

Case C-500/18

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

30 July 2018

Referring court:

Tribunalul Specializat Cluj

Date of the decision to refer:

2 May 2018

Applicant:

AU

Defendants:

Reliantco Investments Ltd

Reliantco Investments Ltd Limassol Sucursala București

Subject matter of the main proceedings

Claim seeking a declaration of nullity and of liability, under which the applicant asks the court to:

- (a) declare that certain terms in a contract for the trading of financial instruments on www.ufx.com, the online platform of the company RELIANTCO INVESTMENTS LTD, are unfair, and order their removal from the contract on the grounds that they are null and void;
- (b) declare the six limit orders placed by the applicant on the UFX platform on 13 January 2017 to be null and void;
- (c) order the defendants to pay the sum of USD 1 919 720 and statutory interest calculated from 13 January 2017 until the date of payment, by way of damages as a result of civil liability in tort/delict, or in the alternative in order to restore the parties to their previous situation, as an effect of the declaration that the limit orders are null and void;

(d) order the defendants to pay USD 191 972 as compensation for non-material damage.

Subject matter and legal basis of the request for a preliminary ruling

Pursuant to Article 267 TFEU, an interpretation is requested of Article 4(1).12 of Directive 2004/39/EC, Article 2(b) of Directive 93/13/EEC and Article 7(2) and Article 17(1)(c) of Regulation (EU) No 1215/2012.

Questions referred

1. When interpreting the concept of ‘retail client’ in Article 4(1).12 of Directive 2004/39/[EC], can or must the national court use the same interpretive criteria as those which define the concept of ‘consumer’ within the meaning of Article 2(b) of Directive 93/13/EEC?
2. If the answer to the first question is in the negative, under what conditions may a ‘retail client’ within the meaning of Directive 2004/[39/EC] claim consumer status in a dispute such as that in the main proceedings?
3. In particular, do the facts that a ‘retail client’, within the meaning of Directive 2004/[39/EC], carries out a high volume of transactions within a relatively short period of time and that he invests very large sums of money in financial instruments such as those defined in Article 4[(1)].17 of Directive 2004/39/[EC], constitute relevant criteria for the purpose of assessing whether a ‘retail client’ has consumer status under that directive?
4. When attempting to establish its own jurisdiction, since it has the obligation to determine the impact of Article 17(1)(c) or Article 7(2) of Regulation (EU) No 1215/2012, whichever is applicable, can and/or must the national court take into consideration the legal basis relied on by the applicant (namely non-contractual liability alone) as a remedy for the conclusion of terms alleged to be unfair within the meaning of Directive 93/13/EEC, for which the substantive law applicable has been established pursuant to Regulation (EC) No 864/2007 (Rome II), or does the possible consumer status of the applicant make the substantive legal basis of his request irrelevant?

Provisions of EU law cited

Article 2(b) and Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

Article 1(2), Article 2(2), Article 4(1).12, Article 6(4)(d) and Article 19(2), (3) and (5) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament

and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

Article 17(1)(c), Article 18(1), Article 19, Article 21(1) and Article 25(4) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) (OJ 2012 L 351, p. 1).

Article 6(1) and (2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

Article 2(1) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40).

Article 13(1) of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ 2014 L 352, p. 1).

National provisions referred to

The referring court sets out various provisions of national law which have been referred to by the applicant in his action and ‘which could be applied to this case’ when entering into its merits. However, they are irrelevant to the issue of court jurisdiction, which is the subject of the request for a preliminary ruling.

Brief outline of the facts and the main proceedings

- 1 On 15 November 2016 the applicant created a digital trading account on www.ufx.com, the online platform of the company RELIANTCO INVESTMENTS LTD, and consented via the platform to the UFX terms and conditions for the purposes of trading in financial instruments relating to ‘contracts for difference’ (hereinafter ‘CFDs’).
- 2 The applicant used a web domain of a commercial company to create the account on the UFX platform, and he corresponded with the company RELIANTCO INVESTMENTS LTD in his capacity as director of development of that commercial company.
- 3 On 11 January 2017 the applicant signed a contract for the gains arising from the trading, indicating that he wished to use the trading services offered by the company RELIANTCO INVESTMENTS LTD and indicating that he had read, understood and agreed to comply with the terms and conditions of the offer.
- 4 Under those conditions, the applicant agreed to conclude with the company RELIANTCO INVESTMENTS LTD, in the latter’s capacity as a regulated body,

authorised and governed in Cyprus by the Cyprus Securities and Exchange Commission, the customer contract in accordance with the terms and conditions governed by that document, for the purpose of trading CFDs.

