Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 19 December 2019[1]

Case C-779/18

Mikrokasa S.A. w Gdyni,
Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty w Warszawie
v
XO

(Request for a preliminary ruling from the Sąd Rejonowy w Siemianowicach Śląskich (District Court, Siemianowice Śląskie, Poland))

(Reference for a preliminary ruling — Consumer protection — Credit agreements for consumers — Directive 2008/48/EC — Extent of the harmonisation — Concept of total cost of the credit for the consumer — Directive 93/13/EEC — Unfair terms in consumer contracts — Exclusion provided for contractual terms reflecting mandatory legislative or regulatory provisions)

1. Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66) sets out the legal framework governing consumer credit agreements. In particular, Article 10 details the type of information which must be included in any such credit agreement. The Court is now called upon by means of this request for a preliminary ruling to clarify some aspects of the scope of application and the proper interpretation of this provision.

2. The present request for a preliminary ruling was submitted to the Court by the Sąd Rejonowy w Siemianowicach Śląskich (District Court, Siemianowice Śląskie, Poland) on 12 December 2018 in the context of two respective actions brought by Mikrokasa S.A., established in Gdynia, and Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty, established in Warsaw, against XO, and joined by the referring court, concerning claims for payment of sums due under two separate consumer credit agreements.

3. The main issue raised by this case concerns the degree of harmonisation and the scope of application of Article 10(2) of Directive 2008/48 and the extent to which the requirements of that directive may be supplemented by requirements imposed by national law. Before embarking on a consideration of these issues, it is, however, first necessary to set out the relevant legal provisions.

1 Original language: English.

I. Legal context

A. EU law

4. Recitals 3, 4, 6 to 9, 19 and 31 of Directive 2008/48, as applicable in 2016, state:

‘(3) Those reports and consultations revealed substantial differences between the laws of the various Member States in the field of credit for natural persons in general and consumer credit in particular. An analysis of the national laws transposing Directive 87/102/EEC [2] shows that Member States use a variety of consumer protection mechanisms, in addition to Directive 87/102/EEC, on account of differences in the legal or economic situation at national level.

(4) The *de facto* and *de jure* situation resulting from those national differences in some cases leads to distortions of competition among creditors in the [Union] and creates obstacles to the internal market where Member States have adopted different mandatory provisions more stringent than those provided for in Directive 87/102/EEC. It restricts consumers’ ability to make direct use of the gradually increasing availability of cross-border credit. Those distortions and restrictions may in turn have consequences in terms of the demand for goods and services.

…

(6) In accordance with the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. The development of a more transparent and efficient credit market within the area without internal frontiers is vital in order to promote the development of cross-border activities.

(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.

(8) It is important that the market should offer a sufficient degree of consumer protection to ensure consumer confidence. Thus, it should be possible for the free movement of credit offers to take place under optimum conditions for both those who offer credit and those who require it, with due regard to specific situations in the individual Member States.

(9) Full harmonisation is necessary in order to ensure that all consumers in the [European Union] 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. …

…

2 Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Members States concerning consumer credit (OJ 1987 L 42, p. 48).

(19) In order to enable consumers to make their decisions in full knowledge of the facts, they should receive adequate information, which the consumer may take away and consider, prior to the conclusion of the credit agreement, on the conditions and cost of the credit and on their obligations. To ensure the fullest possible transparency and comparability of offers, such information should, in particular, include the annual percentage rate of charge applicable to the credit, determined in the same way throughout the [Union]. …

…

(31) In order to enable the consumer to know his rights and obligations under the credit agreement, it should contain all necessary information in a clear and concise manner.'

5. Article 1 of Directive 2008/48, entitled 'Subject matter', 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.'

6. According to Article 3 of that directive, entitled 'Definitions':

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

…

(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'.

7. Article 5 of Directive 2008/48, entitled 'Pre-contractual information', stipulates:

'1. In good time before the consumer is bound by any credit agreement or offer, the creditor and, where applicable, the credit intermediary shall, on the basis of the credit terms and conditions offered by the creditor and, if applicable, the preferences expressed and information supplied by the consumer, provide the consumer with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement. Such information, on paper or on another durable medium, shall be provided by means of the Standard European Consumer Credit Information form set out in Annex II. The creditor shall be deemed to have fulfilled the information requirements in this paragraph and in Article 3, paragraphs (1) and (2) of Directive 2002/65/EC [3] if he has supplied the Standard European Consumer Credit Information.

The information in question shall specify:

(a) the type of credit;

(b) the identity and the geographical address of the creditor as well as, if applicable, the identity and geographical address of the credit intermediary involved;

(c) the total amount of credit and the conditions governing the drawdown;

3 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16).

(d) the duration of the credit agreement;

(e) in the case of a credit in the form of deferred payment for a specific good or service and linked credit agreements, that good or service and its cash price;

(f) the borrowing rate, the conditions governing the application of the borrowing rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedure for changing the borrowing rate; …

(g) the annual percentage rate of charge and the total amount payable by the consumer …

…

Any additional information which the creditor may provide to the consumer shall be given in a separate document which may be annexed to the Standard European Consumer Credit Information form.

