential immovable property,³³ against the backdrop of financial stability concerns.³⁴ According to recital 66 of that directive, the right to early repayment is an instrument which furthers those objectives.³⁵

48. Where the right to compensation has been recognised in a Member State, as explained above, Directive 2014/17 leaves that Member State ample leeway to regulate its exercise. It thus allows the Member State to take account of the specific features of its credit market, without clashing with the objectives of that directive.

²⁹ Compensation is only to cover costs 'directly linked to the early repayment' and is to be based on them; it is not to 'exceed the financial loss of the creditor'; it is not to penalise the consumer; and it is to be 'objective' and 'fair'.

³⁰ Or what is meant by 'objective' compensation. In my view, that adjective refers to the method of calculating the amount of compensation: see point 62 below.

³¹ Despite their differences, in my view, the notion of equitable indemnity payable to a commercial agent for loss of customers, which does not prevent an additional claim for damages being made, provided for in Article 17(2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17), may be cited as evidence of a degree of consensus; in that regard, see judgments of 23 March 2023, *02 Czech Republic* (C-574/21, EU:C:2023:233), and of 13 October 2022, *Herios* (C-593/21, EU:C:2022:784). Another example would be Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), Article 5(2)(b) of which establishes an obligation to pay authors 'fair compensation' in certain circumstances. The Court has clarified the link between that concept and the need for a 'fair balance' to be struck between the different interested parties, referred to in recital 31: see judgment of 21 October 2010, *Padawan* (C-467/08, EU:C:2010:620, paragraph 38 et seq.), and the Opinion of Advocate General Trstenjak in that case (C-467/08, EU:C:2010:264, point 73 et seq.). Lastly, reference should be made to the fair compensation accepted by the Court in the context of the (since repealed) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19): see judgment of 3 September 2009, *Messner* (C-489/07, EU:C:2009:502, paragraph 26).

³² That was the explanation of 'fair' given in the Commission's first proposal for a consumer credit directive, which expressly referred to an indemnity for creditors: Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, COM(2002) 443 final, Section 3 (Examination of the articles, Article 16).

³³ Recital 82.

³⁴ In particular, recitals 3, 66, 67 and 75.

³⁵ 'A consumer's ability to repay the credit prior to the expiry of the credit agreement may play an important role in promoting competition in the internal market and the free movement of Union citizens as well as helping to provide the flexibility during the lifetime of the credit agreement needed to promote financial stability in line with the recommendations of the Financial Stability Board'. As I explained in point 67 of my Opinion in *UniCredit Bank Austria* (C-555/21, EU:C:2022:742), the right to early repayment is not intended to correct the asymmetry typically present in contractual relationships between creditors and consumers.

49. Whether or not to provide for compensation in favour of the creditor in the event of early repayment and, if so, to what extent, is a decision which may, depending on the circumstances, have significant consequences. In the field of credit agreements relating to immovable property, primarily of a domestic nature, those consequences would first of all be visited on the local market and the local economy, but their capacity for contagion at higher levels cannot be ruled out.

50. A scheme which does not allow creditors to be compensated for the loss of interest they expected to receive may impel them to implement strategies with a potentially undesirable impact on the objectives of Directive 2014/17,³⁶ for instance, limiting the range of credit products on offer or charging higher interest to consumers across the board.³⁷

51. Where Article 25(3) of Directive 2014/17 entrusts Member States with the decision whether or not to introduce compensation, it does not limit that compensation at the outset to repayment processing costs or to other associated administrative costs. The national legislature thus enjoys a broad discretion, with the result that it is free to ensure that compensation covers the creditor's loss of profit if it considers it necessary to do so in order ultimately to further the objectives of Directive 2014/17 in its own residential property market.

