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Assessment of the consumer's ability to repay a consumer loan

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Abstract. The academic thesis analyses the obligations that are connected with the topic of assessing the consumer's ability to repay a consumer loan. The author interprets the obligations in assessing the consumer's ability to repay the loan in the sense of the current *de lege lata* legislation, which is supplemented by the current case law. The chosen topic is set in the context of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements. The author presents arguments indicating the inadequate implementation of individual directives and decisions of the Court of Justice in the courts' decision-making.

Keywords. Consumer, consumer credit, creditworthiness.

1. Introduction

Credit transactions are one of the most important activities of banks and non-bank entities, but they are also the riskiest credit products as they are associated with high costs and fees, especially in the context of the low incomes of the consumers to whom they are sold. Consumers often have difficulty repaying these types of loans, but can easily obtain a new loan to refinance the previous one. On the other hand, any credit extended carries with it both a future return and a potential risk for the supplier. The operationalization of the concept of 'responsible lending' in the legal context of consumer credit transactions involves the need to translate it into concrete obligations of credit providers towards consumers. The risk that the purchase of a consumer credit product will harm the consumer may be increased by certain lending practices that creditors and credit intermediaries resort to in the distribution process. For example, they may fail to carry out an adequate assessment of the consumer's creditworthiness before entering into a credit agreement or offer other financial products that are not suitable for the consumer. Creditworthiness assessments, which evaluates the borrower's ability to afford credit, are one of the key tools and a cornerstone of financial stability to avoid mis-selling of consumer credit products and over-indebtedness. In many cases, suppliers do not carry out a proper analysis of the household budget, nor do they ask for any supporting documents to verify the information or data provided by the consumer. The main motive of the supplier in granting credit is the vision of profit in the form of interest income on these loans granted. In an ideal world, creditors would only provide credit to consumers when they can repay it without undue hardship and

when the consumer credit or related products meet the needs of the consumers. At first glance, acting in the interests of consumers may appear to be in the interests of the creditors themselves, as they generally seek to reduce their credit risk - that is, the risk to the creditor that the consumer will default on the loan. In practice, however, the interests of creditors and consumer borrowers do not always coincide. Financial incentives may encourage lenders to lend to consumers whom they expect to be profitable, even if these consumers are at high risk of significant loss.

2. The concept of creditworthiness

Creditworthiness expresses the value and credibility of an economic entity (e.g. a company, an individual, but also a municipality or a state) in the financial market. It is related to the economic performance of a given entity and thus expresses its solvency, credibility, and ability to value the capital invested or to meet its obligations. More broadly, it is also related to reputation. Although it is often equated with credit rating, which represents the ability to repay debts, creditworthiness has a broader scope, and credit rating is only one of its components. A consumer's ability to repay a consumer loan is most often assessed by banks before the provision of credit, by other entities, or before extending credit. In general, creditworthiness assessment has a significant impact on the creditor-borrower relationship. When a supplier assesses a client as creditworthy, it expresses its confidence in the client's ability to meet its obligations. The better the consumer's creditworthiness, the less risky he or she looks to potential lenders and the cheaper sources of finance he or she may be able to obtain.

A consumer's credit rating is the result of a credit analysis that is part of the lending process. The credit application phase is followed by a creditworthiness test phase (creditworthiness analysis), which analyses three main areas: the applicant's legal circumstances, the applicant's personal credibility, and the applicant's economic and financial situation. For individual applicants, the supplier assesses personal data such as age, gender, education, occupation, and marital status, as well as the permanent income and regular expenditure of the applicant or the entire household. The supplier should also examine the applicant's credit history and payment record. One source (not the only source) of this information is the Joint Register of Banking Information (SRBI), which collects information on loans and business borrowers from all Slovak banks and branches of foreign banks operating in Slovakia.