…

4. Upon request, the consumer shall, in addition to receiving the Standard European Consumer Credit Information, be supplied free of charge with a copy of the draft credit agreement. …

…

6. Member States shall ensure that creditors and, where applicable, credit intermediaries provide adequate explanations to the consumer, in order to place the consumer in a position enabling him to assess whether the proposed credit agreement is adapted to his needs and to his financial situation, where appropriate by explaining the pre-contractual information to be provided in accordance with paragraph 1, the essential characteristics of the products proposed and the specific effects they may have on the consumer, including the consequences of default in payment by the consumer. …'

8. Article 10 of the same directive, entitled 'Information to be included in credit agreements', states in paragraphs 1 and 2:

'1. Credit agreements shall be drawn up on paper or on another durable medium.

All the contracting parties shall receive a copy of the credit agreement. This Article shall be without prejudice to any national rules regarding the validity of the conclusion of credit agreements which are in conformity with [Union] law.

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

(a) the type of credit;

(b) the identities and geographical addresses of the contracting parties as well as, if applicable, the identity and geographical address of the credit intermediary involved;

(c) the duration of the credit agreement;

(d) the total amount of credit and the conditions governing the drawdown;

(e) in case of a credit in the form of deferred payment for a specific good or service or in the case of linked credit agreements, that good or service and its cash price;

(f) the borrowing rate, the conditions governing the application of that rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedures for changing the borrowing rate and, if different borrowing rates apply in different circumstances, the abovementioned information in respect of all the applicable rates;

(g) the annual percentage rate of charge and the total amount payable by the consumer, calculated at the time the credit agreement is concluded; all the assumptions used in order to calculate that rate shall be mentioned;

…'

9. Article 22(1) of Directive 2008/48, entitled 'Harmonisation and imperative nature of this Directive', specifies:

'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 law

10. The ustawa z dnia 7 lipca 2005 r. o zmianie ustawy Kodeks cywilny oraz o zmianie niektórych innych ustaw (Law of 7 July 2005 amending the Law establishing the Civil Code and certain other laws) (Dz. U. of 2005, No 157, item 1316) introduced, in the ustawa z dnia 23 kwietnia 1964 r. — Kodeks cywilny (Law of 23 April 1964 — Civil Code) (Dz. U. of 2014, item 121, consolidated text), as amended ('the Civil Code'), Article 359(2^2). This provision sets a maximum amount of interest that may be claimed in return for a legal act, that is, twice the amount of annual legal interest. Currently, this maximum amount of interest corresponds to 10% of the borrowed capital.

11. Some creditors have circumvented this nationally imposed limit by artificially increasing the amount of commission and fees charged. In response to this, national courts ruled that when the clauses fixing these commissions or costs were contested or when the creditor brought an action for payment before a court, it was accordingly necessary for it to prove the existence of consideration for any commission or cost charged in addition to the interest. In the absence of such consideration or if the commission or costs turned out to be due in return for the capital provided, national courts considered that those commissions or costs were intended to circumvent the provisions of Article 359(2) of the Civil Code. As a result, their amount was reduced to the maximum amount of interest that could be claimed under Article 359(2) of the Civil Code. When the commissions or costs were the counterpart of a service other than providing capital, such clauses could nevertheless be declared invalid, but only if they are unfair within the meaning of the national legislation transposing Council Directive 93/13/EEC. [4]

12. In order to strengthen the control of prices charged by creditors, the Polish legislature then introduced a mechanism to cap the amount of the non-interest credit costs that can be claimed, by means of Articles 5(6a) and 36a of the ustawa z dnia 12 maja 2011 r. o kredycie konsumenckim (Law of 12 May 2011 on Consumer Credit) (Dz. U. of 2011, No 126, item 715) ('the Law on Consumer Credit').

4 Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

13. Article 5(6), (6a), (7) and (8) of Law on Consumer Credit defines a series of concepts to which reference is made in that Law. In the version quoted by the referring court this provision provides for:

'(6) the total cost of the credit — all the costs which the consumer is required to pay in connection with the credit agreement, in particular:

(a) interest, charges, fees, taxes and margins, if known to the creditor; and

(b) costs of ancillary services, in particular insurance, if these must be paid in order to obtain the credit or obtain it on the terms and conditions marketed

— except for the costs of notarial fees paid by the consumer;

(6a) the non-interest credit costs — all the costs borne by the consumer in connection with the consumer credit agreement, excluding interest;

(7) the total amount of the credit — the maximum amount of money, not including credit costs, that the creditor makes available to the consumer under the credit agreement or, in the case of agreements in respect of which no provision has been made regarding that maximum amount, the total amount of money, not including credit costs, that the creditor makes available to the consumer under the credit agreement;

(8) the total amount payable by the consumer — the sum of the total cost of the credit and the total amount of the credit'.

