Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 29 September 2022 [1]

Case C-555/21

UniCredit Bank Austria AG
v
Verein für Konsumenteninformation

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Request for a preliminary ruling – Consumer protection – Credit agreements for consumers relating to residential immovable property – Early repayment of the credit – Reduction in the total cost of the credit – Proportional reduction in costs – Reduction in costs that are not dependent on the duration of the agreement – Costs owed to third parties)

1. The right of a consumer who has entered into a credit agreement to repay that loan early (with a reduction in the interest and the costs for the remaining duration of the agreement) has been recognised in EU legislation for many years. [2]

2. That right applies both to consumer credit in general (Directive 2008/48/EC) [3] and, specifically, to credit provided to consumers for residential immovable property (Directive 2014/17/EU). [4]

3. The Court of Justice has ruled on the legal consequences of early repayment of consumer credit in the judgment of 11 September 2019, [5] in response to a reference for a preliminary ruling on the interpretation of Article 16(1) of Directive 2008/48. [6]

4. It is now asked to interpret Article 25(1) of Directive 2014/17 in connection with a pre-formulated (standard) term included by a particular bank in its mortgage-secured loan agreements. The referring court asks, specifically, if it must follow the rule established in *Lexitor*.

1 Original language: Spanish.

2 Provision was first made in Article 8 of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48).

3 Directive 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).

4 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).

5 *Lexitor* (C-383/18, EU:C:2019:702; '*Lexitor*' or 'the *Lexitor* solution').

6 In that reference, the debate revolved around a fee charged by lending banks to consumers. The Court ruled that, pursuant to Article 16(1) of Directive 2008/48, 'the right of the consumer to a reduction in the total cost of the credit in the event of early repayment of the credit includes all the costs imposed on the consumer'.

I. Legal framework

A. European Union law

1. Directive 2008/48

5. Article 3(g) provides that:

'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'.

6. Pursuant to Article 16(1):

'The consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement. In such cases, he shall be entitled to a reduction in the total cost of the credit, such reduction consisting of the interest and the costs for the remaining duration of the contract.'

2. Directive 2014/17

7. Recitals 19, 50 and 66 are particularly relevant to this case.

8. Article 4 includes the following definitions for the purposes of this directive:

'…

(13) "Total cost of the credit to the consumer" means the total cost of the credit to the consumer as defined in point (g) of Article 3 of Directive 2008/48/EC including the cost of valuation of property where such valuation is necessary to obtain the credit but excluding registration fees for the transfer of ownership of the immovable property. It excludes any charges payable by the consumer for non-compliance with the commitments laid down in the credit agreement.

…

(15) "Annual percentage rate of charge" (APRC) means the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit, where applicable, including the costs referred to in Article 17(2) and equates, on an annual basis, to the present value of all future or existing commitments (drawdowns, repayments and charges) agreed by the creditor and the consumer.

…'

9. Article 25 provides as follows:

'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.

…

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

10. In the version in force until 31 December 2020, Paragraph 20 of the Hypothekar- und Immobilienkreditgesetz (Law on mortgage and immovable property loans),[7] entitled 'Early repayment', provided as follows:

'1. The borrower shall have the right to choose at any time to repay the amount of credit, either fully or partially, prior to the expiry of the agreed term. The early repayment of the entire amount of credit, together with interest, results in termination of the credit agreement. In the event of early repayment of the amount of credit, the amount of interest to be paid by the borrower decreases proportionally to the reduced receivable and, where appropriate, proportionally to the reduced term of the agreement; costs that are dependent on the duration of the agreement decrease proportionally.'

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

11. In its credit agreements secured by a mortgage directed at consumers, UniCredit Bank Austria AG ('UniCredit') uses standard terms governing the right to repay the loan early, with a reduction in the interest payable and the costs that are dependent on the duration of the agreement.

[7] Of 26 November 2015 (BGBl. I No 135/2015). The text has been amended by the Bundesgesetz, mit dem das Verbraucherkreditgesetz und das Hypothekar- und Immobilienkreditgesetz geändert werden (Federal law amending the Law on consumer credit and the Law on mortgage and immovable property loans) of 5 January 2021 (BGBl. I No 1/2021).

12. The agreements include the following standard term: 'It is pointed out that the processing costs that are not dependent on the duration of the agreement will not be reimbursed (even on a pro-rata basis)'.

13. The Verein für Konsumenteninformation ('VKI') is a consumer protection association which brought an action against UniCredit in the Handelsgericht Wien (Commercial Court, Vienna, Austria), seeking an order for it to cease using the above term.

14. The court of first instance dismissed the action. However, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) upheld the appeal lodged by VKI and granted the forms of order sought in the application.

15. The Oberster Gerichtshof (Supreme Court, Austria) is asked to rule on the appeal lodged against the decision of the Oberlandesgericht Wien (Higher Regional Court, Vienna) by Unicredit, by which UniCredit seeks to have the judgment at first instance reinstated. Before doing so, it has referred the following question to the Court for a preliminary ruling:

'Is Article 25(1) of Directive [2014/17] to be interpreted as precluding national legislation that provides for the sum of interest to be paid by the borrower and the costs that are dependent on the duration of the agreement to be proportionally reduced in the event that the borrower exercises the right to repay the amount of credit, either fully or partially, prior to the expiry of the agreed term, with no corresponding rule for costs that are not dependent on the duration of the agreement?'

