PRE-CONTRACTUAL DUTIES IN CONSUMER CREDIT CONTRACTS AND REMEDIES FOR THEIR BREACH

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ABSTRACT. Muovendo dalla sentenza CGUE, 9 novembre 2016 C-42/15 Home Credit Slovakiaa v. Mrs. Bíróovà, lo scritto affronta il problema della violazione dei doveri informativi precontrattuali e delle conseguenze che ne derivano nei contratti di credito al consumo, nella prospettiva dei principi di effettività, proporzionalità ed efficacia dissuasiva.

Moving from the Court CGUE-42/15 of 9 November 2016, Home Credit Slovakiaa v. Mrs. Bíróovà, the paper deals with the remedies provided by Italian law in case of breach of pre-contractual duties in consumer credit contracts in the perspective of effectiveness, proportionality and dissuasiveness

The issue on which I will focus my attention here is related to effectiveness, proportionality and dissuasiveness, following art. 23 of Directive 2008/48/EC, of the remedies provided by Italian law in case of breach of pre-contractual duties in consumer credit contracts.

The issue concerning the proportionality of national remedies in case of breach of pre-contractual duties in consumer credit contracts was addressed by the Court of Justice in case C-42/15 of 9 November 2016, Case Home Credit Slovakiaa v. Mrs. Bíróovà.

The referring court asks, in essence, whether Article 23 of Directive 2008/48 must be interpreted as not precluding a Member State from providing, under national law, that, where a credit agreement does not include all the information required under Article 10(2) of the directive, the agreement is to be deemed interest-free and free of charges.

The Court stated that:

Article 23 of Directive 2008/48 must be interpreted as not precluding a Member State from providing, under national law, that, where a credit agreement does not include all the information required under Article 10(2) of the directive, the agreement is deemed to be interest-free and free of charges, provided that the information covers matters which, if not included, may compromise the ability of the consumer to assess the extent of his liability.

Let me now illustrate the Court's argument.

First of all, the Court said that, following art. 23 of the Directive, 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.

Therefore, while the choice of penalties remains within the discretion of the Member States, such penalties must be effective, proportionate and dissuasive.

The Court, invoking the decision of 27 of March 2014, LCL Le Crédit Lyonnais (C-565/12, EU:C:2014:190), said that it has previously held that the severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while respecting the general principle of proportionality

So therefore, in Home Credit Slovakia, in the light of the case-law referred, the Court confirms that it must be found that a creditor's breach of a vitally important obligation in the context of Directive 2008/48 may be penalised, under national law, by the creditor's forfeiture of entitlement to interest and charges.

Advocate General Eleanor Sharpston, in her Opinion, suggests that, in answer to the question referred, the Court should invite the national court to assess, in any particular case, whether the items of compulsory information listed in Article 10(2) of Directive 2008/48 that were omitted from the consumer credit agreement were such as to significantly jeopardize the consumer's ability to assess the desirability of entering into the credit transaction in order to determine whether a sanction whose effect is to require the lender to forgo all interest and to bear all charges associated with the credit agreement is proportionate, or whether a lesser sanction would be appropriate.

In other words, she suggests to answer that it is for the national judge to assess, in any particular case, whether the items of compulsory information listed in Article 10(2) of Directive 2008/48 that were omitted from the consumer credit agreement were such as to significantly jeopardize the consumer's ability to assess the desirability of entering into the credit transaction in order to determine whether a sanction whose effect is to require the lender to forgo all interest and to bear all charges associated with the credit agreement is proportionate, or whether a lesser sanction would be appropriate.

The Court, instead, has not renounced to make a list, although not exhaustive, of compulsory information listed in Article 10(2) of Directive 2008/48 that were omitted from the consumer credit agreement were such as to significantly jeopardize the consumer's ability to assess the desirability of entering into the credit transaction.

With reference to the omission of these information, the Court has held that the penalty of forfeiture by the creditor of entitlement to interest and charges must be considered to be proportionate.

Just as it has not renounced to indicate a compulsory information whose omission certainly can not lead to the forfeiture of the creditor of his right to interest.

The Court, in particular, stated that:

(70) The obligation to include, in a credit agreement, inter alia, information such as the annual percentage rate of charge, referred to in Article 10(2)(g) of Directive 2008/48, the number and frequency of payments, in accordance with Article 10(2)(h) of that directive, and, where applicable, a statement that notarial fees will be payable and the sureties and insurance required, as provided for in Article 10(2)(n) and (o) of the directive, constitutes such a vitally important obligation.

(71) In so far as failure to include such information in a credit agreement may compromise the ability of a consumer to assess the extent of his liability, the penalty laid down under national law of forfeiture by the creditor of entitlement to interest

and charges must be considered to be proportionate within the meaning of Article 23 of Directive 2008/48 and the case-law cited in paragraph 63 above.

(72) However, the imposition, in accordance with national law, 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) of Directive 2008/48 which, by their nature, cannot have a bearing on the consumer's ability to assess the extent of his liability, such as, inter alia, 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.

So therefore, the penalty of forfeiture by the creditor of entitlement to interest and charges should be considered proportionate in case of omission of information related to the annual percentage rate of charge (APR, in Italy TAEG), the number and frequency of payments, notarial fees and sureties and insurance required.

The penalty should not be considered proportionate in case of omission of the name and address of the competent supervisory authority.

The first question we have to consider is concerning the possibility to have or not just one kind of penalty to be considered proportionate.

In other words, we have to ask ourselves whether the fact that the court finds a type of remedy as "proportionate" to the type of omission means that all other remedies should be considered "not proportionate" in the presence of that omission or if, vice versa, it is possible to identify a range of remedies that has the character of proportionality.