In the past, the assessment of a borrower's creditworthiness was mainly subjective. In the first half of the 19th century, the function of banks was performed by private moneychangers, who individually assessed the creditworthiness of private individuals and states and lent them money at varying rates of interest. With the onset of indirect financing, and especially for the needs of institutional lenders, the assessment needed to be made more objective and its procedures harmonised. Various mathematical and statistical models have been used.

3. Legal regulation

The consumer protection legislation in the context of consumer credit is continuously evolving and is constantly being expanded and the individual instruments are often refined. The current legislation, together with the case law, constitutes a fairly coherent and sufficient set of instruments that should be able to compensate for the unequal position of the consumer and the supplier and should also ensure adequate protection for the consumer. The determination of the

degree of liability or co-liability of the various parties to the contractual relationship is a very sensitive legal issue.

The central piece of European Union legislation currently governing consumer credit is 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. It is aimed at facilitating "the emergence of a well-functioning internal market in consumer credit" and ensuring that "all consumers (...) have a high and equivalent level of protection of their interests", in particular by preventing "irresponsible lending". EU law places greater demands on suppliers to responsibly assess a consumer's ability to repay a consumer loan. Article 8 of the Consumer Credit Directive states that the assessment of creditworthiness should be based on 'sufficient information' obtained from the consumer and/or from a relevant database. According to the Court of Justice of the European Union, "the sufficiency of the information may vary according to the circumstances in which the credit agreement was concluded, the personal situation of the consumer or the amount to which the agreement relates." The Court also held that Article 8 allows the creditor to assess the consumer's creditworthiness solely based on the information provided by the consumer, presuming that the information is sufficient and that the consumer's statements themselves are accompanied by supporting evidence. Furthermore, this provision does not require the creditor to systematically verify the information provided by the consumer. The Consumer Credit Directive, as interpreted by the Court of Justice of the European Union, thus leaves a wide margin of discretion to the Member States as regards the collection of information on the consumer's financial situation. It is not surprising, therefore, that creditworthiness assessments in the field of consumer credit are carried out in ways that vary considerably across the European Union. Given the widespread problems with consumer credit, it is questionable to what extent the current national rules governing the collection of information for such assessments in many Member States can effectively prevent irresponsible lending. [1]

In Slovakia, the key law in the field of consumer credit is Act No. 129/2010 on consumer credit and other credits and loans to consumers and on amendment and supplementation of certain acts. The application of this regulation has harmonised the Slovak credit market within the internal market, which has contributed to strengthening the confidence and legal certainty of consumers and providers of consumer credit. In the introduction to the general part of the explanatory memorandum to Act No 129/2010 Coll., it is stated that the present draft law 'is, in its content, a full transposition into Slovak law of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements and repealing Council Directive 87/102/EEC. At the end of the general part of the explanatory memorandum to Act No 129/2010 Coll. it is stated that the present Act transposes the Directive into the Slovak legal order in its entirety. According to point 26 of the preamble to Directive 2008/48/EC of the European Parliament and the Council on credit agreements and repealing Council Directive 87/102/EEC, Member States should take appropriate measures to promote responsible practices during all phases of the credit relationship, taking into account the specific nature of their credit market. Such measures may, for example, include the provision of information and education to consumers, including warnings about the risks associated with non-compliance with contractual repayment provisions and over-indebtedness. Particularly in an emerging credit market, it is important that creditors do not grant credit irresponsibly or without prior creditworthiness assessment and that Member States exercise the necessary supervision to avoid such behaviour and provide for the necessary measures to sanction creditors in such cases. Without prejudice to the provisions on credit risk laid down in Directive