4. Systematic criterion. Directive 2008/48

52. In the recitals, Directive 2014/17 recalls the need for interpretations that are consistent with and complementary to other EU acts, in particular Directive 2008/48.³⁸ Although it also points to the limits on the criterion of systematic interpretation, none of them concerns the right to early repayment.³⁹

53. Directive 2008/48 acknowledges (recital 39) the difference between consumer credit and 'other products which are financed by long-term funding mechanisms, such as fixed-rate mortgage loans'. It is precisely because the latter long-term financing model is not commonplace in consumer credit that the maximum compensation due to the creditor in the event of early repayment of that credit must, as a rule, be set on a flat-rate basis.

³⁶ Observations of the German Government, paragraph 45, and, in detail, observations of VR Bank, paragraph 44 et seq. Pages 60 and 61 of Annex 3 to the Commission staff working document accompanying the White Paper on the integration of EU mortgage credit markets, SEC(2007) 1683, referred to those strategies linked to how compensation was governed in various Member States and provided examples of their adverse effect on specific markets. See Schäfer, H.B. and Wulf, A.J., 'Premature repayment of fixed interest mortgage loans without compensation, a case of misguided consumer protection in the EU', *European Journal of Law and Economics*, 2022, pp. 175 to 208.

³⁷ That ultimately restricts consumers' ability to shop around for the products best suited to their needs before concluding a credit agreement relating to residential property or, at a later date, with a view to exercising the right to early repayment. Whether or not provision is made for a right to compensation and whether or not the amount thereof is subject to a maximum limit are linked to the extent to which creditors are willing to offer long-term fixed-rate loans.

³⁸ Recitals 19 and 20. Also see judgment in *UniCredit Bank Austria*, paragraph 28: 'it is apparent from recitals 19 and 20 of Directive 2014/17 that, for reasons of legal certainty, it is necessary to ensure that the directive is consistent with and complementary to other acts adopted in the area of consumer protection.'

³⁹ Recital 22. Prior to the adoption of Directive 2014/17, some Member States had extended Article 16 of Directive 2008/48 to cover credit secured by a mortgage or equivalent security.

54. In Directive 2008/48, the exception to that rule confirms that interest which will no longer be received following early repayment is (or may be) compensable:

- Subject to a maximum limit, Article 16(4)(b) allows Member States to provide for a different level of compensation based on the loss actually sustained.⁴⁰
- That directive establishes, as the criterion for determining the loss sustained, that such 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’.

55. If that is the case under Directive 2008/48, it may a fortiori also be the case as regards credit relating to immovable property (secured by a mortgage or equivalent security) for the purpose of interpreting Article 25 of Directive 2014/17.⁴¹ This therefore confirms that financial loss in the form of interest may be included in the potential costs linked to early repayment of the credit, in accordance with the national rules on compensation.

56. In short, my view is that there is nothing to prevent the legislation of a Member State from providing that compensation under Article 25(3) of Directive 2014/17 should take into account damage linked to the loss of interest which, as a result of early repayment, will no longer accrue.

B. Second question referred

57. If (as I suggest) the first question is answered in the affirmative, the referring court enquires whether Article 25(3) of Directive 2014/17 contains ‘guidelines for the calculation of the income which the creditor receives from its reinvestment of a consumer loan relating to immovable property which has been repaid early – income to be taken into account in the context of loss of profit’.

1. The method of calculation in general

58. Directive 2014/17 does not refer to a specific way of calculating the compensation payable to the creditor.⁴² The method of calculation (like other aspects of compensation, subject to only a few conditions to which I have already referred and which I will repeat here) is left to the discretion of the Member States.

59. That is confirmed by recital 66 of Directive 2014/17, which states that compensation must be set ‘in accordance with the national rules’.

⁴⁰ It being understood that the difference may operate in favour of either party: the creditor, if it demonstrates that it actually sustained a higher loss than the loss calculated on a flat-rate basis; or the consumer, who may demand a reduction in that flat-rate amount if it exceeds the loss actually sustained by the creditor.