III. Proceedings before the Court of Justice

16. The request for a preliminary ruling was lodged with the Court on 9 September 2021.

17. Written observations were submitted by VKI, UniCredit, the Italian Government and the European Commission.

18. A hearing was held on 7 July 2022, in which VKI, UniCredit, the German Government, the Italian Government and the Commission intervened.

IV. Analysis

A. Preliminary observations

19. The first consumer credit directive dates from 1987. Credit agreements intended for the purpose of acquiring or retaining property rights in land or in an existing or projected building, or renovating or improving a building, were excluded from its scope. Only some of its provisions applied to credit agreements secured by a mortgage on immovable property which, by way of exception, were not already excluded by virtue of that provision.

20. Nearly 30 years later, Directive 2014/17 establishes a (partial) common regulatory framework for consumer credit agreements secured by a mortgage or other comparable security over residential immovable property.

21. The separate regulation of the latter agreements is usually explained by reference to the differences between the markets for consumer credit and for home purchase or renovations loans. Attention is also drawn to the differences between the technical features of each type of loan and the security usually provided in each case.

22. In spite of those differences, in drafting several of the provisions in Directive 2014/17 the legislature has looked to Directive 2008/48. In some cases the later directive simply refers to the earlier one, without further comment, or introduces additional elements and clarification. [8]

23. One aspect common to both directives, and already present in Directive 87/102, is the consumer's right to repay the loan early. In all three instruments, that right is accompanied by the right to a reduction in the total cost of the credit which:

– had to be equitable, according to Directive 87/102 (Article 8);

– must include 'the interest and the costs for the remaining duration of the contract' (Article 16(1) of Directive 2008/48);

– must include 'the interest and the costs for the remaining duration of the contract' (Article 25(1) of Directive 2014/17).

24. The Court has ruled on the concept of 'total cost of the credit to the consumer' in the field of consumer credit. [9] As I have already stated, in *Lexitor* it gave an interpretation of the reduction in that cost resulting from the early discharge of obligations under a credit agreement, as provided for by Article 16(1) of Directive 2008/48.

25. In order to answer the question referred by the referring court, it is first necessary to consider the concepts of 'total cost of the credit' [10] and 'reduction in the total cost' [11] in Article 25(1) of Directive 2014/17.

26. Before embarking on that analysis, I shall make two observations on the relevance of Directive 2008/48 to this case:

– In the first place, the interpretation of Directive 2008/48 is (or may be) a factor to be taken into consideration in interpreting Directive 2014/17, particularly where the latter reuses terms used in the former. [12] However, it is simply *one* factor, which must be considered in conjunction with the usual criteria of interpretation, applied collectively to the concepts and provisions applicable to mortgage credit. [13]

8 This is the case with the definition of 'total cost of the credit to the consumer' in Article 4(13). The same applies to Article 25(1).

9 In, among others, judgments of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127); of 3 September 2020, *Profi Credit Polska and Others* (C-84/19, C-222/19 and C-252/19, EU:C:2020:631); and of 16 July 2020, *Soho Group* (C-686/19, EU:C:2020:582).

10 The view I set out below on the relevance of *Lexitor* to the question of costs paid to third parties would in practice make it unnecessary for me to examine which, of all the costs, comprise the 'total cost of the credit'. I shall, nevertheless, undertake that analysis in case the Court takes a different view and the analysis might prove useful.

11 Directive 2014/17 seems to use the terms 'costs' and 'charges' interchangeably. Of the versions which I have been able to consult, only Article 25(1) of the French version refers to the reduction in 'frais dus' (expenses due), as part of the 'coût [total du crédit pour le consommateur]'; by contrast, the German, Spanish, English, Italian and Portuguese versions use 'Kosten', 'costes', 'costs', 'costi' and 'custos' respectively.

12 In this regard, see recital 19 of Directive 2014/17.

13 This is clear from recital 22 of Directive 2014/17.

– In the second place, the debate in these proceedings has been prompted by the contractual term used by UniCredit, and the focus of the debate is on sums paid to third parties.[14] By contrast, the *Lexitor* case did not involve any costs other than those of the creditor, and there was no mention of any other type of cost.[15] It can reasonably be argued that that judgment is of limited value for the purposes of the present reference for a preliminary ruling.

B. Total cost of the credit in Article 25(1) of Directive 2014/17

27. In so far as the exercise of the right to early repayment entails a corresponding reduction in the total cost of the credit to the consumer, it is necessary to determine what items (in addition to interest) are included in that concept.

1. Literal interpretation

28. The expression 'total cost of the credit to the consumer' is defined in Article 4(13) of Directive 2014/17 by reference to Directive 2008/48, with some additional provisos that do not alter the basic definition.[16]

29. Literally, the *total* cost of a mortgage credit includes *all* costs accrued in respect of that credit (other than those excluded by the legislature) which satisfy two conditions: they are mandatory on the consumer, and they are (or should be) known to the creditor.[17]

30. The provision cites as typical examples of those costs 'interest, commissions, taxes', and 'costs in respect of ancillary services relating to the credit agreement, in particular insurance premiums … 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'. Fees for credit intermediaries and the costs of property valuation for a mortgage[18] may also be included in the total cost.