- 5 Pursuant to Article 27 of the contract entered into by the parties, all disputes arising from or having a link with the customer contract as thus concluded were to be settled by the courts of Cyprus, and the agreement concluded and relations between the parties relating to the trading were to be governed by Cypriot law.
- 6 In the period from November 2016 to 13 January 2017, having effected 197 transactions involving CFDs, the applicant made a profit of USD 644 413.53.
- 7 On 13 January 2017 the applicant placed six limit orders on the UFX platform based on the price of oil. The applicant claims that, as a result of these transactions, he lost the entire amount accumulated in the trading account, namely USD 1 919 720.
- 8 On 26 April 2017 the applicant brought an action before the referring court against the company RELIANTCO INVESTMENTS LTD of Cyprus and the company RELIANTCO INVESTMENTS LTD LIMASSOL SUCURSALA BUCUREȘTI (RELIANTCO INVESTMENTS LTD LIMASSOL, Bucharest branch), claiming that he had been the victim of a deceptive manipulation that had resulted in the loss of the abovementioned sum.
- 9 Under those circumstances, the applicant argues that the defendants are liable under civil liability in tort/delict for the breach of consumer-protection provisions. At the same time, he is asking the court to declare that various terms in the contract are unfair and to order them to be removed from the contract because they are null and void; he is also asking the court to declare six limit orders placed by him on the UFX platform on 13 January 2017 to be null and void; and to order the defendants, primarily, to pay the sum of USD 1 919 720 and the statutory interest calculated from 13 January 2017 until the date of payment, by way of damages as a result of civil liability in tort/delict, or in the alternative in order to restore the parties to their previous situation, as an effect of the declaration that the abovementioned limit orders are null and void, and to order the defendants to pay the sum of USD 191 972 in non-material damages.
- 10 Essentially, the applicant argues that the defendants have incurred tortious/delictual civil liability because the provisions relating to his protection as a consumer were breached, as the defendants did not meet the legal obligations to provide him with information, give him advice or warn him with regard to the services provided and the risks connected with trading on the UFX platform, and included in the UFX contract many unfair terms which were not negotiated, creating a significant imbalance in the parties' rights and obligations, in conflict with the requirement of good faith, [and that the defendants] provided investment marketing and consultancy services that were not in compliance, concealed under

the form of ‘personal trainer’ services, and did not execute the orders placed in accordance with the instructions given, which resulted in the loss.

- 11 In their defence, the defendants have argued that the Romanian courts do not have general jurisdiction, and they claim that the action comes within the jurisdictional remit of the Cypriot courts.

The essential arguments of the parties in the main proceedings

- 12 In support of the plea that the Romanian courts do not have jurisdiction, **the defendants** put forward a variety of arguments.
- 13 Firstly, they argue that the parties to the UFX contract made a valid choice of jurisdiction in favour of the courts of Cyprus by means of the clause set out in Article 27 of the contract.
- 14 Secondly, a Cypriot court, namely the district court of Limassol, which had been asked by the applicant to issue a provisional measure freezing the first defendant’s assets in Cyprus, has already given a ruling recognising its own jurisdiction to rule in the matter.
- 15 Thirdly, the defendants argue that the Romanian courts do not have jurisdiction, contrary to the applicant’s claims on the basis of Article 17(1)(c), in conjunction with Articles 18 and 19, of Regulation No 1215/2012, since it follows from Article 25(1) of that regulation that, in the event of a dispute regarding the choice of jurisdiction, the court must assess the validity of jurisdiction pursuant to the law of the State whose jurisdiction the parties have chosen, namely pursuant to Cypriot law.
- 16 Fourthly, the defendants submit that, in their view, the action is based on *culpa in contrahendo*, since the applicant is seeking recognition of tortious or delictual civil liability primarily because of allegedly misleading advertising and an alleged failure to comply with obligations to provide pre-contractual information, as *culpa in contrahendo* is a non-contractual obligation, pursuant to Article 2(1) of Regulation No 864/2007.
- 17 Fifthly, the defendants argue that it is not clear whether the applicant is relying on the first alternative of Article 17(1)(c) of Regulation No 1215/2012 (the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile) or on the alternative in the second part of point (c) (or, by any means, directs [such activities] to that Member State or to several States including that Member State, and the contract falls within the scope of such activities).
- 18 With regard to the first part of Article 17(1)(c) of Regulation No 1215/2012, the defendants argue that it is not applicable to the dispute because the second defendant, which is a subsidiary of the first defendant, has no employees and no