14. Article 13 of the Law on Consumer Credit states:

'1. Before entering into a consumer credit agreement, the creditor or credit intermediary shall be required to provide the consumer with the following information, on a durable medium, in sufficient time to allow the consumer to familiarise himself with that information:

…

(5) the total amount of the credit;

(6) dates and methods of drawdown of credit;

(7) the total amount payable by the consumer;

…

(10) where applicable, information on the other costs which the consumer is required to pay in connection with the consumer credit agreement, in particular regarding interest, fees, margins, charges, including charges for maintaining one or several accounts recording both payment transactions and drawdowns, together with the charges for using payment instruments for both payment transactions and drawdowns, and the costs of ancillary services, in particular insurance, if known to the creditor, and the conditions under which those costs may change;

(11) information on the need to pay notarial fees, if any;

…'

15. Article 30 of the Law on Consumer Credit provides

‘1. Subject to Articles 31 to 33, a consumer credit agreement should set out:

…

(2) the type of credit;

…

(4) the total amount of the credit;

(5) the dates and methods of drawdown of credit;

(6) the credit interest rate, …;

(7) the annual percentage rate of charge and the total amount payable by the consumer as determined at the date on which the consumer credit agreement is concluded together with all the assumptions used in order to calculate it;

(8) the rules and deadlines with regard to repayment of the credit, …;

(9) a statement including the deadlines and rules with regard to the payment of interest and any other credit costs where the creditor or credit intermediary allows a grace period in repaying the credit;

(10) information on the other costs which the consumer is required to pay in connection with the consumer credit agreement, in particular charges, including charges for maintaining one or several accounts recording both payment transactions and drawdowns, together with charges for using a means of payment for both payment transactions and drawdowns, fees, margins and the costs of ancillary services, in particular insurance, if known to the creditor, and the conditions under which those costs may change;

…’

16. Article 36a of the Law on Consumer Credit stipulates:

‘1. The maximum amount of the non-interest credit costs shall be calculated according to the formula:

$$MPKK \leq (K \times 25\%) + (K \times \frac{n}{R} \times 30\%)$$

where the meaning of each of the symbols is as follows:

MPKK — the maximum amount of the non-interest credit costs;

K — the total amount of the credit;

n — the repayment period, expressed in days;

R — the number of days in a year.

2. Throughout the entire lending period, the non-interest credit costs may not exceed the total amount of the credit.

3. Non-interest credit costs arising from a consumer credit agreement shall not be payable in so far as they exceed the maximum non-interest credit costs calculated in the manner described in paragraph 1 above or the total amount of the credit.'

17. Article 45(1) of the Law on Consumer Credit provides for the forfeiture of interest and other credit costs as a penalty in the event of a failure to comply with Article 36a. In accordance with Article 47 of that law, contractual terms may not exclude or limit the consumer's rights.

II. The main proceedings and the questions referred for a preliminary ruling

18. The two cases pending before the referring court, which it joined by decision of 8 November 2018, concern the payment of claims arising from two separate credit agreements concluded by XO.

19. The first case concerns a cash loan agreement concluded on 21 December 2016 between Mikrokasa and XO by virtue of which 4 000 zloty (PLN) (approximately EUR 940) was lent to XO. Under that agreement — which was not negotiated between the parties — XO agreed to pay, for that loan, an arrangement fee of PLN 600 (approximately EUR 139), an administrative fee of PLN 3 400 (approximately EUR 790) and an interest rate of 7% per annum, amounting, over the term of the loan, to PLN 371.87 (approximately EUR 86) in total.

20. The cash loan agreement states that the 'total amount payable by the consumer' — which is described as 'the sum of all the money that the creditor will make available to you and all the costs which you will be obliged to pay in connection with the credit agreement' — amounted to PLN 8 371.87 (approximately EUR 1 946). The cash loan agreement also mentions that the 'non-interest credit costs' amounted to PLN 4 000 (approximately EUR 929).

21. The applicant explains that the non-interest credit costs were set at the lower limits of the costs borne by loan providers, and therefore those charges would have necessarily been lower than the costs actually borne by creditors. It also cited case-law of the Polish domestic courts, according to which no review of whether non-interest credit costs are excessive is admissible as long as their amounts are within the limits of the maximum non-interest credit costs.

22. Since XO did not pay any amount due to Mikrokasa, the latter brought a claim against XO before the Sąd Rejonowy Lublin Zachód w Lublinie (District Court, Lublin West, Poland) on 30 June 2017, demanding the payment of PLN 8 184.53 for the loan which XO had failed to repay.

23. By decision of 10 October 2017, the Sąd Rejonowy Lublin Zachód w Lublinie (District Court, Lublin West) found that there were no grounds for issuing a payment order and referred that case to the court which has jurisdiction in consumer cases, namely the referring court.

24. The second case concerns a loan agreement concluded on 21 November 2016 between IPF Polska sp. z o.o., Warsaw ('the creditor') and XO, which was also not negotiated between the parties, under which the creditor made available to XO cash amounting to PLN 3 000 (approximately EUR 698).