31. It is clear from this list that mandatory costs are not necessarily costs unilaterally imposed by the creditor in order to increase its profits: the total cost of the credit may include fees to organisations or individuals other than the parties to the agreement,[19] and may cover a wide range of items.

32. From the literal perspective under consideration here, the total cost of the credit therefore includes the cost of ancillary services, subject to the same requirements that they must be mandatory for the consumer and known to the creditor.[20]

[14] The referring court specifically mentions the costs of valuing the property, of attestation of signatures for the purposes of registering the mortgage in the Land Register, and of applying for reservation of priority and registering the mortgage in the Land Register.

[15] Nor was there any such mention in the Opinion of Advocate General Hogan (C-383/18, EU:C:2019:451).

[16] The provisions in question are not relevant to consumer credit agreements because they refer to elements which, by definition, are not included in such agreements.

[17] Article 3(g) of Directive 2008/48. See also recital 50 of Directive 2014/17, which also sets out the parameters for assessing the creditor's knowledge.

[18] Article 4(13) and recital 50 of Directive 2014/17.

[19] This is noted in the judgment of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 48), in connection with Directive 2008/48. The concept of the total cost of the credit to the consumer 'is … defined particularly broadly so that the total amount of all the costs or expenses to the consumer and relating to *payments made by the latter both to the lender and to third parties* must be clearly stated in consumer credit agreements'. Italics added.

[20] In this context, an ancillary service may be classed as mandatory if the service must be purchased in order to obtain the credit or to obtain it on certain conditions. Article 3(g) of Directive 2008/48 and recital 50 of Directive 2014/17.

33. Examples given of this type of costs are life insurance or fire insurance premiums;[21] the valuation costs for the property to be mortgaged;[22] the costs of opening and maintaining an account and of using a means of payment for transactions and drawdowns on that account; and other costs relating to payment transactions.[23]

34. While the following costs could, in theory, be classed as falling within the concept of the total cost of the credit to the consumer, the legislature has expressly decided that they are not included in the calculation:

– notarial costs, which are excluded under Article 3(g) of Directive 2008/48;[24]

– the 'registration fees for the transfer of ownership of the immovable property',[25] which are excluded under Article 4(13) of Directive 2014/17;

– any charges payable by the consumer for non-compliance with the commitments laid down in the credit agreement.[26]

35. Applying that typology of items to be included in (or excluded from) the concept of 'total cost of the credit to the consumer' to the items listed by the referring court, I consider that, for the purposes of Article 25(1) of Directive 2014/17, that concept:

– includes the property *valuation costs*, where the valuation is required in order to obtain the credit and the creditor knows the costs, and the costs of applying for *reservation of priority* and *the entry of the mortgage* in the register,[27] which are usually essential in order to constitute the security and to ensure it operates correctly;

– does not include the costs of *notarial attestation of the signatures* (notarial costs) required in order to register the mortgage.

[21] Recital 50 of Directive 2014/17.

[22] Where the valuation is necessary to obtain the credit, as noted in Article 4(13) of Directive 2014/17.

[23] Recital 50 of Directive 2014/17 and Article 17(2) of Directive 2014/17, which concerns the calculation of the APRC. An equivalent provision is to be found in Article 19(2) of Directive 2008/48. In both cases, the purpose of the reference appears to be purely pedagogical or confirmatory. I have found nothing in the preparatory work for the directives, nor any arguments (other than the argument concerning systematic positioning) to suggest that those components are part of the total cost of the credit *only* for the purposes of calculating the APRC.

[24] Recital 50 of Directive 2014/17 adopts a similar approach. The exclusion is absolutely clear, even though it is arguable in the case of mortgage credit, where, by contrast with consumer credit, the involvement of an attesting official in the creation or registration of the security is usually not optional. For a tentative explanation, see footnote 40.

[25] Not to be confused with mortgage registration fees. The term 'fee' has a very broad meaning in this context.

[26] Article 4(13) of Directive 2014/17. In Directive 2008/48, those costs are excluded from the total cost of the credit for the purposes of calculating the APRC by virtue of Article 19(2).

[27] This is supported by the European Standardised Information Sheet ('ESIS') in Part A of Annex II to Directive 2014/17, and the instructions for completing the ESIS in Part B of that annex.

2. Interpretation in the light of the history of the provision

36. An analysis of the evolution of the concept of the 'total cost of the credit to the consumer' in the legislative work undertaken prior to the adoption of Directive 2014/17 [28] confirms that, of the items listed by the referring court, mention was made of 'mortgage registration fees'.

37. On this point, the Commission proposal for the (future) Mortgage Credit Directive simply referred to Directive 2008/48. [29]

38. The solution was explained as being the result of weighing up the advantages and disadvantages of the options under consideration for calculating the APRC. [30] The fact that a parallel text to the existing text (Directive 2008/48) would assist consumer understanding and help them to compare credits was also taken into account. [31]

39. The concept was subsequently refined, with components being added or removed, but the link to Article 3 of Directive 2008/48 remained.