In fact, it is the same Court that recalls that the recital 47 of the Directive shows that the choice of penalties remains within the discretion of the Member States, provided that the sanctions are effective, proportionate and dissuasive.

Considering this it seems that the rule according to which the notion of proportionality can tolerate - within minimum and maximum limits linked to efficacy, proportionality and dissuasiveness - variations of remedies, must follow.

Taking also into account the fact that the Court has expressed only the maximum limit of a possible remedy, it seems correct to consider that the forfeiture of interest and expenses is not the only possible remedy in the presence of the omissions that the Court considered essential, provided that, however, the national system does not adopt a remedy too distant from that considered proportionate by the Court.

In the light of what the Court said, I will try to understand whether the Italian remedial apparatus, in the absence of essential information, is consistent with the statement of the Court of Justice.

In Italy the absence of information determines three types of remedies:

a) nullity of the contract and possibility for the consumer to return the sum used, with the same periodicity provided for in the contract. This is a penalty substantially equivalent to that of forfeiture by the creditor of entitlement to interest and charges

b) modification of the contract (binding integration);

c) no payment of a specific cost.

In particular, Italian law is structured as follows:

Article. 125-bis of Bank Law (T.u.b.) imposes, for the purpose of validity, that the contract contains some information. In fact, the eighth paragraph of the article states that the contract will be void if it does not contain some essential information, in particular those relating to the type of contract, the parties to the contract, the total amount of the loan and the withdrawal and repayment conditions.

In the event of a nullity of the contract, the Italian legislator has prescribed that the consumer can not be required to return more than the amounts used and has the right to pay the amount with the same periodicity provided for in the contract.

We can certainly agree with those who believe that, due to the reference to the sums actually used, the consumer does not have to pay the interest on the sums received on the basis of a null contract.

The proportionality of the remedy, with reference to this omission, is therefore fully consistent with what was established by the Court.

On the other hand, there can be no doubt that the information on the type of contract, the parts of the contract, the total amount of funding and the conditions of withdrawal, are absolutely essential for the purpose of evaluating its commitment by the consumer.

So that also on the point the remedial solution, which leads - as we said - substantially to free the consumer from the payment of interest and expenses, appears "proportionate".

The type of remedial solution analyzed up to now does not apply, however, with reference to the omissions concerning the annual percentage rate of charge (APR), the existence of notary fees, the guarantees and the insurance required.

All information that the Court considers essential.

With reference to such omissions it is therefore necessary to understand whether the remedial apparatus is proportionate.

The sixth paragraph of the art. 125-bis of Bank Law provides for the nullity of the clauses of the contract relating to costs borne by the consumer that have not been included, or have been incorrectly included, in the APR advertised in the documentation prepared in accordance with article

124 of Bank Law. The nullity of the clause does not entail the nullity of the contract.

The seventh paragraph of the art. 125-bis provides that in case of absence or nullity of the clauses related to the APR, the latter is equivalent to the minimum nominal rate of the annual treasury bills or other similar securities indicated by the Minister of the Economy and Finance, issued in the previous twelve months the conclusion of the contract and no other sum will be payable by the consumer as interest rates, commissions or other expenses.

With reference to nullity, therefore, the mechanism is that one of art. 1419, second paragraph, of the Italian c.c., which provides for the replacement of the null clause

In Italy, the APR is inclusive of interest and all costs, including any fees of credit intermediaries, commissions, taxes and any other expenses that the consumer must pay in relation to the credit agreement and of which the lender is to know, but notarial fees are excluded.

The questions we have to consider, with reference to proportionality, are therefore two:

1) the fact that in the event of omission or nullity of the APR there is only binding integration through the provision of the minimum nominal rate of annual treasury bills or other similar securities possibly indicated by the Minister of Economy and Finance, issued in twelve months before the conclusion of the contract and no other sum will be due by the consumer as interest rates, commissions or other expenses, allows us to say that the remedy is proportionate?

2) Can the fact that in any case the failure to indicate notarial fees does not lead even to mandatory integration means that our law be said not in line with the correct interpretation of Directive 2008/48 CE, offered by the Court?

With reference to the first question it seems to be possible that the remedy has the effect of effectiveness and dissuasiveness required by art. 23 of the directive, even though it can not be denied that it diverges from what the Court considered "proportional".

This must surely lead us to believe, as has already been argued in doctrine, that in no way can interpretations which may even circumscribe the scope of the provision be accepted. It seems to me, therefore, that the solution accepted by the ABF (Banking and Financial Ombudsman, that is an out-of-court settlement scheme for disputes between customers and banks and other financial intermediaries, concerning banking and financial transactions and services), according to which the failure to include the cost of insurance in the APR gives rise to the legal integration of the contract with application of the nominal replacement rate (and not just a non-payment of a cost of insurance, following paragraph 6 od art. 125-bis of bank Law) is well founded.

Nevertheless, taking into account the circumstances according to which:

- the notion of proportionality can tolerate remedial variants;
- the Court has expressed itself exclusively on the maximum limit of a possible remedy;
- the remedy still has a deterrent effect;

it does not seem appropriate to go so far as to believe that the remedy should not be considered "proportionate" following art. 23 of Directive 2008/48, while not excluding the fact that in the future the issue can be raised before the Court of Justice.

What seems certain, however, is that the Italian remedy in case of omissions of notary fees is incongruous compared to the Court's provisions.

In fact, the omission of such data can only lead to the non-payment of this cost pursuant to the fifth paragraph of art. 125 - bis of Bank Law.

With reference to the omissions of the notarial fees it seems, therefore, as stated above, that the Italian remedy can be considered not proportionate in light of the decision adopted by the Court of Justice.

Therefore, a regulatory review of this profile is hoped for.