25. Under that loan agreement, XO was required to pay a fee of PLN 2 084 (approximately EUR 484) and an interest rate of 10% per annum, amounting over the term of the loan to PLN 248.41 (approximately EUR 57) in total.

26. The applicant in this second case, Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty ('Revenue') acquired the claim against the defendant from the creditor under a claim assignment agreement. The defendant settled a small amount due to the applicant under the loan agreement.

27. On 27 October 2017, Revenue brought a claim against XO before the Sąd Rejonowy Lublin Zachód w Lublinie (District Court, Lublin West), demanding payment of PLN 5 196.68 (approximately EUR 1 208).

28. On 29 November 2017 the Sąd Rejonowy Lublin Zachód w Lublinie (District Court, Lublin West) issued an order for payment in the amount claimed. The consumer challenged this order and the second case was referred back to the referring court.

29. In her pleadings, XO essentially claimed that the protection provided for by Article $359(2^1)$, is insufficient and that the notion of 'non-interest credit costs' used by that provision to calculate the maximum fees that can be charged does not reflect the actual credit cost.

30. In this regard, the national court states that in both cases, the non-interest credit costs do not exceed the maximum amount permitted under Article 36a of the Law on Consumer Credit. However, this court has doubts as to the conformity of Article 36a of the Law on Consumer Credit with EU law, in so far as the concept of non-interest credit costs is not mentioned in Directive 2008/48. Even if Article 36a of the Law on Consumer Credit pursues objectives other than informing consumers, the creation of this new category of costs might be contrary to the objective of consumer protection pursued by that directive, since, in particular, Article 36a of the Law on Consumer Credit does not provide for an obligation to inform consumers of the non-interest credit costs, including where they are below the threshold provided for in that provision.

31. In addition, the national court queries whether the different clauses setting out the non-interest credit costs are covered by Directive 93/13 and whether they fall within the exception set out in Article 1(2) of that directive. Indeed, although Article 36a of the Law on Consumer Credit sets an upper limit for non-interest credit costs that can be charged, this provision does not fix the exact amount of non-interest credit costs that can be charged. The question therefore arises as to whether price clauses which are in conformity with this provision can be regarded as reflecting mandatory statutory or regulatory provisions within the meaning of Article 1(2) of Directive 93/13.

32. The Sąd Rejonowy w Siemianowicach Śląskich (District Court, Siemianowice Śląskie) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should the provisions of Directive [2008/48], as amended, in particular Articles 3(g), 10(1) and 22(1) thereof, be interpreted as precluding 'non-interest credit costs', determined as a lump sum in accordance with the statutory calculation formula set out in Article 36a of the Law on Consumer Credit, from being distinguished from the 'total cost of the credit to the consumer', as defined in that directive, in a manner that enables the actual non-interest credit costs borne by the loan provider to be concealed from the consumer?

(2) Should the provisions of Directive [93/13], as amended, in particular Articles 1(2), 6(1) and 7(1) thereof, be interpreted as precluding a review of the terms of consumer credit agreements with respect to the conditions set out in Article 3 of that directive in so far as it includes 'non-interest credit costs', the criteria for determining which are described in Article 36a of the Law on Consumer Credit?'

III. Analysis

33. As requested by the Court, I shall confine my observations in this Opinion to the first question.

A. Preliminary observations

34. From the outset, it shall be noticed that the doubts expressed by the referring court are related to the reference made in Article 36a of the Law on Consumer Credit to the concept of non-interest credit costs. Since Directive 2008/48 does not contain any mention of this or any similar concept, the referring court questions whether national legislation may make reference to that concept and whether credit agreements should or simply may mention the amount of these costs. Accordingly, the first question raises two separate issues.

35. The first is to determine whether Article 10(2), read in conjunction with Article 22(1) of Directive 2008/48, precludes a national provision, such as Article 36a of the Law on Consumer Credit, from referring, for its application, to a concept not provided for in Directive 2008/48, such as that of 'non-interest credit costs'.

36. The second is to ascertain whether those EU provisions preclude national legislation which allows credit agreements to include, among the information provided to consumers, information other than that set out in that directive, such as non-interest credit costs.

37. I propose now to examine these two issues in turn.

38. In this regard, it appears that not all of the provisions cited by the referring court in its first question — namely Articles 3(g), 10(1) and 22(1) of Directive 2008/48 — are relevant.

39. Regarding Article 3(g), although it defines the concept of 'total cost of the credit to the consumer', it does not appear from the Court's file that the reference to, or calculation of, this total cost is contested in either of the two agreements which are in dispute in the present case.

40. With respect to Article 10(1) of Directive 2008/48, it follows from its wording that that provision concerns the medium on which credit agreements must be drawn up. That provision therefore also appears to be unrelated to the first question asked. Admittedly, Article 10(1) specifies that that provision applies without prejudice to any national rules regarding the validity of the conclusion of credit agreements which are in conformity with EU law. However, since such an indication aims at clarifying the scope of application of the other provisions laid down in Article 10, that provision cannot be interpreted independently.