40. In this context, I consider it relevant that the first report by the European Parliament on the proposed Mortgage Credit Directive explicitly excluded 'registration fees for the mortgage or another comparable security'. [32]

41. However, the amendments that were adopted include one which provided that 'the total cost of the credit to the consumer should exclude costs that the consumer pays in relation to the purchase of the immovable property or land, *such as associated taxes and notarial costs or the costs of land registration*' [33] (italics added).

[28] The first definition appears in Directive 87/102; the original text was subsequently amended, reflecting attempts to standardise the calculation of the annual percentage rate of charge. The documents prepared during negotiations over the approval of Directive 2008/48 record fluctuating views on whether or not the costs should include costs payable to third parties, in particular, taxes and notarial costs. In the final text, taxes are included as a compromise solution, while no explanation is given for the exclusion of notarial costs. See the Communication from the Commission to the European Parliament in accordance with the second paragraph of Article 251(2) of the EC Treaty on the common position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on credit agreements for consumers (COM(2007) 546 final), Section 3.2.

[29] Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property (COM(2011) 142 final), Article 3(k). Recital 23 of the proposed directive included elements from recital 20 and Article 3(g) of Directive 2008/48.

[30] Working paper accompanying the Proposal for a directive of the European Parliament and of the Council on credit agreements relating to residential property (SEC(2011) 356 final), Volume II, p. 130 et seq.

[31] *Ibidem*, p. 134. Some Member States had extended their own rules on consumer credit to cover mortgage credit, or were planning to do so: see *Study on the costs and benefits of the different policy options for mortgage credit, Final Report*, November 2009, p. 29 et seq.

[32] First 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)), document PE469.842v04-00, amendment 48.

[33] Amendments adopted by the European Parliament 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)), document P7_TA(2013)0341 of 13 September 2013: see recital 50 and Article 4(13). The reason for an express reference to this exclusion has not emerged; in my view, it can be explained by the absence of any direct connection between the costs mentioned and the actual credit. It may be relevant to note the situation regarding the components which were included in the calculation of the APRC (or similar concept) by Member States' legislation prior to the adoption of a standard rule. Those components included – albeit in a minority of Member States – notarial costs and property transfer taxes: see table 39 in the *Study on the costs and benefits of the different policy options for mortgage credit, Final Report*, November 2009.

42. There is no record of any other discussion of the inclusion of 'mortgage registration costs' or the exclusion of the costs relating to the purchase of the property. [34]

3. Contextual and purposive interpretation

43. The concept of 'total cost of the credit to the consumer' in Directive 2014/17 is a functional one, as it is in Directive 2008/48. It is, above all, a means of establishing two concepts:

– the concept of 'total amount payable by the consumer', which is the same as that defined in Article 3(h) of Directive 2008/48; [35]

– and the concept of APRC, which is the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit. [36]

44. The Court has attributed the breadth of this concept to the aim of providing broad consumer protection, and has interpreted it accordingly. [37] That protection is provided by supplying consumers with general information – particularly pre-contractual information – to enable them (ideally) to choose the credit product that is right for their personal situation and their needs. That is, in essence, the *principal* purpose of the concept of 'total cost of the credit'.

45. In order to select the formula which is best for them, consumers must be able to compare products on offer in both domestic and cross-border markets. The consumer protection offered by Directives 2008/48 and 2014/17 is part of the overall objective of creating an internal market for credit. [38] The APRC, which sets out the price (total cost) of the credit on the basis of a mathematical formula which is the same across the European Union, is a crucial part of that comparison.

46. There is, however, a certain tension between the objective of giving consumers the best information and doing so in a way which enables them to compare creditors' products within a reasonable period of time.

47. Intuitively, the more information (on costs additional to interest) that is included in the APRC, and the less effort consumers have to devote to identifying other credit-related costs for themselves, the better it is for consumers – particularly where a different legal system is involved (since legal systems tend to be restricted to domestic systems).

[34] Various Council documents record the exclusion of costs relating to the purchase of the property, such as the costs of land registration, taxes associated with the purchase, and notarial costs: see recital 23 in the Presidency compromise proposal, Note from the General Secretariat to the Delegations of 3 November 2011, document 16325/11, and recital 34 in the Council's general approach with regard to the Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property (Mortgage Credit Directive – MCD), Note from the General Secretariat to the Delegations of 30 May 2012, document 10587/12.

[35] The concepts of 'total amount of credit' and 'total amount payable by the consumer' in Directive 2014/17 simply adopt those used in Directive 2008/48, by virtue of the references to the earlier directive in Article 4(12) and (14) of Directive 2014/17, respectively. On the relationship between those concepts, see judgments of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraphs 85 and 86), and of 16 July 2020, *Soho Group* (C-686/19, EU:C:2020:582, paragraphs 38 and 42).

[36] Article 4(15) of Directive 2014/17.

[37] In respect of Directive 2008/48, see judgments of 26 March 2020, *Mikrokasa and Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty* (C-779/18, EU:C:2020:236, paragraph 39 and the case-law cited), and of 16 July 2020, *Soho Group* (C-686/19, EU:C:2020:582, paragraph 31).

[38] This purpose is ever-present throughout the texts. It can be seen explicitly in recitals 1 to 9 of Directive 2008/48, and in recital 2 and recitals 5 to 8 of Directive 2014/17.

