ECLI:EU:C:2016:934

JUDGMENT OF THE COURT (Third Chamber)

8 December 2016 (*)

(Reference for a preliminary ruling — Directive 2008/48/EC — Consumer protection — Consumer credit — Article 2(2)(j) — Rescheduling agreements — Deferred payment, free of charge — Article 3(f) — Credit intermediaries — Debt recovery companies acting on behalf of lenders)

In Case C-127/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 17 February 2015, received at the Court on 12 March 2015, in the proceedings

Verein für Konsumenteninformation

v

INKO, Inkasso GmbH,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan (Rapporteur) and D. Šváby, Judges,

Advocate General: E. Sharpston,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 25 February 2016,

after considering the observations submitted on behalf of:

– the Verein für Konsumenteninformation, by S. Langer, Rechtsanwalt,

– INKO, Inkasso GmbH, by C. Rabl, Rechtsanwalt,

– the German Government, by T. Henze and M. Hellmann and by J. Kemper and D. Kuon, acting as Agents,

– the French Government, by D. Colas and S. Ghiandoni, acting as Agents,

– the Lithuanian Government, by K. Dieninis and D. Kriaučiūnas, and by J. Nasutavičienė, acting as Agents,

– the European Commission, by S. Grünheid and G. Goddin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 July 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(2)(j) and 3(f) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66, and corrigenda OJ 2009 L 207, p. 14; OJ 2010 L 199, p. 40; OJ 2011 L 234, p. 46, and OJ 2015 L 36, p. 15).

2 The request has been made in proceedings between the Verein für Konsumenteninformation (Consumer Information Association, 'the Association') and INKO, Inkasso GmbH concerning the latter's practice of concluding with consumers debt rescheduling agreements concerning the grant of deferred payment, without making pre-contractual information known to them.

Legal context

EU law

3 Recital 24 of Directive 2008/48 states:

'The consumer needs to be given comprehensive information before he concludes the credit agreement, regardless of whether or not a credit intermediary is involved in the marketing of the credit. Therefore, in general, the pre-contractual information requirements should also apply to credit intermediaries. However, where suppliers of goods and services act as credit intermediaries in an ancillary capacity, it is not appropriate to burden them with the legal obligation to provide the pre-contractual information in accordance with this Directive. Suppliers of goods and services may be deemed, for example, to be acting as credit intermediaries in an ancillary capacity if their activity as credit intermediaries is not the main purpose of their trade, business or profession. In those cases, a sufficient level of consumer protection is still achieved since

the creditor is responsible for ensuring that the consumer receives the full pre-contractual information, either from the intermediary, if the creditor and the intermediary so agree, or in some other appropriate manner.'

4 Under Article 2 of that directive, entitled 'Scope':

'1. This Directive shall apply to credit agreements.

2. This Directive shall not apply to:

…

(f) credit agreements where the credit is granted free of interest and without any other charges and credit agreements under the terms of which the credit has to be repaid within three months and only insignificant charges are payable;

…

(j) credit agreements which relate to the deferred payment, free of charge, of an existing debt;

…

6. Member States may determine that only Articles 1 to 4, 6, 7, 9, Article 10(1), points (a) to (i), (l) and (r) of Article 10(2), Article 10(4), Articles 11, 13, 16 and Articles 18 to 32 shall apply to credit agreements which provide for arrangements to be agreed by the creditor and the consumer in respect of deferred payment or repayment methods, where the consumer is already in default on the initial credit agreement and where:

(a) such arrangements would be likely to avert the possibility of legal proceedings concerning such default; and

(b) the consumer would not thereby be subject to terms less favourable than those laid down in the initial credit agreement.