41. In these circumstances it may be observed that the relevant paragraph of Article 10 of Directive 2008/48 is not, in fact, paragraph 1, but rather paragraph 2, which defines the relevant elements of information that must be included in credit agreements.

42. Accordingly, in order to provide a useful answer to the referring court, I propose to consider the question raised as relating, first, to whether Article 10(2), read in conjunction with Article 22(1) of Directive 2008/48, is to be interpreted as precluding national legislation from referring to the amount of non-interest credit cost due, provided that such legislation does not require creditors to mention that amount on credit agreements and, second, to whether, according to those provisions, a national legislation may permit creditors voluntarily to mention this information in a credit agreement.

B. Whether national legislation may utilise a concept not provided for in Directive 2008/48 in the context of credit agreements

43. Article 1 of Directive 2008/48 states that that directive harmonises certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers.

44. In this regard, recital 9 of that directive specifies that, with regard to those aspects, in order to ensure that all consumers in the EU enjoy a high and equivalent level of protection of their interests and to create a genuine internal market, full harmonisation of the national legislation is sought.

45. Accordingly, Article 22(1) of Directive 2008/48 states that, in so far as that directive contains harmonised provisions, Member States are not authorised to maintain or introduce national provisions other than those provided for in that same directive. [5]

46. In that context, Article 10(2) of Directive 2008/48 provides, as its title indicates, for the harmonisation of the information which must imperatively be included in a credit agreement. That provision does not mention among those elements the amount of non-interest credit costs due.

47. Article 10(2) nevertheless obliges creditors to specify the total cost of the credit for the consumer. The latter term is defined by Article 3(g) as referring to 'all the costs, including interest, commissions, taxes and any other kind of fees that the consumer is required to pay in connection with the credit agreement and which are known to the creditor, except for notarial costs'. Since, however, the EU legislature has required creditors simply to mention only that total, and *not* the different costs comprising this total, Member States cannot provide for any alternative *obligation* in their domestic legislation, regardless of whether such an information obligation concerns an amount that constitutes a part of the total cost of the credit in the meaning of Article 10(2) of Directive 2008/48 or not. [6] Consequently, a national law cannot be contrary to that directive because it does not provide the obligation to inform consumers of the non-interest credit costs, within the meaning of this term under national law.

48. This does not mean, however, that Article 10(2) of Directive 2008/48 precludes Member States from using information that is not mentioned in that directive for the purposes of applying an item of legislation which does not impose obligations on the provision of information. This is a critical distinction which, it seems to me, is at the very heart of this case. Indeed, when an EU act harmonises a certain aspect of the laws, regulations or administrative provisions of the Member States, such harmonisation does not preclude the application of national rules which fall outside its scope of application, provided that such rules do not themselves impede the application of EU law.

49. For example, in *Assica and Kraft Foods Italia*, [7] the Court held that, although the regime for the protection of geographical indications and designations of origin instituted by Council Regulation (EEC) No 2081/92 [8] is exhaustive, that exhaustiveness does not preclude the application of a regime which protects geographical indications falling outside the scope of application of that regulation. Since the latter aims to protect indications and designations used to emphasise a particular link

5 See judgments of 12 July 2012, *SC Volksbank România* (C-602/10, EU:C:2012:443, paragraphs 38, 63 and 64), and of 9 November 2016, *Home Credit Slovakia* (C-42/15, EU:C:2016:842, paragraph 55).

6 See, by analogy, judgments of 9 November 2016, *Home Credit Slovakia* (C-42/15, EU:C:2016:842, paragraphs 58 and 59), and of 5 September 2019, *Pohotovosť* (C-331/18, EU:C:2019:665, paragraph 50 and 51).

7 Judgment of 8 May 2014 (C-35/13, EU:C:2014:306).

8 Regulation of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1).

between the characteristics of a product and its geographical origin, the Court held that the exhaustiveness of that regime does not preclude the existence of a national regime aiming at prohibiting the use of misleading geographical indications, as long as that regime does not require, for its application, that the relevant products possess certain characteristics.[9]

50. Similarly, in the field of consumer law, but in this instance involving Directive 2005/29/EC of the European Parliament and of the Council,[10] the Court held, in *Kirschstein*,[11] that even if that directive fully harmonises the rules relating to unfair commercial practices,[12] it does not preclude national legislation from penalising persons who, without having been duly authorised to do so, confer certain diplomas. Since the legislation at issue in that case was not intended to sanction certain arrangements taken for promoting or marketing services in the field of higher education, but was rather aimed at determining which operator is authorised to provide a service, without directly regulating the practices which that operator may subsequently implement to promote or dispose of the sales of that service, the Court considered that that national legislation does not fall within the field harmonised by Directive 2005/29.[13]

51. In the main proceedings, it appears from the Court's file, although it is for the national court to ascertain, that the concept of 'non-interest credit cost' laid down in Article 5(6a) of the Law on Consumer Credit is used only for the purposes of applying Article 36a of that law.