48. That is why the concept of 'total cost of the credit to the consumer' includes a wide range of costs connected with the credit transaction. It is easier for creditors to obtain that information than it is for consumers, although the process is not cost-free even for creditors. [39]

49. At the same time, the inclusion in the APRC calculation of components which are regulated at national level, and therefore vary widely, affects the comparability of the products on offer. [40] Ultimately, it has a negative impact on cross-border activity by creditors and on attracting customers from other Member States.

50. In my view, the legislature has opted for a solution which seeks to reconcile the various concerns through a combination of different elements:

– a broad concept of the total cost of the credit to the consumer, albeit one that is restricted to costs connected with the credit agreement itself and excludes the costs of the transaction which that credit agreement is being used to finance;

– a requirement on creditors to include in that concept the applicable costs which are, or should be, known to them, applying normal standards of professional diligence;

– a requirement to provide consumers with personalised pre-contractual information, in the form of the ESIS contained in Annex II to Directive 2014/17;

– a requirement for the ESIS to list the costs incurred by consumers which should be included in the APRC but which are not known to the other party, under the heading 'The following costs are not known to the lender and are therefore not included in the APRC'; [41]

– the inclusion of the following warning in the ESIS: 'Please make sure that you are aware of all other taxes and costs associated with your loan'; [42]

– a duty to include, as part of the general information on mortgage credits, an indication of possible costs to the consumer not included in the total cost of the credit. [43]

51. In my view, this ensures that the average consumer has the information required to reach a decision on the mortgage credit agreement, having compared products on the basis of the APRC. [44] The average consumer will also know that there may be additional costs – whether ones which belong in the APRC but are not known to the lender, or ones which are not part of the total cost of the credit – to which he or she has been alerted.

[39] One of the reasons for the lack of cross-border mortgage activity is that creditors fear that having to implement foreign law in a legally secure manner would expose them to legal risks and challenges that could undermine the profitability of cross-border transactions: see the Report from the Commission to the European Parliament and the Council on the review of the 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), Section 2.2.

[40] Indeed, the decision to exclude notarial costs from the total cost of the credit to the consumer may be due to the possible adverse effect which their inclusion would have on the ability to compare products. Notarial fees can vary considerably, not only between Member States but even within the same State where they are subject (in whole or in part) to negotiation between the notary and the client. The Commission also cited this as the most probable explanation in reply to a question at the hearing.

[41] Section 4 of the ESIS: 'Interest rate and other costs'.

[42] *Ibidem.*

[43] Article 13(1)(h) of Directive 2014/17.

[44] As I have already stated on a previous occasion (Opinion in *DenizBank* (C-287/19, EU:C:2020:322)), there is no denying that the factual foundation for this entire legal construction is actually very weak. Unless they have a solid financial background, many mortgage borrowers will find it extremely difficult to understand the legal categories that apply when they are granted their mortgage-secured loans.

4. Interim conclusion

52. In the light of the above, in my view the reply to the referring court on whether or not the items it lists are part of the total cost of the credit to the consumer, within the meaning of Article 25(1) of Directive 2014/17, could be that:

– that concept includes the property valuation costs and the costs of applying for reservation of priority and the entry of the mortgage in the register, where these are necessary in order to obtain the credit (that is, they are imposed on the borrower), provided that they are known to the creditor;

– it does not include the costs of notarial attestation of the signatures required in order to enter the mortgage in the register.

C. Reduction required by Article 25(1) of Directive 2014/17. Costs to which it applies

53. The referring court wishes to know whether, where the borrower exercises the right to repay the amount of credit, either fully or partially, prior to the expiry of the agreed term, the proportional reduction applies only to the interest payable and the costs that are dependent on the duration of the agreement, or whether it also applies to costs that are not dependent on the duration of the agreement.

54. A debtor who repays the credit early is, indeed, entitled to a reduction in the total cost of that credit. According to Article 25(1) of Directive 2014/17, the reduction applies to 'the interest and the costs for the remaining duration of the contract'. [45]

55. In so far as Article 25(1) does not distinguish between the various categories of costs, it might seem that the reduction applies to any sum included in the total cost of the credit (which satisfies the temporal criterion noted below). Without prejudice to my observations below, [46] my view, however, is that the reduction does not apply indiscriminately to every single one of the items which, together, indicate to the consumer the total cost of the credit before the agreement is entered into.

56. Directive 2014/17 leaves some aspects of the early repayment regime open (as options for Member States). [47] However, the actual existence of the right to repay all or part of the credit prior to the expiry of the agreed term is not a matter for each national legislature, neither are the consequences of the exercise of that right (namely, the reduction in the total cost of the credit). [48]

57. It is not, therefore, for Member States to determine which cost items are to be reduced. Thus, the question of 'what' is to be reduced requires a uniform interpretation, as with any other concept which enjoys autonomy under EU law.

[45] As I noted earlier, this wording follows that of Directive 2008/48 which, in turn, replaces the 'equitable reduction' of Directive 87/102.

[46] On the relevance of the *Lexitor* solution to mortgage credit agreements.

[47] It is for Member States to decide whether the right is underpinned by a statutory provision or may be contractual, and to determine certain conditions governing exercise of that right.

[48] See, however, the option for Member States to make the exercise of the right subject to the existence of a legitimate interest on the part of the consumer, in the situation provided for in Article 25(5) of Directive 2014/17.