⁴¹ On the basis that, as regards mortgage credit, other methods of calculating compensation are theoretically possible, provided that they satisfy the conditions laid down in Article 25(3) of Directive 2014/17. I would point out that the level of harmonisation achieved by Directive 2014/17 is lower than that achieved by Directive 2008/48.

⁴² Nor do the preparatory documents relating to the directive specify possible methods of calculation.

60. For the purposes of establishing the compensation, Directive 2014/17 neither requires account to be taken of the way in which the creditor actually uses the amount repaid early⁴³ or of any other similar method, nor prohibits such account from being taken, which are matters for each Member State.

61. The constraints imposed by Directive 2014/17 as regards compensation are limited to ensuring that it does not penalise the consumer or exceed the creditor's financial loss, and that it is 'fair'⁴⁴ and 'objective'.

62. The requirement that compensation be 'objective' refers to an abstract and predetermined method of calculation, the parameters of which cannot be defined as one of the parties sees fit. That method must, moreover, serve to identify cases in which compensation is not warranted.⁴⁵ However, provided that those features are respected, calculating the compensation payable using a method incorporating a hypothetical element may, in my view, be an option which is consistent with Directive 2014/17.

2. Asset/liability method under German case-law

63. According to the description set out in the order for reference, which refers to national case-law,⁴⁶ in the asset/liability method the financial loss sustained by the creditor is the difference between two amounts:

- the interest which the borrower would have paid if the contract had been performed as agreed; and
- the return which the creditor would obtain if it invested the amount repaid early in a capital market, in safe securities with maturities corresponding to the term of the loan.

64. For the purposes of that calculation, it is not necessary for the reinvestment as such to have been made. The benchmark is set by assessing the return on an investment with the same maturity.⁴⁷

65. The amount of the difference must also be reduced by the risk costs and administrative costs which were avoided as of the date of payment of the compensation for early repayment. It is also updated having regard to that date of payment.

⁴³ In paragraph 35 of its observations, the Commission draws attention to the difficulties inherent in that method, which would make it necessary to determine precisely, and even lay down, how the repaid amount will be invested from the moment it is recovered until the initially agreed payment date.

⁴⁴ As I have already indicated, compensation will be 'fair' if it strikes a balance between the advantages which the right to early repayment entails for the consumer and the disadvantages it entails for the creditor. See point 46 above.

⁴⁵ That may occur where, because of improved market conditions, the reinvestment generates a higher income for the creditor than the income it would have received from performance of the agreement over the agreed period. That was the approach taken in the Commission's first proposal for a consumer credit directive, which made express provision for an indemnity for creditors: Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, COM(2002) 443 final, Section 3 (Examination of the articles, Article 16).

⁴⁶ Judgment of the Bundesgerichtshof (Federal Court of Justice) of 30 November 2004, XI ZR 285/03.

⁴⁷ The return can be determined from the capital market data of the Deutsche Bundesbank or the European Central Bank.

66. Under that method:

- Compensation is calculated on the basis of capital market conditions, which are determined in a transparent manner and over which the creditor has no influence.
- The formula does not include amounts in respect of penalties imposed on the borrower for early repayment.
- The compensation calculated using that method is intended to balance out the financial loss, so that it too does not de facto impose a penalty on the consumer making the early repayment. If the interest rates applied to the reinvestment are higher than those agreed to in the initial credit agreement, the creditor will not be entitled to compensation.

67. Like all the parties which participated in the preliminary ruling proceedings, and subject to the referring court's final assessment on that point, I consider that the 'asset/liability' method meets the minimum conditions for compensation required by Directive 2014/17.

68. What is more, that method is similar to the method used by Directive 2008/48, in Article 16(4) *in fine*, to calculate the creditor's actual financial loss, where Member States have made exceptional provision to derogate from the flat-rate maximum rule (Article 16(2)).

69. Like the 'asset/liability' method, the calculation of compensation payable to the creditor under Directive 2008/48 on consumer credit incorporates an element of hypothetical (and not necessarily actual) reinvestment of the amount repaid.⁴⁸ The fact that such an element is permitted in the field of consumer credit also enables it to be used in relation to credit secured by a mortgage or equivalent security.