2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, creditors should be responsible for individual checks on the creditworthiness of the consumer. To that end, they should be able to make use of the information provided by the consumer not only during the preparation of the credit agreement in question but also during the long-term business relationship. Member States' authorities could also provide creditors with appropriate instructions and guidelines. Consumers should also act prudently and comply with their contractual obligations. National legislation regulates the assessment of the ability to repay a loan in Article 86 of Act No. 129/2010 on consumer credit and other credit and loans to consumers and amending certain laws, entitled "Assessment of the consumer's creditworthiness", and provides, that the creditor shall, before concluding a consumer credit agreement or amending the agreement by increasing the consumer credit, assess with professional diligence the consumer's ability to repay the consumer credit, taking into account, in particular, the period for which the consumer credit is granted, the amount of the consumer credit, the consumer's income and, where applicable, the purpose of the consumer credit. The Slovak legislation, although it does not prohibit the granting of credit to a consumer who has not passed the creditworthiness test, provides for significant financial penalties if credit is granted to such a consumer. [2]

4. Obligation to assess the ability to repay the loan

The court's obligation to examine ex officio whether the creditor has assessed the consumer's creditworthiness follows from the decision of the Court of Justice of the European Union C-679/2018 of 05.03.2020, the conclusions of which are that Articles 8 and 23 of Directive 2008/48/EC of the European Parliament and of the Council of 23 March 2008 on the repayment of loans. Directive 2008/48/EC of 28 April 2008 on credit agreements must be interpreted as imposing on the national court an obligation to examine ex officio the existence of a breach of the obligation laid down in an article of that directive requiring the creditor to assess the consumer's creditworthiness before concluding the contract and to draw the consequences under the national law of a breach of that obligation, provided that the penalties comply with the requirements of Article 23 of that directive. Articles 8 and 23 of Directive 2008/48/EC must be interpreted as precluding national legislation under which the penalty for breach of the creditor's obligation to assess the consumer's creditworthiness before the conclusion of the contract, which consists in the nullity of the credit agreement coupled with the consumer's obligation to repay the principal sum advanced to the creditor within a period commensurate with the consumer's means, applies only if the consumer in question contests that nullity. [3]

It must also be noted that in Case C-303/20 of 10 June 2021 *Ultimo Portfolio Investment (Luxembourg) SA v. KM*, the Court of Justice (Sixth Chamber) ruled that Article 23 of Directive 2008/48/EC of the European Parliament and of the Council of 23 June 2008 on credit agreements and repealing Council Directive 87/102/EEC must be interpreted as meaning that the review of the effective, proportionate and dissuasive nature of the penalties established in that article for breaches, in particular, of the obligation to assess the consumer's creditworthiness imposed by Article 8 of that directive must be carried out in such a way that in accordance with the third paragraph of Article 288 TFEU, by taking into account not only the provision of national law adopted specifically for the purpose of transposing that directive, but also all other provisions of that law, which must be interpreted, as far as possible, in the light of the wording and objectives of that directive, so that those penalties comply with the requirements laid down in Article 23 of that directive. [4]

It is apparent from the various points of the judgment of the Court of Justice (First Chamber) of 6 June 2019 in Case C-58/18 Michel Schyns v. Belfius Banque SA that, as recalled in paragraph 29 of that judgment, although Directive 2008/48/EC harmonises only certain aspects of the rules of the Member States in the field of credit agreements, it follows from recital 44 of that directive that, to ensure the transparency and stability of the market, and in anticipation of even wider harmonisation, the Member States must take care to put in place the appropriate regulatory or supervisory measures applicable to creditors. [5]