…'

5 Article 3 of that directive, entitled 'Definitions', provides:

'For the purpose of this Directive:

…

(b) "creditor" means a natural or legal person who grants or promises to grant credit in the course of his trade, business or profession;

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

…

(f) “credit intermediary” means a natural or legal person who is not acting as a creditor and who, in the course of his trade, business or profession, for a fee, which may take a pecuniary form or any other agreed form of financial consideration:

(i) presents or offers credit agreements to consumers;

(ii) assists consumers by undertaking preparatory work in respect of credit agreements other than as referred to in (i); or

(iii) concludes credit agreements with consumers on behalf of the creditor;

(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;

(h) “total amount payable by the consumer” means the sum of the total amount of the credit and the total cost of the credit to the consumer;

(i) “annual percentage rate of charge” 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 19(2);

…’

6 Article 5 of Directive 2008/48, headed ‘Pre-contractual information’, states in paragraph 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. …’

7 Article 6 of that directive, entitled ‘Pre-contractual information requirements for certain credit agreements in the form of an overdraft facility and for certain specific credit agreements’, provides, in paragraph 1:

‘In good time before the consumer becomes bound by any credit agreement or offer concerning a credit agreement as referred to in Article 2(3), (5) or (6), 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.

…’

8 Under Article 7 of that directive, entitled ‘Exemptions from the pre-contractual information requirements’:

‘Articles 5 and 6 shall not apply to suppliers of goods or services acting as credit intermediaries in an ancillary capacity. This is without prejudice to the creditor’s obligation to ensure that the consumer receives the pre-contractual information referred to in those Articles.’

9 Under Article 21 of that directive, entitled ‘Certain obligations of credit intermediaries vis-à-vis consumers’:

‘Member States shall ensure that:

(a) a credit intermediary indicates in advertising and documentation intended for consumers the extent of his powers, in particular whether he works exclusively with one or more creditors or as an independent broker;

(b) the fee, if any, payable by the consumer to the credit intermediary for his services is disclosed to the consumer, and agreed between the consumer and the credit intermediary on paper or another durable medium before the conclusion of the credit agreement;

(c) the fee, if any, payable by the consumer to the credit intermediary for his services is communicated to the creditor by the credit intermediary, for the purpose of calculation of the annual percentage rate of charge.’

Austrian law

10 Paragraph 6 of the Verbraucherkreditgesetz (Law on consumer credit) of 20 May 2010 (BGBl. I, 28/2010, ‘the VKrG’) reads as follows:

‘1. In good time before the consumer is bound by any credit agreement or offer, the lender shall, on the basis of the credit terms and conditions offered by the lender and, if applicable, the preferences expressed and information supplied by the consumer, provide the consumer with the information the consumer needs to compare different offers and make an informed decision on whether to conclude a credit agreement. This information must be provided on paper or another durable medium and contain the following information in particular.

(1) the type of credit;

…

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

(4) the duration of the credit agreement; …

(7) the annual percentage rate of charge and the total amount payable by the consumer, illustrated by means of a representative example mentioning all the assumptions used in order to calculate that rate in accordance with Paragraph 27; …

8. The information requirements set out in Paragraphs 1 to 7 also apply to credit intermediaries, provided that these are not suppliers of goods or services participating in a subordinate role only.’

11 Paragraph 25 of the VKrG provides:

‘1. Contracts in which a business person grants a deferral of payment or some other kind of financial accommodation to a consumer in return for remuneration are subject to the provisions of Section 2. …

…

(2) ... The cash price and the item or service must also be specified in the pre-contractual information (Paragraph 6(1)) …’

12 Under Paragraph 1000(1) of the Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code):

‘Interest rates which have been agreed without specifying the level or which apply by law shall be paid at an annual rate of four per cent, unless otherwise provided by law.’

13 Paragraph 1333 of that Code provides:

‘1. The damages which the debtor owes his creditor as a result of the default in payment of a monetary claim are compensated for by the statutory interest (Paragraph 1000(1)).

2. In addition to statutory interest, the creditor may also seek the reimbursement of other damages caused to him by the fault of the debtor, in particular the necessary costs of extrajudicial enforcement or collection, provided these are reasonably proportionate to the claim pursued.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 The Association is entitled, under Austrian law, to seek collective injunctions for the protection of consumers' interests.

15 Inko operates a debt collection agency. In the context of its activities, it sends letters of demand to debtors on behalf of creditors which specify the outstanding debt owed to the creditor, including any interest accrued, plus Inko's own fees. The debtors are called upon to either pay their debt within three days or to fill out a pre-printed form indicating their acceptance of a rescheduling plan for their debt and return it to the defendant. By formalising their agreement, the debtors acknowledge the existence of the debt 'plus the filing costs and interest to be calculated for the duration of the resulting term'. They undertake to pay their debt, in monthly instalments of a determined amount, in accordance with that plan, the payments first being applied to Inko's fees, then to the capital and interest.