C. Third question referred

70. The referring court enquires whether Article 25 of Directive 2014/17 applies in circumstances such as those of the present case, in which the consumer, before repaying the credit, terminates the agreement on the basis of a right of termination conferred on him or her by national law.

71. The question arises in relation to German law, which envisages two scenarios of early repayment of credit in connection with fixed-interest loans:

- In the first, repayment follows the borrower's termination of the agreement and is subject to the conditions governing termination. Paragraph 490(2) of the BGB applies, which confers on the consumer the right to terminate the agreement on exceptional grounds.⁴⁹ That provision, as currently worded, predates Directive 2014/17 and does not form part of its transposition into national law.

⁴⁸ Under Article 16(4) *in fine* of Directive 2008/48, the creditor's financial loss, in respect of which the creditor may be entitled to compensation if the Member State has enacted provisions to that effect, is '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'. The hypothetical element is more apparent in the language versions which use the subjunctive.

⁴⁹ Technically, Paragraph 490(2) of the BGB confers on the consumer the right to vary the contractual relationship ('Gestaltungsrecht') subject to strict temporal requirements and provided that there is a legitimate interest, to be interpreted strictly. According to the order for reference, that interest is linked to the borrower's economic freedom of action with regard to the immovable property; it exists, in particular, where the borrower needs to put the property to a different use.

- In the second, repayment is not the result of termination of the agreement; it occurs regardless of whether or not the agreement is terminated. That scenario is governed, in essence, by Paragraphs 500 and 502 of the BGB, which were amended in 2016 in order to transpose Directive 2014/17.⁵⁰ The consumer is free to make the early repayment at any time, provided that he or she can demonstrate a legitimate interest.⁵¹

72. The consequences of applying one rule or the other differ as regards the compensation payable to the creditor:

- Paragraph 490(2) of the BGB provides that the borrower is to compensate the creditor for loss sustained as a result of early termination of the agreement. The calculation of that compensation is subject to the general principles applicable to damages, with the result that loss of profit is also included, in accordance with Paragraph 252 of the BGB.
- Under Paragraph 502(1) of the BGB, in the event of early repayment, the creditor may claim reasonable compensation for the loss directly linked to that repayment. The constituent elements of the compensation and how it should be calculated are matters for the national legislature, subject to the limits and conditions set out in Directive 2014/17.

73. The existence of divergent academic opinions leads the referring court to express doubts as to whether Article 25 of Directive 2014/17 also applies to repayment of the loan following a contractual termination governed by Paragraph 490(2) of the BGB.

74. The referring court takes the view that ‘there is good reason to assume that Article 25 of Directive 2014/17 is also applicable where the consumer terminates the ... agreement ... in accordance with Paragraph 490(2) of the BGB before repaying the loan early’.

75. Otherwise, ‘many consumers would not benefit from their right to early repayment ... If the compensation for early repayment in the case where the right of early termination under Paragraph 490(2) of the BGB is exercised were calculated differently than in the context of ... Paragraphs 500 and 502 of the BGB, the result would be that a consumer who terminates his or her loan early might be worse off than a consumer who exercises his or her right of early repayment without terminating the loan’.

76. The referring court summarises the situation thus: ‘due to the objective of consumer protection pursued by that right, it would therefore appear necessary for Article 25 of Directive 2014/17 also to apply in the case where termination is declared before the loan is repaid’.

77. I share the referring court’s view on the applicability of Article 25 of Directive 2014/17. However, I have reservations about some of the reasoning on which it is based.

78. In the abstract, the question is whether each Member State may configure the lender’s right to compensation differently,⁵² depending on whether or not it links compensation to the exercise of an extraordinary right enjoyed by the consumer to terminate the contract.