Concerning the necessity of examining the consumer's expenses when assessing the ability to repay the loan, the court refers to the decision of the Supreme Court of the Czech Republic, Case No. 33Cdo 2178/2018-77 of 25.7.201, citing: "The obligation to assess the consumer's creditworthiness protects not only the consumer himself from the negative consequences of the inability to repay the loan but also, indirectly, society as a whole, as it prevents the negative social consequences of over-indebtedness and insolvency in the form of the consumer and his dependents falling into the public social network, disruption of family and social relationships, etc. Last but not least, it also protects the position of the creditors themselves, as a professional assessment of the consumer's creditworthiness when applying for another loan reduces the risk of creditors who have previously provided loans or other services to the same consumer. Therefore, the law, in particular the Consumer Credit Act (Article 9(1) thereof), provides that the creditor is obliged to exercise professional care when assessing the consumer's creditworthiness. The Court of Appeal can be agreed that a creditor fails to comply with the obligation laid down by the Consumer Credit Act, i.e. fails to exercise professional care in assessing the consumer's ability to repay a consumer credit, if it relies on an objectively unsubstantiated personal statement of the debtor's personal, earning and financial circumstances. The fact that the debtor is not registered in the debtors' databases does not change that. A grammatical and logical interpretation of Section 9(1) of the Consumer Credit Act already shows that sufficient information is not meant to be information obtained only from the consumer. Professional diligence presupposes that the information provided by the debtor to the creditor is verified or objectively substantiated, at least by confirmation from the debtor's employer. Undoubtedly, the creditor's obligation to use publicly available information, such as the data published by the State on the minimum subsistence level under Act No 110/2006 Coll., on the minimum subsistence level and the average expenditure of the population (the database of the Czech Statistical Office), and to compare it with known or ascertained (not merely claimed) information on the consumer's income and expenditure, is also crucial. This was also concluded by the Supreme Administrative Court in its decision of 1 April 2015, Case No. 1 As 30/2015, whose conclusions were used by the Court of Appeal in support of its argumentation in the contested decision. The conclusion of the Court of Appeal that the applicant failed to comply with the creditor's obligation under Article 9(1) of the Consumer Credit Act by being satisfied with the defendant's unsubstantiated statement of his personal, earnings and financial circumstances and by consulting the register of debtors is correct." [6]

5. Burden of proof

The supplier must bear the burden of proof as regards the examination of the consumer's regular expenditure before the conclusion of the credit agreement. It is not sufficient to investigate expenditures by consulting the bank's databases and credit registers. Those databases cannot give a complete picture of the customer's expenditures, since that can include ordinary monthly household expenditures. Unless the creditor knows the total amount of the client's expenditure, it cannot conclude whether or not the client can repay the loan requested.

To assess whether the obligation imposed on the supplier by clause 7(1) of the Consumer Credit Act has been fulfilled, determinative is not the actual financial, property, and social situation of the consumer, but how the creditor approached the investigation and assessment of the client's creditworthiness. The consequence of an underestimation of creditworthiness is a failure to protect a creditor who grossly negligently breaches the duty to exercise due professional care in assessing a consumer's creditworthiness.

The case-law of the Court of Justice of the European Union is also relevant in this respect, citing: „It should be stressed, however, that compliance with this principle would be undermined if the burden of proving non-compliance with the obligations laid down in Articles 5 and 8 of Directive 2008/48/EC were to fall on the consumer. The consumer does not have the means of proving that the creditor has failed to provide him with the information required by Article 5 of that directive and has failed to check his creditworthiness. On the contrary, the effective exercise of the rights conferred by Directive 2008/48/EC is ensured by national legislation under which the creditor is, in principle, obliged to prove before a court the correct performance of those pre-contractual obligations. Such a rule aims to ensure consumer protection without unduly prejudicing the creditor's right to a fair trial. Indeed, as the Advocate General states in paragraph 35 of his submissions, a prudent creditor must be aware of the necessity of collecting and preserving evidence of the fulfillment of his information obligations and of the obligation to provide explanations." (paragraphs 27 and 28 of the judgment of the Court of Justice of the European Union C-449/13 of 18.12.2014 CA Consumer Finance SA v. Ingrid Bakkaus, Charline Bonat, née Savary, Florian Bonat). [7]

6. Legal consequences of a breach of obligations

Even if the supplier has gathered a certain amount of information about the consumer, he must evaluate it sufficiently. The supplier cannot build up a sufficient picture of the consumer's ability to pay based on the information obtained from the consumer alone, since it is also necessary to know the amount of the consumer's expenditure. The mere collection of information about the consumer, which is incomplete, cannot in itself be regarded as a proper fulfillment of the obligation under Article 7(1) of the Consumer Credit Act. Without examining other aspects, the applicant cannot form a realistic picture of the consumer's financial situation, which is necessary for assessing the consumer's ability to repay the debt under the contract.

