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# **CJEU rules on ‘durable medium’ requirements for consumer credit agreements**

*Home Credit Slovakia AS v. Ms Klára Bíróová*  
*Case C-42/15*

**Article by David Bowden**

### Executive speed read summary

The CJEU has handed down its ruling in a case referred from a first instance court in Slovakia. There a debtor had attempted to avoid repaying a loan by submitting a defence raising technical matters under the Consumer Credit Directive. The CJEU has agreed with the opinion of its Advocate-General. The CJEU has said a consumer credit agreement does not have to be in 1 document and a lender can also issue a general set of terms and conditions as well. On 'durable medium' the CJEU is comfortable with this as long as the consumer can store information addressed personally to him in an accessible way for future reference which allows for the unchanged reproduction of the stored information. A credit agreement had to clearly set out the payment frequency of repayments. Although the CCD contained provisions about amortisation tables, a lender had to provide these only when requested.

The CJEU said a lender should forfeit its right to recover interest under a credit agreement where it had failed to include the APR, the number or frequency of payments or sureties or compulsory insurance required. This was vitally important information the omission of which compromised a debtor's ability to assess the extent of his liability. However where a lender had omitted information such as the name and address of a competent supervisory authority, this was a technical breach of the CCD. For these breaches it was not proportionate to impose on a lender a sanction that it could not recover any interest.

*Home Credit Slovakia AS v. Ms Klára Bíróová*

*The Governments of the Republics of Slovakia & Germany and the European Commission intervening*  
Case C-42/15

9 November 2016

*Court of Justice of the European Union (3<sup>rd</sup> Chamber) - Judges Bay Larsen (President), Vilaras, Malenovský, Safjan (Rapporteur) and Šváby*

*Opinion of Advocate-General Eleanor Sharpston QC*

9 June 2016

### **What are the facts?**

Ms Bíróová ('the borrower') borrowed €700 from Home Credit Slovakia AS ('the lender') on 29 June 2011. The loan was unsecured and was for 3 years at an APR of between 35% and 37.5%. The borrower made only 2 repayments (each of €32.50) and defaulted. The lender called in the loan, sought default interest and brought proceedings in a Slovakian District Court to enforce the loan. On advice the borrower put in a number of technical defences based on the Slovakian law which had been made to transpose the Consumer Credit Directive ('CCD') **2008/48/EU**. Rather than attempt to deal with these defences, this first instance court submitted 7 questions to the CJEU for determination on the CCD.

### **What information was provided by the lender in its credit agreement?**

The lender included the following information:

- Total amount of loan,
- Total amount payable,
- Monthly instalment,
- Dates when instalments due.
- Borrowing rate,
- Anticipated end date,
- Estimated APR, and

### **What does the Consumer Credit Directive say?**

The relevant parts of the Consumer Credit Directive ('CCD') are these.

- **Article 3** – 'Definitions' states '(m) "durable medium": means any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored'
- **Article 10** - 'Information to be included in credit agreements', provides
  - '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 Community 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....;
    - (c) the duration of the credit agreement;
    - (d) the total amount of the credit ....;
    - ....
    - (f) the borrowing rate, ...
    - (g) the annual percentage rate of charge ....
    - (h) the amount, number and frequency of payments to be made ....

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....  
(l) the interest rate applicable in the case of late payments ...;  
(m) a warning regarding the consequences of missing payments;

....  
(r) the right of early repayment, ...'

- **Article 14** – 'Right of withdrawal' provides 'The consumer shall have a period of 14 calendar days in which to withdraw from the credit agreement without giving any reason.'
- **Article 22** – 'Harmonisation and imperative nature of this Directive' says '1. 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.'
- **Article 23** - headed 'Penalties' provides that 'Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.'

#### **Are there any recitals in the Consumer Credit Directive of relevance?**

There are a number of recitals to the CCD that are also relevant. These are:

- **Recital 9** – 'Full harmonisation is necessary in order to ensure that all consumers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market.'
- **Recital 10** – 'The definitions contained in this Directive determine the scope of harmonisation.'
- **Recital 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.'
- **Recital 30** – 'This Directive does not regulate contract law issues related to the validity of credit agreements.'
- **Recital 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.'
- **Recital 47** – 'Member States should lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and ensure that they are implemented. While the choice of penalties remains within the discretion of the Member States, the penalties provided for should be effective, proportionate and dissuasive.'