⁵⁰ Gesetz zur Umsetzung der Wohnimmobilienkreditrichtlinie und zur Änderung handelsrechtlicher Vorschriften, 11.3.2016, BGBl I. 2016, Nr. 12 16.3.2016, p. 296.

⁵¹ The concept of ‘legitimate interest’ for those purposes is broader than that which applies under Paragraph 490(2) of the BGB. According to the order for reference, divorce or unexpected unemployment are regarded as legitimate interests.

⁵² By imposing different requirements, for example as regards the ‘legitimate interests’ that may have to be shown or as regards waiting periods before the right can be exercised, as is presently the case in Germany.

79. In my view, an affirmative answer to that specific question cannot be ruled out. In other words, arguments to the effect that a consumer might end up ‘worse off’⁵³ than another for having chosen one of the options open to him or her under national law over another do not seem to me to be sufficient to curtail the regulatory freedom enjoyed by Member States.

80. What is required, in all cases, is that each option available under national law complies with Article 25 of Directive 2014/17, in addition to the general provision set out in Article 2 thereof.

81. It follows from the foregoing that the question whether or not the principles governing compensation in the context of Paragraph 490(2) of the BGB (which allow the creditor’s loss of profit to be included) are required to comply with Article 25(3) of Directive 2014/17 must be answered in the affirmative.⁵⁴

82. Article 25 of Directive 2014/17 grants consumers the right to discharge their obligations, in whole or in part, without having to wait until they fall due. That provision is silent as to the detailed rules for the exercise of that right: it may be exercised as a purely material act of repayment or pursuant to a power to terminate the loan agreement.

83. The protection which Directive 2014/17 affords to consumers must always exist, irrespective of which of the abovementioned two options they choose in order to exercise the right to discharge their obligations early. Regardless of the rules which a Member State may lay down in making use of the freedom conferred on it by Directive 2014/17, its discretion is subject to the conditions laid down in Article 25(3) of that directive. Those conditions therefore apply whether or not early repayment follows termination of the agreement.

84. In my view, the reference in Article 25(1) and (4) of Directive 2014/17 to the right to repayment ‘prior to the expiry’ of the agreement does not lend support to the argument put forward by VR Bank.⁵⁵ Article 25 of Directive 2014/17 does not seek to impose temporal restrictions on the exercise of the consumer’s right to discharge his or her obligations early. Rather, it serves to underline that that right trumps the *usual* rules governing private contracts, under which both parties are required to perform their obligations and to do so on the agreed terms (including temporal terms).

V. Conclusion

85. In the light of the foregoing, I propose that the Court of Justice give the following answer to the Landgericht Ravensburg (Regional Court, Ravensburg, Germany):

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

⁵³ Point 75 above.

⁵⁴ For obvious reasons, that answer does not prejudice whether or not Member States may confer on consumers an exceptional right to terminate the agreement. Recital 21 *in fine* of Directive 2014/17 makes clear that that directive ‘should not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive’. See, also, by analogy, judgment of 9 September 2021, *UK and Others* (C-33/20, C-155/20 and C-187/20, EU:C:2021:736, paragraph 110), concerning Directive 2008/48.

⁵⁵ Observations of VR Bank, paragraphs 16 and 17. In its view, where the consumer opts for extraordinary termination of the agreement, that agreement ends *ex nunc* and the subsequent repayment is not made ‘prior to the expiry’ of the agreement referred to in Article 25(1) and (4) of Directive 2014/17.

must be interpreted as meaning that:

- it does not preclude national legislation which, in order to determine the compensation payable to the creditor, takes into account damage linked to the loss of interest which, as a result of early repayment of the credit by the consumer, will no longer accrue;
- it does not preclude a method of calculating the compensation payable to the creditor for early repayment of the credit which is based on the notional reinvestment of the amount repaid in safe capital market securities with maturities corresponding to the term of the loan;
- it applies where the consumer exercises his or her right to discharge his or her obligations early after terminating the consumer credit agreement relating to immoveable property.