16 The Association brought proceedings before the Handelsgericht Wien (Commercial Court, Vienna) seeking an order restraining Inko from entering into agreements for deferred payment of debts without having provided the information specified in Paragraph 6 of the VKrG.

17 By decision of 14 November 2013, that court granted the Association's request.

18 Hearing an appeal against that decision, the Oberlandesgericht Wien (Regional Court, Vienna) partially reversed it by judgment of 30 July 2014.

19 Both the Association and Inko brought appeals on a point of law against that ruling before the referring court.

20 The referring court observes that a debt collection agency, such as Inko, acts on a professional basis and obtains the remuneration for its activity by charging various fees. It proposes to the debtors, on behalf of the creditors, to enter into agreements for deferred payment or rescheduled repayments.

21 According to the order for reference, Inko's corporate object consists, in the first place, in the recovery of claims. In that context, the referring court seeks to ascertain whether a debt collection agency such as Inko, whose activity as a credit intermediary is only secondary in relation to the other professional activities which it primarily carries out, is to be regarded as being a 'credit intermediary' within the meaning of Article 3(f) of Directive 2008/48.

22 As regards the financial consequences, laid down by the Austrian legislation, of late payment of a debt, the referring court observes that the debtor is obliged not only to pay statutory interest at a rate of 4%, but also to make good other damage suffered by the creditor, including damage relating to the costs of recovery of the claim, in so far as they are proportionate.

23 It is apparent from the order for reference that the Association has not established that the interest and costs charged to the defaulting borrowers by Inko exceed, by their amounts, those owed to the creditors in accordance with Austrian legislation where those creditors allow those debtors to make deferred payment.

24 Consequently, the referring court seeks to ascertain whether the debt rescheduling agreements on deferred repayment concluded by Inko with consumers are to be considered as having been agreed to 'free of charge' within the meaning of Article 2(2)(j) of Directive 2008/48 and, therefore, excluded from the scope of that directive.

25 In those circumstances the Oberster Gerichtshof (Supreme Court, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a debt collection agency that offers instalment agreements in connection with the professional recovery of debts on behalf of its client and that charges fees for this service that are ultimately to be borne by the debtors operating as a 'credit intermediary' within the meaning of Article 3(f) of Directive 2008/48?

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

Is an instalment agreement entered into between a debtor and his creditor through the intermediation of a debt collection agency a 'deferred payment, free of charge' within the meaning of Article 2(2)(j) of Directive 2008/48 if the debtor undertakes therein only to pay the outstanding debt and such interest and costs as he would have incurred by law in any case as a result of his default — in other words, even in the absence of such an agreement?'

Consideration of the questions referred

The second question

26 By its second question, which it is appropriate to examine in the first place, the referring court asks, in essence, whether Article 2(2)(j) of Directive 2008/48 must be interpreted as meaning that a credit rescheduling agreement, which is concluded, following the consumer's default, between that consumer and the lender through a debt collection agency, is agreed to 'free of charge', within the meaning of that article, where, by that agreement, the consumer undertakes to repay the total amount of that credit and to pay the interest and costs which he would have been required to pay in accordance with national legislation in the absence of that agreement.

27 In order to answer that question, it must, at the outset, be noted that Directive 2008/48 provides, as regards consumer credit, full and mandatory harmonisation in a number of key areas, which is regarded as 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 facilitate the emergence of a well-functioning internal market in consumer credit (see judgment of 18 December 2014, *CA Consumer Finance*, C-449/13, EU:C:2014:2464, paragraph 21).

28 That directive applies, in accordance with Article 2(1) thereof, to credit agreements, with the exception, in particular, under Article 2(2)(j) of that article, of credit agreements which relate to the deferred payment, free of charge, of an existing debt.

29 As regards, on the one hand, the concept of 'credit agreement', that is defined in Article 3(c) of that directive as meaning an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments.

30 It must be stated that the concept of 'credit agreement', defined by that article, is particularly broad and covers an agreement, such as that at issue in the main proceedings, which provides for the rescheduling of repayments of an existing debt.