#### **What happened in the Slovakian courts?**

The lender brought proceedings claiming €1,155.52 and default interest of 0.024% daily on the sum of €778.34 from 11 February 2014 until payment of the outstanding debt. The proceedings were brought in the District Court, Dunajská Streda, Slovakia. The borrower put in a defence and the court on 19 December 2014 referred 7 questions on the CCD to the CJEU. A hearing took place on 24 February 2016 at which both sides as well as the European Commission and the Government of Slovakia made oral submissions. The Advocate-General produced her written opinion on 9 June 2016.

#### **What were the terms of reference to the CJEU?**

The court in Slovakia referred these 7 questions to the CJEU. These were:

- **Question 1** - What is the meaning of the expression 'on paper or on another durable medium' in Article 10(1) read together with Article 3(m) of CCD? Does that expression cover only the physical document signed by the parties to the credit agreement? Must that document contain the compulsory information laid down in Article 10(2)? Where the compulsory information is in a separate document, such as the general terms of business, that is not signed by the parties to the credit agreement and the credit agreement cross refers to that document, does that comply with the requirements of Article 10(1) of CCD?
- **Question 2** - To what extent does CCD fully harmonise the rules relating to the information to be included in the credit agreement for the purposes of Article 10(1) and (2), so that those provisions preclude national rules: (i) requiring the compulsory information to be contained in a single document signed by the parties to the credit agreement, or (ii) meaning that the credit agreement cannot have full legal effect because some of the compulsory information is in a separate document, such as the general terms of business?
- **Question 3** - Does the 'frequency of payments' in Article 10(2)(h) of CCD mean that the lender is required to indicate in the credit agreement the exact date on which each payment must be made, or is it sufficient to indicate when each payment is due by reference to objectively ascertainable criteria?
- **Question 4** - If the latter, may that information be contained in a separate document to which the credit agreement refers, such as the 'general terms of business' which is not signed by the parties?

- **Question 5** - Do Article 10(2)(h) and (i) of CCD read together mean that an amortisation table does not have to be included in a credit agreement for a fixed period, where the capital is repaid by individual instalments, and that such information may instead be provided by the lender to the borrower upon his request? Or is the lender required to provide an amortisation table in the credit agreement from the date that the agreement begins and does the borrower also have the right to request an amortisation table during the term of the credit agreement indicating the schedule of payments from the date of that request?
- **Question 6** - Are the information requirements in Article 10(2)(h) fully harmonised in accordance with Article 22(1) of CCD so that Member States are precluded from requiring that an amortisation table must be included in the credit agreement?
- **Question 7** - Where the lender fails to provide most of the information laid down in Article 10(2) of CCD, is a penalty imposed under national law, by which the credit agreement is deemed to be interest-free and free of charges (meaning that the borrower is obliged solely to repay the principal sum), proportionate for the purposes of Articles 1 and 23?

#### **Are there any special provisions in Slovakian Law?**

The CCD was transposed into Slovakian law by means of Law number 129/2010 on 'Consumer credit and other forms of credit and loans for consumers'. The relevant provisions are:

- **Paragraph 9** – *'1. A consumer credit agreement must be drawn up in written form. Every party to the agreement shall receive at least one copy in documentary form or on another durable medium accessible to the consumer.'*  
*'2. A consumer credit agreement must, in addition to the general requirements set out in the Civil Code ..., contain the following:....(k) the amount, number and frequency of repayments of capital, interest and other charges and, if appropriate, the order in which payments will be allocated to individual outstanding balances charged at different borrowing rates for the purposes of reimbursement.'*
- **Paragraph 11** – *'Consumer credit granted shall be deemed to be interest-free and free of any charges if: (a) the consumer credit agreement is not in writing in accordance with Paragraph 9(1) and does not contain the information specified in Paragraph 9(2)(a) to (k), (r) and (y) and Paragraph 10(1), (b) the annual percentage rate of charge is stated incorrectly, to the detriment of the consumer.'*

The Slovakian Commercial Code also provided that *'Part of the terms of a contract may be determined by reference to general terms and conditions drawn up by professional organisations or interest groups or by reference to other terms and conditions which are known to the parties concluding the contract or submitted as proposals annexed to the offer.'*