1. Literal interpretation

58. As I noted earlier, Article 25(1) of Directive 2014/17 does not specify the items (from among those which make up the total cost of the credit) to which the reduction is to apply. [49] All that can be inferred with certainty from the text is that the reduction will not apply to items that are not included in that cost. [50]

59. In any event, the provision includes a temporal stipulation which I consider significant: the interest and costs which are to be reduced in the event of early repayment of the credit are those 'for the remaining duration of the contract'.

60. The fact that there is a link between the items to be reduced and the remaining duration of the contract seems to me to indicate that the items to be reduced reflect amounts owed for services which have not been performed by the time of the early repayment and which will not now occur. [51]

61. That logic is readily grasped in relation to the interest on the credit. Early repayment of the capital (the principal of the debt) implies, *eo ipso*, that from that date no more interest will be payable on that sum. The reduction in the interest that has not accrued by the time of the early repayment is not disputed, and I see no reason why the provision should be interpreted differently in the case of the other costs.

62. The literal element seems to me to be key: Article 25 refers only to costs that relate to the period of time after the right to repayment has been exercised ('the remaining duration'). Nevertheless, in so far as, in most language versions, Article 25(1) of Directive 2014/17 is the same as Article 16(1) of Directive 2008/48, and the Court did not find the literal argument convincing in respect of the latter, [52] I realise that it may be similarly unconvinced by my interpretation now.

63. To address that eventuality, I shall analyse the provision in its context and in the light of its purpose. [53]

2. Contextual and purposive interpretation

64. Recognition of the right to early repayment in Directive 2014/17 reflects – as does the entire directive – a desire to foster the creation of an internal market in credit agreements relating to residential immovable property.

[49] Nor does recital 66 of Directive 2014/17, which addresses the right to repayment, the reduction in costs and compensation for the creditor.

[50] That is, the costs which form part of the total amount of credit and which, when added to the total cost, comprise the total amount payable by the borrower: on the mutually exclusive nature of the concepts of total amount and total cost of the credit, see the judgments cited in footnote 35.

[51] How or when payment is made is not relevant: the amount owed for a recurring service can be paid each time the service is provided, or a single payment can be agreed, payable at either the start or end of the relationship, without affecting the nature of the service. Where payment is made at the start of the relationship, the right to a reduction becomes a right to repayment ofadvance payments.

[52] *Lexitor*, paragraphs 24 and 25.

[53] An examination of the background to the provision and its history, from the initial wording in Article 8 of Directive 87/102 (which was 'equitable') to the current wording, does not shed any light on the nature of the costs to be reduced. The debate revolved around the right to the existence of repayment and of compensation for the creditor. Initially, there was considerable divergence among the solutions found in the Member States, and among the positions adopted by negotiators, over how to achieve a balance between the interests of the parties to the agreement, and over the consequences which early repayment would have on lending activity in general.

65. In that context, the right to early repayment pursues a specific objective, which recital 66 of Directive 2014/17 describes by reference to promoting competition, the free movement of citizens and financial stability. The advantages to consumers are treated as merely secondary, and are described in terms of enabling consumers to change products in order to find the one which best meets their needs at any given time.

66. The legislature provides for the right to early repayment to be subject to conditions. [54] It also provides for possible compensation to the creditor, which may, in some cases, be large enough to act as a deterrent to the consumer. [55]

67. It can be inferred from that regulatory regime that the right to early repayment of the credit is not intended to correct asymmetries in an unequal relationship, but rather to provide flexibility in a long-term contract by enabling the debtor to pay off the obligation before the expiry of the agreed term, without needing to give or prove any reason. [56]

68. Directive 2014/17 does not specify the rationale for the reduction established by Article 25(1) as a corollary to the right to early repayment. That fact, together with the absence of any discussion during the course of the *travaux préparatoires*, justifies the assertion that that readjustment is seen as a *natural* consequence of the early repayment, which also removes or (in the case of partial early repayment) reduces the risk of default for the other party. Moreover, if the borrower were required to pay the unaccrued interest and the other outstanding costs, this would lead to the unjust enrichment of the creditor, which is likewise released (albeit by a unilateral decision of the other party) from its reciprocal contractual obligation. [57]

69. I do not believe, however, that the aim of the reduction established in Article 25(1) of Directive 2014/17 is to place the consumer in the situation in which he or she would have been if the credit had originally been granted for a shorter period or were for a smaller sum. [58] The right to early repayment does not transform the original credit agreement into an agreement *that it could have been*, but rather enables it to be adapted to circumstances that have changed. [59]

70. Those considerations support my belief, already voiced in my analysis of the literal interpretation of the provision, that the reduction applies only to the sums which the consumer would have to pay for services yet to be provided in performance of the agreement.

[54] They include the condition established in Article 25(5) of Directive 2014/17, which requires, in specific circumstances, 'the existence of a legitimate interest on the part of the consumer'.

[55] The compensation is intended to neutralise the losses suffered by the creditor. In Directive 2014/17, that compensation is not necessarily restricted to the amount of interest which the consumer would have paid during the period between the early repayment and the expiry date of the agreed term. Given that consumers must be informed in advance of the repayment conditions, a rational consumer will prefer not to exercise the right to early repayment if the amount required in order to compensate the creditor is such that, in practice, there is no saving.