In that regard, in judgment C-565/12 of 27 March 2014, LCL Le Crédit, the Court of Justice assessed compliance with such thresholds defined for the sanctioning regime established by the Member State, in the present case concerning the sanction consisting in the forfeiture of the creditor's right to an interest in principle in the event of a breach of the obligation, laid down in Article 8 of Directive 2008/48/EC, to check the consumer's creditworthiness before concluding the contract. [8] Given the importance of the objective of consumer protection, which is inextricably linked to the creditor's obligation to check the creditworthiness of the debtor, the Court has held that, if the sanction of forfeiture of the right to interest were to be weakened or rendered wholly inoperative, it would necessarily follow that it was not genuinely dissuasive (paragraphs 64, 65 and 65 above). of the judgment of the Court of Justice in Case C-42/15 Home Credit Slovakia, a.s. v. Klara Bíróová). [9]

The legal consequences of a breach of the obligation to assess the consumer's ability to repay a consumer loan in Slovakia are regulated in the provisions of Section 11(2) of the Consumer Credit Act. In the event of a gross breach of the obligation under Section 7(1), the loan shall be deemed to be interest-free and free of charge. The assessment of the consumer's ability to repay the loan by the creditor without any data on income, expenditure, and marital

status or without consulting the relevant consumer database is then considered to be a gross breach of the obligation within the meaning of this provision. Regarding Section 7(1) of the Consumer Credit Act, it is fully justified to require proof of the applicant's investigation of the creditworthiness of the client in court proceedings. In so far as the applicant claims a right to performance under a consumer credit agreement, it is necessary to assess whether all the obligations and conditions imposed by the consumer protection legislation on those contractual relations were fulfilled when the agreement was concluded. As regards the examination of the consumer's creditworthiness, it should, first of all, be pointed out that the credit agreement, if concluded at a time when Act No 129/2010 Coll. 1 imposed an obligation on the creditor to assess with professional care the consumer's ability to repay the consumer credit before concluding the consumer credit agreement, but did not provide for the sanction of interest-free and charge-free nature of the credit granted in case of failure to fulfill this obligation (it provided only for the sanction of the impossibility of a one-off repayment of the credit in Section 11(2)). Only since 10.6.2013, the provision of Article 11(2) stipulates that in the event of a gross breach of the obligation under Article 7(1), the loan shall be deemed to be interest-free and fee-free; whereas a gross breach of the obligation under Article 7(1) shall be deemed to be an assessment of the ability to repay the loan by the creditor without any data on the consumer's income, expenditure and marital status or without consulting the relevant database of consumer data to assess the consumer's ability to repay the loan. The fact that, at the time of the conclusion of the contract in question, the law did not provide for the sanction of interest-free and charge-free credit does not mean that cases of a creditor's flagrant breach of its obligation to investigate the consumer's creditworthiness before concluding a contract cannot be regarded as contrary to good morals. However, only a truly serious breach of the creditor's fundamental obligations could be considered to be such an act (contrary to good morals).

In assessing the consumer's creditworthiness, the creditor is obliged to take into account the consumer's existing situation, in particular the consumer's income and expenses, following the provisions of Sections 7 and 11 of the Consumer Credit Act. In assessing creditworthiness, it is important to emphasise the ratio between the consumer's income and expenditure and to assess whether the consumer will have enough left over after the current expenditure to repay the loan monthly. A consumer's ability to repay a consumer credit should be understood as a situation where, depending on the frequency of repayments, the consumer has sufficient funds left in his personal and household budget to be able to repay the repayment at the expected rate without any problems or constraints. Therefore, the supplier must, among other things, analyse the consumer's personal and household budget, both on the income and expenditure side, always concerning the specific loan applicant. An analysis of only one side of the budget alone is not sufficient to assess creditworthiness. [10]