31 In that regard, it is expressly stated in Article 2(6) of Directive 2008/48 that the directive is in principle to apply to credit agreements which provide for arrangements by the creditor and the consumer in respect of deferred payment or repayment methods, where the consumer is already in default on the initial credit agreement.

32 Consequently, such an agreement, concluded with the consumer either directly by the lender or by a credit intermediary acting on behalf of that lender, must be considered to be a 'credit agreement' within the meaning of Article 3(c) of that directive, without prejudice to the derogations provided for in Article 2(2) thereof.

33 That said, on the other hand, it is necessary to assess whether such a contract is agreed to 'free of charge', within the meaning of Article 2(2)(j) of that directive, where the consumer undertakes to repay the total amount of the credit and to pay the interest and costs which he would have been required to pay, in the absence of a contract, in accordance with national legislation.

34 Although Directive 2008/48 does not specifically define the concept of 'charge', it is important to note that, in accordance with Article 3(g) of that directive, the total cost of the credit to the consumer covers all the costs which he is required to pay in connection with the credit agreement and which are known to the creditor (see judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 84).

35 The particularly broad definitions of the concepts ‘credit agreement’, within the meaning of Article 3(c) of Directive 2008/48, and ‘total cost of the credit to the consumer’, within the meaning of Article 3(g) of that directive, meet the objective pursued by that directive, as noted in paragraph 27 of the present judgment, in so far as they provide for extended consumer protection.

36 Therefore, any limitation of the scope of that directive, pursuant to Article 2(2) thereof, must be interpreted in the light of that objective.

37 Consequently, where, by an agreement which provides for new conditions for the payment of an existing debt, the consumer undertakes not only to repay the total amount of the credit but also to pay interest or charges not having been provided for in the initial contract under which the unpaid credit has been granted, such an agreement cannot be regarded as being ‘free of charge’ within the meaning of Article 2(2)(j) of Directive 2008/48.

38 In the present case, it is apparent from the order for reference that the credit rescheduling agreements proposed by Inko to consumers, following defaults, provide that those consumers undertake to pay their debt by monthly instalments, the payments being set, first, against Inko’s costs, then against the remaining capital due and interest.

39 Such an agreement, which provides for the obligation of a consumer to pay the costs of a credit recovery agency, here, Inko, which were not provided for by the initial credit agreement, cannot be regarded as being linked to a deferred payment that has been agreed to ‘free of charge’, within the meaning of Article 2(2)(j) of Directive 2008/48.

40 In view of the objective, referred to in paragraph 27 of the present judgment, to ensure that all consumers enjoy a high level of protection of their interests, such a statement cannot be called into question by the cumulative amounts of interest and costs provided for by such an agreement, even if those amounts do not exceed those which would be payable in the absence of an agreement between the parties, in accordance with the national legislation applicable following delayed payment.

41 In those circumstances, the answer to the second question is that Article 2(2)(j) of Directive 2008/48 must be interpreted as meaning that a credit rescheduling agreement, which is concluded, following the consumer’s default, between that consumer and the lender through a debt collection agency, is not agreed to ‘free of charge’, within the meaning of that article, where, by that agreement, the consumer undertakes to repay the total amount of that credit and to pay interest and costs that were not provided for by the initial contract under which that credit was granted.

The first question

42 By its first question, which it is appropriate to examine in the second place, the referring court asks, in essence, whether Article 3(f) and Article 7 of Directive 2008/48 must be interpreted as meaning that a collection agency which concludes, on behalf of a

lender, a rescheduling agreement for an unpaid credit, but which acts as a credit intermediary only in an ancillary capacity, must be regarded as being a 'credit intermediary' within the meaning of Article 3(f) and be subject to the obligation to provide the consumer with pre-contractual information under Articles 5 and 6 of that directive.

43 In that regard, it must be borne in mind that, under Article 3(f), a 'credit intermediary' is a natural or legal person who is not acting as a creditor and who, in the course of his trade, business or profession, for a fee, which may take a pecuniary form or any other agreed form of financial consideration, presents or offers credit agreements to consumers, assists consumers by undertaking preparatory work in respect of credit agreements, or concludes credit agreements with consumers on behalf of the creditor.