52. In so far as the national legislation does not provide for the obligation to inform the consumer of the amount of the non-interest credit cost due, but rather aims at setting a maximum amount of that kind of cost which can be charged to a consumer — an interpretation which was confirmed during the hearing by the Polish Government — the reference to that amount made in Articles 5(6a) and 36a of the Law on Consumer Credit does not fall within the scope of the full harmonisation carried out by Directive 2008/48.

53. According to the national court, Article 36a of the Law on Consumer Credit may nevertheless conflict with Directive 2008/48, since the method of calculating the maximum of non-interest credit costs that can be charged to consumers provided for in that provision does not reflect the actual cost of the credit borne by the creditor.

54. It is important, however, to stress that neither Directive 2008/48 nor, for that matter, any other EU instrument,[14] harmonises the cost of credit agreements or, for that matter, the maximum amount of fees that consumers may be charged. It follows, therefore, that Member States may in principle utilise national provisions to regulate prices on the consumer credit market, even if they rely to this end on concepts that do not reflect the actual cost of the credit borne by the creditor, provided that these provisions do not affect the areas harmonised by Union law.

55. The national court also questions the compatibility of Article 36a of the Law on Consumer Credit with Article 10(2) of Directive 2008/48 because of the absence of an obligation for creditors to mention in credit agreements the non-interest credit cost due, although such information could be of importance to consumers.

9 Judgment of 8 May 2014, *Assica and Kraft Foods Italia* (C-35/13, EU:C:2014:306, paragraphs 28 to 30).

10 Directive of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

11 Judgment of 4 July 2019 (C-393/17, EU:C:2019:563).

12 See, on that issue, judgment of 26 October 2016, *Canal Digital Danmark* (C-611/14, EU:C:2016:800, paragraph 26).

13 Judgment of 4 July 2019, *Kirschstein* (C-393/17, EU:C:2019:563, paragraphs 37 to 49).

14 So far as Directive 93/13 is concerned, Article 4(2) of that directive expressly states that the assessment of the unfair nature of the terms shall not relate to the adequacy between the price charged and the good or service offered in return in so far as these terms are in plain intelligible language. Therefore, any clause providing for the payment of a fixed commission falls outside the scope of the control of unfair terms provided for in Directive 93/13 — if drafted in plain intelligible language — except if they are challenged for a reason other than their amount.

56. In this regard, it is sufficient to recall that Directive 2008/48 does not mention the amount of the non-interest credit cost due among the elements of information that must imperatively be included in a credit agreement. Since the harmonisation carried out by that directive is exhaustive, the validity of national legislation cannot be challenged on the ground that such information has not been included. [15]

57. In this context, I do not overlook the fact that the referring court seems implicitly to question the validity of the full harmonisation carried out by Article 10(2), since that article may seem contrary to the objective of ensuring a high level of consumer protection pursued by Directive 2008/48. [16] One may observe, however, that, as the Commission stressed at the oral hearing, while that particular objective is naturally of considerable importance, it is by no means the only one pursued by that directive. Indeed, it is clear from recitals 3 to 7 of that directive that it aims in the first place to reduce remaining national disparities and distortions of competition between creditors, the objective of which can only be achieved by means of full harmonisation of the information to be included in a loan agreement.

58. Second, one might also observe that the provision of excessive information to consumers can actually be counterproductive. Given that Directive 2008/48 already provides that national laws must require creditors to include in consumer loan agreements information such as the total amount of credit, [17] the annual percentage rate of charge, [18] or the total amount payable by the consumer, [19] the EU legislature might reasonably have considered that such information is sufficient to enable consumers to assess the potentially significant economic consequences of their loan agreement and that it was not necessary to oblige creditors also to mention in the credit agreement the amount of the non-interest credit costs which were due. While some undoubtedly might wish it were otherwise, that, in any event, was a policy choice for the EU legislature to make.

59. These considerations, to my mind, may be regarded as justifying the conclusion that that directive precludes Member States from imposing in their national law any information *obligations* on credit providers *other* than those expressly provided for in Article 10(2).

60. In any case, in the main proceedings, it appears from the Court's file that neither Article 5(6a), nor Article 36(a) of the Law on Consumer Credit require that the amount of non-interest credit costs due be mentioned in the loan agreement, that being, of course, subject to verification by the national courts. If, however, this interpretation is correct, then it must be noted that those provisions simply make reference to that kind of cost *for the sole purposes of applying a price control mechanism in respect of those costs*.

61. Accordingly, I am of the view that those national provisions do not contravene Article 10(2) of Directive 2008/48, since they do not fall within the scope of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers which have been fully harmonised by Article 10(2) of Directive 2008/48.