Finally the Slovakian Civil Code provided:

- *A legal act shall be invalid if it is not drawn up in the form required by law or by agreement between the parties.*
- *Any legal act in writing shall be valid if it is signed by the person responsible for drawing it up.....A signature may be replaced by electronic means where such usage is permitted.*
- *The requirement that the legal act be in writing shall be complied with if the legal act is communicated by telefax, telegram or by electronic means which make it possible to determine the content of the legal act and to identify the person who is responsible for it.*
- *For the conclusion of a contract in written form, it is sufficient for there to be a written offer and a written acceptance*

#### **What opinion did Advocate-General Sharpston given on 'durable medium'?**

On 9 June 2016, Eleanor Sharpston gave her opinion where she was required to interpret the phrase *'drawn up on paper or on another durable medium'* as it appears in the CCD. Her opinion was that this phrase refers to the medium on which the credit agreement is drawn up and given to the consumer. Those words cover both the terms of the credit agreement concluded by the parties and the items of information listed in Article 10(2) of CCD which comprise part of the credit agreement.

Her opinion was that a national rule requiring all the compulsory information to be supplied in writing within a single, signed document is not precluded by the CCD. A national rule that permits elements of the compulsory information to be supplied on paper or on another durable medium in the lender's general terms of business, rather than in the signed consumer credit agreement itself, is also not precluded by CCD.

However she ruled that as a minimum the following conditions have to be in place:

- the separate documents containing the compulsory information should be given to the consumer at the same time and prior to conclusion of the agreement,

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- the credit agreement should contain clear and precise cross references to the compulsory information and indicate where it can be found in the lender's general terms of business, and
- the lender should be able to prove that he has given the compulsory information to the consumer prior to the conclusion of the agreement.

**What did the CJEU rule on 'durable medium'?**

Although both the Advocate-General and the CJEU considered both the 1<sup>st</sup> and 2<sup>nd</sup> questions together, because the issue of 'durable medium' is so important and appears in many other EU financial services measures, for this piece the findings have been split. The CJEU starts by referring back to its early decision *Radlinger and Radlingerová* **C-377/14** where it said that the CCD was there 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*'.

On 'durable medium' the CJEU said that what was relevant for the consumer is that '*he should be able to store the information which has been addressed to him personally, to rest assured that its content will not be altered, that the information will be accessible for an adequate period and that it will be possible to reproduce it unchanged*'. Again the CJEU referred back to another of its earlier decisions on this in *Content Services* **C-49/11**.

More interestingly the CJEU noted that Article 10(1) of the CCD made '*no reference to national law and that, therefore, the terms "paper" and "durable medium" in that provision have an autonomous meaning*.' Expanding on this the CJEU ruled that these defined terms '*cannot be interpreted by reference to national law governing the form in which credit agreements must be drawn up*'. The CJEU then referred to Article 3(m) of the CCD where 'durable medium' is defined as meaning '*any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows for the unchanged reproduction of the information stored*'.

The CJEU considered whether a credit agreement needed to be on paper and signed by the parties. On this the CJEU ruled that the Slovakian law transposing the CCD formed '*part of a national rule regarding the validity of the conclusion of credit agreements within the meaning of Article 10(1)*'. It went on to say that neither the CCD '*nor EU law in general preclude such a requirement*'. On the 1<sup>st</sup> referred question, the CJEU then disappointingly ruled that the CCD did not preclude a member state for providing in its transposing law that a credit agreement falling within the CCD's scope '*which is drawn up on paper must be signed by the parties*' and also that '*the requirement that the agreement be signed applies to all the details of the agreement*' referred to in CCD Article 10(2).

**What did the CJEU rule on whether a consumer credit agreement had to be in one document?**

The CJEU started by stating that '*there is, however, nothing in the directive to indicate that the credit agreements referred to in that provision must be drawn up in a single document*' and it wanted to ensure that '*the consumer is aware of his rights and obligations*'. It noted that the CCD not only wanted to ensure '*a well-functioning internal market in consumer credit*' but also that consumers enjoyed '*a high and equivalent level of protection of their interests*'.