44 Consequently, a collection agency, such as Inko, which acts on behalf of a lender for the conclusion of a rescheduling agreement for an unpaid credit, under which the consumer undertakes to repay the total amount of the credit and to pay interest and costs, must be categorised as a 'credit intermediary' within the meaning of Article 3(f).

45 The dispute in the main proceedings concerns the question whether a collection agency such as Inko is required, in respect of its activities as a credit intermediary, to provide consumers with the pre-contractual information referred to in Paragraph 6 of the VKrG, which transposes Article 5 of Directive 2008/48 into Austrian law.

46 In that regard, it should be observed that such a credit intermediary is, in principle, subject to the obligation to provide the consumer with pre-contractual information laid down in Articles 5 and 6 of that directive.

47 However, in accordance with the first sentence of Article 7 of Directive 2008/48, suppliers of goods or services acting as credit intermediaries in an ancillary capacity are not subject to that obligation. In that regard, recital 24 of that directive states that those suppliers of goods and services may be deemed, for example, to be acting as credit intermediaries in an ancillary capacity if their activity as credit intermediaries is not the main purpose of their trade, business or profession.

48 It is for the referring court to determine whether, having regard to all the circumstances of the case in the main proceedings, in particular the main object of the activity of the credit intermediary in question, it may be considered to act as a credit intermediary in an ancillary capacity, within the meaning of the first sentence of Article 7 of that directive.

49 At the same time, it should be noted that the exception — which may benefit a credit intermediary — to the obligation to provide pre-contractual information to the consumer is not such as to affect the concept of 'credit intermediary' within the meaning of Article 3(f) of Directive 2008/48, but has the sole effect of preventing persons who act as intermediaries only in an ancillary capacity from being subject to the pre-contractual information requirement, laid down in Articles 5 and 6 of that directive, the other

provisions of that directive, in particular Article 21 thereof, on certain obligations of credit intermediaries towards consumers, remaining applicable in respect of those persons.

50 Nor does that exception affect the level of consumer protection provided for by Directive 2008/48.

51 In that regard, as the Advocate General in essence stated in points 28 to 30 of her Opinion, the obligation laid down in Articles 5 and 6 of that directive, that pre-contractual information be provided to the consumer by the lender, or, where appropriate, through the credit intermediary, contributes to the attainment of the objective referred to in paragraph 27 of the present judgment of ensuring that all consumers enjoy a high level of protection of their interests (see, to that effect, judgments of 18 December 2014, *CA Consumer Finance*, C-449/13, EU:C:2014:2464, paragraph 21, and 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 61).

52 As follows from the second sentence of Article 7 of that directive, read in the light of recital 24 thereof, the exception provided for in the first sentence of Article 7 of Directive 2008/48, in respect of suppliers of goods or services acting as credit intermediaries in an ancillary capacity, does not affect the lender's obligation to ensure that the consumer receives the pre-contractual information referred to in Articles 5 and 6 of that directive.

53 In the light of all the foregoing considerations, the answer to the first question is that Article 3(f) and Article 7 of Directive 2008/48 must be interpreted as meaning that a debt collection agency which concludes, on behalf of a lender, a rescheduling agreement for an unpaid credit, but which acts as a credit intermediary only in an ancillary capacity, which is for the referring court to determine, must be regarded as being a 'credit intermediary' within the meaning of Article 3(f) and is not subject to the obligation to provide the consumer with pre-contractual information under Articles 5 and 6 of that directive.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 2(2)(j) and 3(f) 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 must be interpreted as meaning that a credit rescheduling agreement, which is concluded, following the consumer's default, between that consumer and the lender through a debt collection agency, is**

not agreed to 'free of charge', within the meaning of that article, where, by that agreement, the consumer undertakes to repay the total amount of that credit and to pay interest and costs that were not provided for by the initial contract under which that credit was granted.

2. **Article 3(f) and Article 7 of Directive 2008/48 must be interpreted as meaning that a debt collection agency which concludes, on behalf of a lender, a rescheduling agreement for an unpaid credit, but which acts as a credit intermediary only in an ancillary capacity, which is for the referring court to determine, must be regarded as being a 'credit intermediary' within the meaning of Article 3(f) and is not subject to the obligation to provide the consumer with pre-contractual information under Articles 5 and 6 of that directive.**

[Signatures]

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* Language of the case: German.