

Anonymised version

Translation

C-600/21 – 1

Case C-600/21

Request for a Preliminary Ruling

Date lodged:

28 September 2021

Referring court:

Cour de cassation (France)

Date of the order for reference:

16 June 2021

Applicant:

QE

Respondent:

Caisse régionale de Crédit mutuel de Loire-Atlantique et du Centre Ouest

[...]

**JUDGMENT OF THE COURT OF CASSATION, FIRST CIVIL
CHAMBER, OF 16 JUNE 2021**

QE, [...] Maisons-Alfort, brought [an] [...] appeal [...] against the judgment delivered on 3 October 2019 by the Cour d'appel de Versailles (16e chambre) (Court of Appeal of Versailles, 16th Chamber), in proceedings between him and Caisse régionale de Crédit mutuel de Loire-Atlantique et du Centre Ouest (a company), [...] Nantes, which was the respondent to the appeal in cassation.

[...] [procedural details]

Facts and procedure

- 1 The judgment under appeal (Versailles, 3 October 2019), which was given after the case had been referred back following the appeal in cassation (1st Civ., 26 September 2018, [...]), indicates that pursuant to an offer which was accepted on 21 February 2006 and confirmed by authentic act of 17 May 2006, the caisse fédérale de Crédit mutuel de Loire-Atlantique et du Centre Ouest, the rights of which have since passed to the caisse régionale de Crédit mutuel de Loire-Atlantique et du Centre Ouest ('the bank') granted QE ('the borrower') a loan for the acquisition of real property in the amount of EUR 209 109, repayable over 20 years. The general conditions of the contract provided, in clause 16-1, that the sums due would be automatically and immediately payable, with no requirement for formalities or a written demand, in the event that there was a delay of over 30 days in the payment of an instalment of principal, interest or incidental amounts.
- 2 The instalment payable on 10 December 2012, in an amount of EUR 904.50, went unpaid, as did the January 2013 instalment, and on 29 January 2013, without making a formal written demand, the bank called in the loan and arranged for a procedure of repossession with a view to sale to be conducted at the borrower's home, on 17 September 2015. The borrower considered that there were irregularities in the judicial officer's report of the repossession procedure, and on that basis he brought the matter before the enforcement judge on 13 October 2015, seeking annulment of the procedure.

Consideration of the grounds of appeal

[...]

- 3 [...][The first ground is not relevant for present purposes]

The second ground

Wording of the second ground

- 4 The borrower objects to the rejection of his claims in the judgment, given:
 - '1. That in contracts made between a party acting in the course of a business and a consumer, terms which have the object or effect of creating, to the detriment of the consumer, a significant imbalance in the parties' rights and obligations, are to be regarded as unfair; that terms which have the object or effect of enabling the party acting in the course of a business to terminate the contract otherwise than on reasonable notice are presumed to be unfair, unless that party proves otherwise; that where a court exercising substantive jurisdiction has occasion to consider contractual terms, it is incumbent on that court to identify any unfair terms, on its own initiative, if it has the factual and legal material necessary to make such a

determination before it; that in the present case, having observed that clause 16.1 of the loan contract provided for the lender to call in the loan without the need for formalities or written demand where the borrower was over 30 days late in paying an instalment of the loan, the court of appeal, in failing to consider whether that clause, which enabled the party acting in the course of a business to terminate the contract otherwise than on reasonable notice, was to be presumed unfair unless the bank proved otherwise, failed to provide a legal basis for its decision with reference to the former Articles L. 132-1 (now L. 212-1), R. 132-2(4) (now R. 212-2(4)), R. 632-1 and L. 141-4 of the code de la consommation (Consumer Code) together with Article 1184 of the code civil (Civil Code) (as it stood prior to the decree of 10 February 2016);

2. that in contracts made between a party acting in the course of a business and a consumer, terms which have the object or effect of creating a significant imbalance in the rights and obligations of the parties to the contract, to the detriment of the consumer, are unfair; that a term enabling the lender to call in the loan, making the amounts owed immediately payable, on the basis of a delay of over 30 days in paying an instalment of the loan, without the borrower having had the opportunity to explain how that ground for calling-in the loan has arisen, is accordingly an unfair term; that in the present case, in failing to consider whether clause 16.1 of the loan contract was an unfair term, given that it enabled the lender, in the event of a delay of over 30 days in paying an instalment, to terminate the contract unilaterally without giving the borrower the opportunity to explain the default imputed to him, the court of appeal failed to provide a legal basis for its decision with reference to the former Articles L. 132-1 (now L. 212-1), R. 632-1 and L. 141-4 of the Consumer Code, together with Article 1184 of the Civil Code (as it stood prior to the decree of 10 February 2016);

3. that in contracts made between a party acting in the course of a business and a consumer, terms which have the object or effect of creating a significant imbalance in the rights and obligations of the parties to the contract, to the detriment of the consumer, are unfair; that where a court exercising substantive jurisdiction has occasion to consider contractual terms, it is incumbent on that court to identify any unfair terms, on its own initiative, if it has the factual and legal material necessary to make such a determination before it; that the Court of Justice has ruled that Article 3(1) and Article 4 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts are to be interpreted as meaning that as regards the assessment by a national court of the potential unfairness of the term relating to accelerated repayment resulting from a failure on the part of the debtor to comply with his obligations during a limited specific period, it is for the referring court to examine whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the applicable common law rules, where specific contractual provisions are lacking, and whether national law provides for

adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in (judgment of 26 January 2017, *Banco Primus*, C-421/14, [EU:C:2017:60]); that in the present case, in failing to consider whether the calling-in provision in clause 16.1 of the loan contract was unfair, given that it permitted termination of the contract, which had been entered into for a term of 20 years and an amount of EUR 209 109, simply on the basis of a delay of over 30 days in the payment of an instalment, the court of appeal failed to provide a legal basis for its decision with reference to Article 3(1) and Article 4 of Directive 93/13/EEC of 5 April 1993, as interpreted by the Court of Justice, together with former Articles L. 132 (now L. 212-1), R. 632-1 and L. 141-4 of the Consumer Code.’