[56] With the exception, noted above, established by Article 25(5) of Directive 2014/17.

[57] Moreover, in theory, the creditor may re-lend the capital it has recovered, possibly more profitably than under the previous loan. This description of the situation is, perhaps, too simplistic, as demonstrated by the debate on this point in connection with Directive 2014/17 which I referred to in footnote 53.

[58] In other words, at a different interest rate and with different – and presumably lower – fees. The amount of any taxes calculated on the basis of the amount of the loan would also have been different.

[59] Technically, each Member State will decide whether early repayment gives rise to termination of the agreement or, in the case of partial repayment, to a novation which extinguishes the agreement or merely amends it.

71. I have no doubt that a different interpretation would be more favourable to the consumer. However, just as consumers are not to be *penalised* for paying off the debt early, [60] I do not believe that, in order to give them the protection intended by Directive 2014/17, it is necessary to extend the right to a reduction to the point of *rewarding* consumers [61] for a change which they impose on the other party. [62]

72. For the same reasons, my view also applies to payments made to third parties in respect of taxes, administrative fees or professional services, such as property valuation or intermediation activities. [63]

73. I do not dispute that the costs paid to third parties form part of the total cost of the credit; otherwise, consumers would not receive all the information they need in order to choose between the products offered by the different creditors.

74. However, I disagree that this means that the right to a reduction enshrined in Article 25 of Directive 2014/17 applies to costs other than the cost of services to be performed by the creditor which have yet to be provided at the time of the early repayment.

75. Some of those costs are payments for one-off services which pave the way for the future contractual relationship (intermediation). Others help to fund public expenditure (taxes) or are payment for activities or services provided by the public administration which are in the interest not only of the parties but of society as a whole and the operation of the legal system (mortgage register). Once again, the fact that those costs must be included in order for consumers to know the total 'price' of the credit, for the purposes of Article 4(13) of Directive 2014/17, irrespective of whether payment is made directly to the end recipient or via the creditor, does not mean that they form part of the costs which are to be reduced in the event of early repayment.

76. I can find no objective reason why the proportional reduction in costs established by Article 25(1) of Directive 2014/17 should apply to payments other than for services provided by the creditor, since they are services which the creditor neither performs nor receives payment for. [64] I am even more convinced of this where the costs are imposed on the borrower by law; if the right to a reduction were to apply to those components of the total cost of the credit, the result would be that the public administration body responsible for revenue collection or for maintaining registers, which is not party to the bilateral relationship between the creditor and the borrower, would be required to make a proportional repayment of those sums.

[60] See Article 25(3).

[61] This is what would happen if the reduction had to include even a proportional repayment of costs already paid which would have been the same under any credit agreement.

[62] The compensation mechanism required of the borrower is intended to deal with the adverse effects of the repayment for the creditor, who is placed in a different legal position. See footnote 55.

[63] A different situation arises in the case of agreements with third parties ancillary to the credit agreement which are due to be performed over the same period as that agreement and which provide that early termination consequent on the termination of the credit agreement entitles the consumer to a reduction in any remaining payments. Directive 2014/17 makes no provision in that regard.

[64] The criterion of who has an interest in the service provided by the third party, which was suggested at the hearing, seems to me to be inappropriate (both parties have an interest in entering into the contract) and extremely uncertain.

D. The relevance of Lexitor to this case

1. Costs payable to the creditor

77. In my opinion, *Lexitor* does not change the view I have set out above. I believe that the Court reached the decision it did based on primarily pragmatic considerations, which are reflected in the arguments set out in paragraphs 31 to 33 of the judgment. There is also the consideration concerning a possible 'disproportionate disadvantage' to the creditor, whose interests underlie the provision for the creditor to receive compensation. [65]

78. Those arguments might make sense in the situation under examination in that case, and could, at most, be generalised to apply to any consumer credit. They cannot, in my view, be applied to mortgage credit.

79. In the first place, with regard to the ease or difficulty in applying the reduction, it should be recalled that the ESIS (use of which is mandatory and which cannot be amended by either Member States or creditors) contains a breakdown of the information on the mortgage credit which must be provided to consumers at the pre-contractual stage. In particular, it classifies the costs on the basis of whether or not they are regular payments: this enables consumers, or the courts, to identify some costs which can be reduced. [66]

80. In the second place, there is a fundamental difference between Directives 2008/48 and 2014/17 as regards the creditor's right to be compensated for costs directly arising from early repayment: the former establishes that right in the directive itself; the latter, which applies in these proceedings, does not.

81. That key difference between Directives 2008/48 and 2014/17 does not, however, prevent the identification of a conceptual relationship between a 'reduction' for the consumer and 'compensation' for the creditor. [67]

82. The absence of harmonised regulation of the right to compensation in Directive 2014/17 is probably an indication of the difficulty in agreeing common rules and is, ultimately, a consequence of the diversity in mortgage funding mechanisms and the range of products available, [68] which reflect the particular characteristics of mortgage financial markets in the Member States.

83. The discretion afforded to Member States over whether or not to introduce compensation in mortgage credits may affect the practices of some Member States, [69] eliminating the balancing factor which led the Court to rule as it did in *Lexitor*. That is why, I repeat, one cannot simply extrapolate from that judgment in order to apply it to mortgage credits.