15 As regards the possibility of obliging a lender to provide such an element of information outside the contract itself, it shall be noted that pre-contractual information is governed by Article 5 of Directive 2008/48, which does not mention the non-interest credit cost due among the information that must be provided to borrowers. It is true that according to Article 5(6) of Directive 2008/48 Member States shall ensure, where appropriate, that creditors provide adequate explanations to the consumer in order to place the consumer in a position that enables him or her to assess whether the proposed credit agreement is adapted to his or her needs and financial situation. However, I believe, in view of the full harmonisation that that directive seeks to achieve, that that provision must be understood in the sense that Member States cannot sanction a creditor for failing to provide a very specific piece of information, but that they shall sanction him or her, when it appears, at the end of an *overall* assessment of all the information given, that the latter was inadequate or insufficient.

16 See, in this respect, judgments of 6 June 2019, *Schyns* (C-58/18, EU:C:2019:467, paragraph 28), and of 11 September 2019, *Lexitor* (C-383/18, EU:C:2019:702, paragraph 29).

17 See Article 10(2)(d) of Directive 2008/48.

18 See Article 10(2)(g) of Directive 2008/48. As regards the importance of that piece of information, see, for example, judgment of 20 September 2018, *Danko and Danková* (C-448/17, EU:C:2018:745, paragraph 64).

19 See Article 10(2)(g) Directive 2008/48.

C. Whether a creditor may voluntarily mention the amount of non-interest credit costs due

62. So far as the option of voluntarily mentioning in a credit agreement the amount of non-interest credit costs due is concerned, it should be noted, as recitals 3 to 9 of Directive 2008/48 make clear, that the latter aims at both remedying distortions of competition linked to the application of various national consumer protection measures, on the one hand, and ensuring that consumers enjoy a high level of protection, on the other. Neither of these objectives would require that creditors be prohibited from adding other information in credit agreements.

63. In particular, with regard to the objective of remedying distortions of competition, it should be noted that such distortions can only exist to the extent that national consumer protection legislation imposes distinct obligations not catered for in Directive 2008/48. If, however, one applies the principle of proportionality — according to which any act adopted by the Union cannot exceed what is necessary to achieve its objectives [20] — Directive 2008/48 does not preclude creditors from voluntarily providing other information to consumers.

64. This solution may seem obvious, but doubts could have existed since, on the one hand, the information mentioned in that provision includes all those, in principle, necessary for the formation of a contract. On the other hand, Article 5(1) of Directive 2008/48, which concerns information to be provided before any consumer is bound by a credit agreement or offer, expressly mentions in its third subparagraph that when the creditor provides the consumer with additional information in addition to that mentioned in the second subparagraph, it must do so in a separate document.

65. The fact, however, that Article 10(2) refers to all the constituent elements of a contract is not sufficient to conclude that the EU legislature's intent was to limit the terms of a credit agreement to those elements.

66. I also believe that the absence in Article 10(2) of Directive 2008/48 of a provision similar to the third subparagraph of Article 5(1), should not be interpreted as prohibiting creditors from including in loan agreements information other than that mentioned in that provision.

67. Indeed, while both Article 5(1) and Article 10(2) contribute to the realisation of the general objective pursued by Directive 2008/48 of informing consumers, the role of the information obligations set out in these provisions is, however, slightly different.

68. Article 5 of Directive 2008/48 harmonises the pre-contractual information that must be provided to consumers in the form of a comprehensive document. As stated in recital 19 of Directive 2008/48, the elements of information which have to be provided at that stage, are those which, according to that recital, ensure the fullest possible transparency and comparability of offers.

69. For such a comparison to be effective, the information provided must necessarily be standardised. This in turn implies that points of comparison must remain limited to those considered by the EU legislature to be relevant. Indeed, as underlined by an empirical study conducted by the Office of Fair Trading (OFT) [21] — which was responsible for protecting consumer interests throughout the UK before

20 See recital 46 of Directive 2008/48.

21 See Office of Fair Trading, *Consumer contracts*, February 2011, pp. 1-116.

being closed in 1 April 2014 — 'many people do not read contracts in full and instead focus on headline elements such as the price'.[22] When an agreement is composed of several documents, consumers 'often forfeit reading one document for another, choosing to read the document they believe to be the most important'.[23]

70. Although this study was carried out after the adoption of Directive 2008/48, ordinary experience suggests that these results are scarcely surprising. The dull verbiage commonly found in standard form credit agreements is unlikely to set the pulses racing, save for a small minority of intrepid and dedicated contract lawyers. The study illustrates, nevertheless, why, in my view, the EU legislature might reasonably have decided in the context of the requirements of Article 5(1) of Directive 2008/48, that the elements of information regarded as being essential should be communicated in one comprehensive document, namely, the Standard European Consumer Credit Information form, while the other information must be given on a separate sheet.[24]

71. Article 10(2) pursues a slightly different objective, since the consumer is expected to compare different offers and select the most advantageous one for him or her on the basis of the information referred to in Article 5. As flows from recital 31 of Directive 2008/48, the specific objective pursued by Article 10(2) is to enable the consumer to know what are or will be his or her rights and obligations under the credit agreement *in a clear and concise manner*. Such an objective does not preclude creditors from including information other than that referred to in Article 10(2) in the same document, but rather quite the contrary.[25]

72. In addition, since any clause of a contract can be considered as providing information in one shape or another,[26] to interpret Article 10 of Directive 2008/48 as exhaustively defining the list of information that may be mentioned in a contract, would mean in practice that Directive 2008/48 effectively harmonises the content of credit agreements themselves, in circumstances where that directive makes no reference to such harmonisation. It is, however, clear from the terms of Article 1 of that directive that it regulates only certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers.