economic activity in Romania and has not yet been authorised to operate by the Cyprus Securities and Exchange Commission, and in addition the parent company does not directly provide market trading services in Romania.

- 19 Sixthly, the defendants challenge the applicant's consumer status, stating that he is a natural person who has sought to make a profit, namely to obtain a profit from conducting transactions involving CFDs, meaning that he has not pursued an activity that is outside his trade or professional activity but rather a specific professional activity, making a profit of USD 644 413.53 during the performance of the contract by placing 197 trades during the period from November 2016 to 13 January 2017, of which only six have been disputed. They argue that, since the applicant has not acted as a consumer, the provisions of Article 19 of Regulation No 1215/2012 do not apply. Furthermore, the determination of consumer status is to be carried out in accordance with Cypriot law, and the Cypriot court has already expressed reservations as to whether the applicant has such status.
- 20 **The applicant** seeks the rejection of the defendants' plea and argues that the Romanian courts have jurisdiction to rule on the merits of the dispute.
- 21 The applicant argues that the clause in Article 27 of the UFX contract conferring jurisdiction is invalid because it is null and void by reason of failure to comply with the substantive conditions of validity in accordance with the law of that Member State, pursuant to Article 21(1) of Regulation No 1215/2012, or that the agreement, at the least, comes under one of the exemptions referred to in Article 25(4) of that regulation.
- 22 He states that this disregards the provisions of Article 25(4) of Regulation No 1215/2012, which refer to Article 19 in the section 'Jurisdiction over consumer contracts'. According to the applicant, the choice of jurisdiction in the UFX contract contravenes the latter article and he has asked for this choice to be declared unfair. As a result, in the applicant's view, consumer law renders this term invalid and a choice of jurisdiction in favour of the Cypriot courts cannot be considered to be valid.
- 23 With regard to the defendants' argument based on the judgment of the district court of Limassol, the applicant states that the latter has not acquired the force of *res judicata* in this case, since it was delivered, within the meaning of Article 35 of Regulation No 1215/2012, with reference to provisional or protective measures and not with reference to the substance of the case or the overall jurisdiction of the Romanian courts.
- 24 The applicant also maintains that the assertion that the action is based on the concept of *culpa in contrahendo* does not rule out the application of Section 4 of Regulation No 1215/2012, as the latter is designed to protect consumers' interests in terms of substantive law. The rationale for such legal protection would be rendered illusory if it were strictly limited to actions under contractual liability, leaving the extremely broad sphere of torts and delicts uncovered.