[65] Paragraph 34 of *Lexitor*.

[66] Directive 2008/48 also makes provision for standardised information; however, it does not contain the same level of detail on the type of costs involved.

[67] See footnote 53.

[68] See recital 66 of Directive 2014/17.

[69] According to the study *Evaluation of the Mortgage Credit Directive (Directive 2014/17/EU)* by Risk & Policy Analysts (RPA), 2020, Annex I, table 163, in October 2021, 20 Member States had adopted provisions for compensating creditors in the event of early repayment; four had not done so; and no information was available on the other three. According to the interventions of their representatives at the hearing, Italy does not provide for a right to compensation, unlike Germany and Austria (in the latter case, subject to strict limits).

2. Costs payable to third parties

84. Accepting the view in *Lexitor* should not lead inevitably to the conclusion that the reduction inherent in early repayment extends to the costs of the mortgage credit which are intended to provide payment to a third party.

85. Aside from the fact that, as I have already noted, *Lexitor* did not address those costs, in the case of mortgage credits it is not the creditor (in this case, the bank) which receives those sums, determines the amount of the payments, profits from them, or is able to manipulate them.

86. I cannot, therefore, see any reason why sums paid to third parties should be treated in the same way as the sums that were examined in *Lexitor*.

87. While not decisive, I believe that the work currently in hand to revise Directive 2008/48 supports my view. Both the Commission's proposal [70] and the general approach set out by the Council [71] clarify that the reduction will apply to the interest and costs imposed by the creditor on the consumer. In my view, the proposal is equally applicable to mortgage credits.

88. It is true that a situation such as that described by VKI may occur: in order to make its offer more attractive to the consumer, the creditor designs the agreement in such a way that, at first sight, third-party costs are paid by the creditor, which then uses its room for manoeuvre in the invoicing process in order covertly to charge the costs to the borrower. [72]

89. However, *Lexitor* cannot be relied on to put a stop to this practice either – a practice which is fraudulent not only from the point of view of each individual consumer, but also from the perspective of preventing distortion to competition. The reduction which, under the terms of *Lexitor*, applies to all costs paid to the creditor applies pro rata, based on the time remaining on the contract at the point of repayment. In other words, on its own, the *Lexitor* solution will never ensure that the consumer recovers the full amount which was, in theory, to be paid by the creditor but which was in the end passed on to the consumer.

90. In my view, the way to halt those abuses should be through the means established in Article 41 of Directive 2014/17: Member States must ensure that the protection which the directive provides to the consumer cannot be evaded 'as a result of the way in which agreements are formulated'.

3. Summary

91. To summarise, if *Lexitor* were considered to apply to mortgage credits, Article 25(1) of Directive 2014/17 would preclude national legislation which limits the proportional reduction linked to early repayment of the credit to the costs that are dependent on the duration of the agreement. However, even in those circumstances (where the *Lexitor* solution is applied to mortgage credits), the reduction would apply only to the costs which provide payment to the creditor, that is, costs that are not paid to third parties.

[70] Proposal for a Directive of the European Parliament and of the Council on consumer credits, COM(2021) 347 final, Article 29(1): 'When calculating that reduction, all the costs imposed on the consumer by the creditor shall be taken into consideration.'

[71] Note from the Permanent Representatives Committee to the Council of 7 June 2022, document 9433/1/22 Rev 1, point 13(c): 'delegations thought it important to clarify that the reduction of the total cost of the credit in the event of early repayment concerns the costs imposed by the creditor, *and not the charges or dues owed to third parties*' (italics added).

[72] Point 4(4) of its written observations. The same fraud is also possible, in principle, where the third-party costs are imposed on the creditor by law.

E. Limitation of the temporal effects of the judgment

92. If the Court accepts my argument, there would be no need to accede to the request from the Italian Government regarding a possible limitation of the temporal effects of the judgment. Moreover, in my view, such a limitation would not be appropriate, because it has not been shown that the conditions required by the case-law of the Court in order for a limitation to apply (in particular the requirement for serious economic repercussions) have been satisfied.[73]

V. Conclusion

93. In the light of the considerations set out above, I propose the following reply to the Oberster Gerichtshof (Supreme Court, Austria):

Primary response:

Article 25(1) 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 is to be interpreted as meaning that, where the borrower exercises the right to repay the amount of credit, either fully or partially, prior to the expiry of the agreed term, the proportional reduction applies only to the sum of interest to be paid by the borrower and to the costs that are dependent on the duration of the agreement.

Alternative response:

Article 25(1) of Directive 2014/17 is to be interpreted as precluding national legislation which provides that, where the borrower exercises the right to repay the amount of credit, either fully or partially, prior to the expiry of the agreed term, the reduction in interest and in the total cost of the credit applies only to the costs that are dependent on the duration of the agreement. However, it would not preclude national legislation which restricted that reduction to the costs which, irrespective of the duration of the agreement, provide payment to the creditor, excluding costs owed to third parties.

[73] See judgments of 16 September 2020, *Romenergo and Aris Capital* (C-339/19, EU:C:2020:709, paragraph 49); of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 216); and of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)* (C-439/19, EU:C:2021:504, paragraph 132).