7. Conclusion

The consequence of underestimating the creditworthiness test is a failure to protect a creditor who grossly negligently breaches the duty to exercise due professional care in assessing a consumer's creditworthiness. In this respect, Article 11(2) of Act No 129/2010 on consumer credit does not act as a deterrent at all, and it is, therefore, *de lege ferenda* to apply the provision of the general law - Article 3(1) of the Civil Code - on the denial of protection in the event of such a serious breach of the creditor's duty on the financial market. The granting of credit and loans is a very serious business since it is not a consideration paid in cash, but a deferred payment, without it being obvious what will befall the borrower after the conclusion of the contract. If such an agenda is particularly pursued because of the precarious circumstances that

may arise after the granting of the credit, then there must be a strict requirement to require a duty to act with professional care and to assess the consumer's creditworthiness, since, unlike the precarious circumstances after the conclusion of the contract, the consumer's state of affairs in terms of his or her financial circumstances at the time of contracting is knowable. If the Court of Justice has recognised as a dissuasive sanction the disallowance of interest and charges in the case of irresponsible conduct by a supplier on the financial market for breach of professional diligence, it is entirely Eurocompatible to apply Article 3(1) of the Civil Code and to regard the breach of a serious obligation on the part of the creditor as contrary to morality. [11]

The practice of a supplier on the credit market, which uncritically accepts clearly unreliable data provided by consumers and replaces them with a flat figure in the form of a minimum subsistence amount, does not follow from the measure of the National Bank of Slovakia of 14 November 2017. The provision of § 2(5) implies, cit. "For paragraph 1, the amount of the cost of providing for the consumer's basic living needs under Article 7(20)(b) of the Act shall be determined at least in the amount of the consumer's subsistence minimum, the subsistence minimum for a person to whom the consumer has a maintenance obligation and who lives in the same household with the consumer, and the expenses for another person to whom the consumer has a maintenance obligation in the amount determined by a final decision of the court; if the court decision does not determine maintenance, in the amount of at least 30% of the subsistence minimum for that person. The total amount of the costs shall be the amount of the costs of providing for the consumer's basic living needs as referred to in the first sentence, increased by 20 % of the difference between the total amount of the consumer's net income and the consumer's minimum subsistence level, the minimum subsistence level of the person to whom the consumer has a maintenance obligation and who lives in the same household with the consumer, and the expenses of another person to whom the consumer has a maintenance obligation in an amount determined by a final decision of the court; if the court decision does not determine maintenance, in an amount of at least 30 % of the minimum subsistence level for that person." The above certainly does not lead to the conclusion or guidance for suppliers in the credit market that the expenditure (or the amount of the cost of providing for the necessities of life) of the consumer is to be equal to the amount of the minimum subsistence level without further consideration.

Thus, linking the creditor's obligation to verify the consumer's creditworthiness to the legal consequence as regards the conduct to be adopted by the creditor in the event of a negative assessment is not contrary to the objective of Article 8(1) of Directive 2008/48/EC. Recital 26 of that directive recalls the objective of strengthening the responsibility of creditors and discouraging them from granting credit irresponsibly.

In the field of consumer credit, in the wake of the international financial crisis, which has demonstrated that irresponsible behaviour by market participants can undermine the foundations of the financial system, even if it does not apply *rationae temporis* and *materiae*, the Union's legislator has demonstrated its intention to strengthen the responsibility of creditors by ensuring that Member States ensure that a creditor grants credit to a consumer only where the result of a creditworthiness assessment indicates that the obligations arising from a credit agreement are likely to be fulfilled in the manner required under that agreement.

The creditor's obligation under national law to refrain from concluding a consumer contract where the creditor cannot reasonably believe that the consumer will be able, given his financial and personal circumstances, to repay the credit following the contract is therefore of such a nature as to undermine the objective of Article 8(1) of Directive 2008/48/EC or to call into question the consumer's principled responsibility to look after his interests.

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