Succinct presentation of the reasons for the request for a preliminary ruling

- 25 The referring court maintains that in this case, in order for jurisdiction to be determined, it is necessary to interpret the concept of ‘retail client’ referred to in Article 4(1).12 of Directive 2004/39. It also considers it necessary to determine whether the national court can and/or must take into consideration the substantive legal basis relied on by the applicant (namely non-contractual liability alone) as a remedy for the conclusion of terms alleged to be unfair within the meaning of Directive 93/13, for which the substantive law applicable has been established pursuant to Regulation No 864/2007, or whether the possible consumer status of the applicant makes the substantive legal basis of his request irrelevant.
- 26 The referring court thus states that the applicant has based the action on civil liability in tort/delict, namely non-contractual liability, for which the substantive law applicable would be determined pursuant to Regulation No 864/2007, although he relies, at the same time, on his consumer status, with the result that his action might be covered by contractual law, rendering Article 17(1)(c) of Regulation No 1215/2012 applicable in terms of jurisdiction.
- 27 The referring court also states that, firstly, the defendants dispute the applicant’s consumer status and maintain that the provisions of Article 19 of Regulation No 1215/2012 do not apply and that the determination of consumer status should be carried out in accordance with Cypriot law, stating that a Cypriot court has already expressed reservations as to whether the applicant has such status. Furthermore, the applicant maintains that the concept of ‘retail client’ laid down in Article 4(1).12 of Directive 2004/39/EC is the same as the concept of ‘consumer’ within the meaning of Article 2(b) of Directive 93/13/EEC.
- 28 With regard to the latter argument put forward by the applicant, the referring court expresses its own reservations. It states that Article 2(b) of Directive 93/13/EEC defines a consumer as ‘any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession’, while ‘retail client’ is defined in Article 4(1).12 of Directive 2004/39/EC as a client who is not a professional client, where the concept of ‘professional client’ includes entities which are required to be authorised or regulated to operate in the financial markets.
- 29 It follows, therefore, from the interpretation of the above provisions that, while a ‘consumer’ can only be a natural person, acting outside his trade, business or profession, a ‘retail client’ may be a natural person or a legal person or an entity, other than that mentioned in Annex II to Directive 2004/39/EC.
- 30 In addition, the referring court cites the judgment of 3 July 1997 in *Benincasa* (C-[269/95], EU:C:1997:337), in which the Court stated that ‘only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual’s own needs in terms of private consumption, are covered by the special rules [...] to protect the consumer.

Such protection is unwarranted in the case of contracts for the purpose of a trade or professional activity’.

- 31 In that context, the referring court highlights the statements by the defendants to the effect that the applicant carried out 197 trading transactions in a period of approximately three months, making a profit of USD 644 413.53, but disputed only six of the abovementioned transactions. By acting in this way, under the criteria laid down by Directive 2004/39/EC and contained in Annex II, point 2, the applicant could be categorised as a professional client.
- 32 The referring court also states that the applicant used a web domain of a commercial company in order to create his account on the UFX platform and corresponded with the company RELIANTCO INVESTMENTS LTD in the capacity of director of development of that commercial company.
- 33 In those circumstances the referring court considers that it is important to clarify the concepts of ‘retail client’ and ‘consumer’, particularly the indicative or mandatory criteria for the national courts that may be applied when the latter are interpreting a contractual term in the light of EU law, with the national court then having an obligation to determine whether, in the light of those criteria, the party claiming consumer status meets the conditions required.
- 34 With regard to the fourth question, this is significant in a context in which the referring court has an obligation to determine jurisdiction, and as a result to determine the impact of Article 17(1)(c), or of Article 7(2), of Regulation No 1215/2012, whichever is applicable, depending on any interpretive criteria offered to it in the answers to the first three questions, and also depending on the interpretation of the abovementioned provisions of Regulation No 1215/2012.
- 35 To that effect, the referring court considers that Section 4 of Regulation No 1215/2012 governs jurisdiction in relation to consumer contracts, and applies, in principle, to actions brought by a consumer based on a contract, whereas the action is based solely on civil liability in tort/delict, ruling out the existence of a contractual relationship, a situation in which, for the purposes of determining jurisdiction, the relevant issue is the impact of Article 7(2) of Section 2 of Regulation No 1215/2012.
- 36 In those circumstances, although the applicant considered that the questions for a preliminary ruling were neither necessary nor relevant to settling the dispute in the main proceedings, citing the ‘*acte clair*’ doctrine, on the other hand, the defendants considered that it was necessary for the court to draw up the questions for a preliminary ruling; and the referring court considers that it is necessary for the purposes of determining jurisdiction on the basis of Regulation No 1215/2012 to refer to the Court of Justice the questions drafted for a preliminary ruling, with a view to obtaining an interpretation of the provisions that are relevant in ruling on a plea that the Romanian courts do not have general jurisdiction, in accordance with the objective of the EU provisions.