The CJEU said that 'all the information referred to in Article 10(2) of the CCD need not '*necessarily be included in a single document*' but only that all the A10(2) information had to be '*set out on paper or on another durable medium and be incorporated into the credit agreement*'. The credit agreement must '*contain a clear and precise cross-reference to other paper, or other durable, media containing the information that was actually given to the consumer prior to the conclusion of the agreement so as to give him the opportunity to be genuinely apprised of all his rights and obligations*'.

In conclusion on the 2<sup>nd</sup> referred question, the CJEU ruled that '*a credit agreement need not necessarily be drawn up in a single document, but all the information referred to in Article 10(2) of the directive must be set out on paper or on another durable medium*'.

**What did the CJEU rule on 'frequency of payments'?**

Here the CJEU said a credit agreement had to include '*in a clear and concise manner, the amount, number and frequency of payments to be made by the consumer and, where appropriate, the order in which payments will be allocated to different outstanding balances charged at different borrowing rates*'. The CJEU agreed with its Advocate-General that the '*objective of that provision is to ensure that the consumer knows the date on which each payment to be made falls due*'.

The CJEU was able to deal with this question quickly by concluding that *'a credit agreement need not indicate the specific date on which every payment to be made by the consumer falls due, provided that the terms of the agreement allow the consumer to ascertain the dates of those payments without difficulty and with certainty'*.

#### **What did the CJEU rule on full harmonisation and how instalments are to be calculated?**

Again it is possible to sense some frustration here from the CJEU that the national court had not actually read the CCD. The CJEU started by stating that Articles (2)(i) and (3) state that *'only on request by the consumer'* does the lender then fall *'under an obligation to provide him, free of charge, with a statement of account in the form of an amortisation table'*. The CJEU said these provisions contained *'clear wording'* which meant they did *'not impose an obligation to include in the credit agreement such a statement of account in the form of an amortisation table'*.

Again the CJEU fell back on the CCD being a maximum harmonization measure when it ruled that Article 10(2) *'cannot, however, be interpreted as permitting the Member States to impose in their national legislation an obligation to include information in a credit agreement other than that required under Article 10(2)'*. Concluding on this referred question the CJEU ruled:

*'a fixed-term credit agreement providing for amortisation of the capital in consecutive instalments need not state, in the form of an amortisation table, the part of each instalment that will be allocated to repayment of capital. Those provisions, read in conjunction with Article 22(1) of that directive, preclude a Member State from imposing such an obligation under national law.'*

#### **What did the CJEU rule on the submission that where there was technical non-compliance with the CCD the lender could not recover any interest?**

Fortunately the CJEU came to its senses and saw through the technical challenge on this for what it was. It has decided to apply a sensible test as to what sorts of breaches it will be appropriate to impose the 'no interest' sanction on. The CJEU has ruled that the following are *'vitaly important obligations'* and *'essential information'*:

- The APR,
- Number or frequency of payments,
- Statement that notarial fees are payable, and
- Sureties or compulsory insurance required.

The CJEU said that where there was a failure to include such information this *'may compromise the ability of a consumer to assess the extent of his liability'* and that a 'no interest' penalty here *'must be considered to be proportionate within the meaning of Article 23'* of the CCD.

However the CJEU ruled that the technical breaches identified here were in a different sort of class. It helpfully said:

*'the imposition... of such a penalty, having serious consequences for the creditor in the event of failure to include those items of information referred to in Article 10(2) ...which, by their nature, cannot have a bearing on the consumer's ability to assess the extent of his liability, such as ... the name and address of the competent supervisory authority referred to in Article 10(2)(v) of that directive, cannot be considered to be proportionate.'*

Concluding on this issue, the CJEU said that national law could provide for an 'interest free' penalty for CCD breaches *'provided that the information covers matters which, if not included, may compromise the ability of the consumer to assess the extent of his liability.'*

#### **What will happen next with this case?**

This case will be sent back to the Slovakian District court so it can apply the CJEU ruling and also deal with costs.

**10 November 2016**

David Bowden is a solicitor-advocate and runs [David Bowden Law](http://DavidBowdenLaw.com) which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at [info@DavidBowdenLaw.com](mailto:info@DavidBowdenLaw.com) or by telephone on (01462) 431444.