73. In view of all of these considerations it follows that, in my view, Directive 2008/48 does not require national legislation to prohibit creditors from including, among the information to be provided in a consumer loan agreement, other information such as the amount of non-interest costs due.

22 Ibid., see 'Key findings', p. 17. In that study, 35% of those interviewed mentioned that they just picked key points to read, 30% gave the agreement a quick skim read and 10% did not read at all. See paragraph 2.23, p. 27. One of the explanations given is that the agreement was too long, contained too much jargon or that the consumers considered that they do not have enough time to read it. Another reason given by the respondents was that they consider themselves protected by the law and, it was, therefore, not necessary to read the agreement in detail. See paragraphs 2.26-2.29, pp. 28-29. Experience suggests that consumers read their contracts in detail when difficulties arise. This illustrates that while consumer information is important, it is far from being sufficient for consumer protection to be effective. What is needed, in my view, is for terms that deviate too significantly from what a reasonably informed consumer could expect to find in an agreement, with regards to national law that would apply in the absence of that agreement, to be declared unenforceable. See, to that effect, judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 68), and of 16 January 2014, *Constructora Principado* (C-226/12, EU:C:2014:10, paragraphs 21 to 23).

23 Ibid., Annex E, paragraph 3.18, p. 31. See, also on this topic, European Commission, 'Consumer empowerment', *Special Eurobarometer*, No 342, , April 2011, p. 28. According to that survey, 60% of the interviewees did not read in full the terms and conditions of a service contract. Over half of them (57%) gave as a reason that the contract was too long or required too much time to read.

24 On this issue see Danish Competition and Consumer Authority, 'Consumers benefit from a standardised front page to loan offers', *Competitive Markets and Consumer Welfare*, No 23, December 2018, pp. 1-5, available at https://www.en.kfst.dk/publikationer/kfst-english/2018/20181219-consumers-benefit-from-a-standardised-front-page-to-loan-offers/.

25 This explains why, unlike the information referred to in Article 5(1), the information referred to in Article 10(2) of Directive 2008/48 does not need to be included in a single document, provided that the different documents used form a single contract and contain clear and precise cross-references. See judgment of 9 November 2016, *Home Credit Slovakia* (C-42/15, EU:C:2016:842, paragraphs 33 and 34).

26 However, not all the clauses of a contract create rights or obligations, since some might be purely informative, such as clauses repeating verbatim or recalling the existence of public policy rules.

74. However, since Article 10(2) of Directive 2008/48 specifies that any item of information to which this provision refers must be specified in a clear and concise manner, any such additional information cannot be added if, as the Commission stressed during the hearing, the addition of such information might obscure or create a risk of confusion in respect of the information referred to in Article 10(2).[27]

75. In view of all the above, I consider that Article 10(2), read in conjunction with Article 22(1), of Directive 2008/48, should be interpreted as not precluding national legislation from referring to the amount of non-interest credit cost due, provided that such legislation does not *require* creditors to mention those amounts in respect of credit agreements. Conversely, creditors may of course voluntarily advance that additional information, provided that such additional information, combined with all of the other additional information provided, does not have the effect that the information referred to in Article 10(2) would no longer be presented in a clear and concise manner.

Conclusion

76. In light of the foregoing considerations, I propose that the Court answer the first question asked by the Sąd Rejonowy w Siemianowicach Śląskich (District Court, Siemianowice Śląskie, Poland) as follows:

Article 10(2), read in conjunction with Article 22(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, should be interpreted as not precluding national legislation from referring to the amount of non-interest credit cost due, provided that such legislation does not *require* creditors to mention those amounts in respect of credit agreements. Conversely, creditors may of course voluntarily advance that additional information, provided that such additional information, combined with all of the other additional information provided, does not have the effect that the information referred to in Article 10(2) would no longer be presented in a clear and concise manner.

27 In this respect, contrary to the argument put forward by the Polish Government in its written observations, the fact that additional information is not related to one of the items of information mentioned in Article 10(2) of Directive 2008/48 is not sufficient to exclude the clarity and conciseness of the other information from being jeopardised. Other factors, such as the number of extra elements of information added, their size or the way in which they are presented in relation to the other elements must be taken into account to ensure that the clarity and the conciseness of the information mentioned in Article 10(2) remains unaffected.