Court’s response

Having regard to Article 267 of the Treaty on the Functioning of the European Union:

EU Law

- 5 Under Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, a contractual term which has not been individually negotiated is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.
- 6 Article 4 of that directive provides:
 - ‘1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
 2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.’
- 7 The Court of Justice of the European Union, by judgment of 26 January 2017, *Banco Primus SA*, C-421/14, [EU:C:2017:60,] has held that Articles 3(1) and 4 of Directive 93/13 are to be interpreted as meaning that:
 - ‘ – the examination of the potential unfairness of a term of a contract concluded between a seller or supplier and a consumer requires it to be determined whether that term causes a significant imbalance in the parties’ rights and obligations under a contract to the detriment of the consumer. That examination must be carried out in the light of national rules which, in the absence of an agreement

between the parties, are applicable, the means which the consumer has at his disposal under national law to bring an end to the use of that type of term, the nature of the goods or services covered by the contract at issue and all the circumstances surrounding the conclusion of the contract; ...

- as regards the assessment by a national court of the potential unfairness of the term relating to accelerated repayment resulting from a failure on the part of the debtor to comply with his obligations during a limited specific period, it is for the referring court to examine whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the applicable common law rules, where specific contractual provisions are lacking, and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.'

National law

- 8 Article L. 132-1 of the Consumer Code, in the version resulting from decree No 2001-741 of 23 August 2001, which is applicable to the present dispute and, amongst other things, transposes Directive 93/13, provides that in contracts between a party acting in the course of a business and a party acting otherwise than in the course of a business or as a consumer, contractual terms which have the object or effect of creating, to the detriment of the party acting otherwise than in the course of a business or as a consumer, a significant imbalance in the parties' rights and obligations, are to be regarded as unfair.
- 9 The Cour de cassation (Court of Cassation) has consistently interpreted Articles 1134, 1147 and 1184 of the Civil Code, as they stood prior to decree No 2016-131 of 10 February 2016, as meaning that, while a contract to lend a sum of money may provide for the loan to be called in following default on the part of a borrower who is not acting in the course of a business, the loan cannot be regarded as having been effectively called in by the lender unless a formal written demand has been delivered, stating the period within which the borrower can object, and the borrower has not complied with that demand. That court accepts, however, that it is possible to dispense with the requirement for formal written demand by way of an express and unequivocal provision of the contract (1re Civ., 3 February 2004, [...]; 1re Civ., 3 June 2015, [...]; 1re Civ., 22 June 2017, [...]) given that, in those circumstances, the consumer has been informed of the consequences of default.

Grounds for the reference for a preliminary ruling

- 10 In examining the various parts of the ground of appeal, it will be necessary to determine whether Articles 3(1) and 4 of the directive are to be interpreted as

meaning that a consumer contract may not dispense with the requirement for formal written demand, even by way of an express and unequivocal provision, and whether the clause at issue, given that its effect is that the loan is automatically called in in the event of a delay of over 30 days in the payment of an instalment of principal, interest or incidental amounts, is to be regarded as unfair in the light, in particular, of the criteria identified by the Court of Justice in the judgment of 26 January 2017, *Banco Primus*, C-421/14, [EU:C:2017:60]. In support of the view that such a term creates a significant imbalance, it can be said that it enables the lender to terminate the contract otherwise than on reasonable notice and without giving the borrower the opportunity to explain the default imputed to him. In support of the view that such a term is not unfair, it can be said that, if it is to be valid, it must be contained in an express and unequivocal provision, such that the borrower is fully informed of his obligations. It can be added that it is always open to the borrower to bring the matter before the court to challenge the application of the term and request that a penalty be imposed on the lender for its improper use.

- 11 As to the first criterion identified in the judgment of the Court of Justice of 26 January 2017, as regards the assessment by a national court of the potential unfairness of the term relating to accelerated repayment resulting from a failure on the part of the debtor to comply with his obligations during a limited specific period, it might be accepted that a failure to make a monthly payment at the contractual time constitutes non-compliance by the consumer with an obligation which is of essential importance, given that the consumer has agreed to make the monthly payments provided for, and that his acceptance of that obligation was a decisive factor in the lender's acceptance of its own obligations.
- 12 The second criterion, which calls for an assessment of whether a delay of over 30 days in the payment of an instalment of principal, interest or incidental amounts, as contemplated by the provision at issue, constitutes sufficiently serious non-compliance in the light of the term and amount of the loan, gives rise to more difficulty. Given that loan terms have lengthened and interest rates have fallen, it may be that, at the point when the loan is called in, the unpaid sums are relatively modest when considered in the light of the term and amount of the loan, and a tempered approach to the seriousness of the non-compliance might therefore be appropriate, with regard being had to the overall balance of the contractual relationship. However, such an approach, which would require the court to determine, on a case-by-case basis, the amount, considered in relation to the term and amount of the loan, and delay beyond which the non-compliance is sufficiently serious to justify calling in the loan, might be said to create inequality as between consumers.
- 13 The question therefore arises of whether a delay of over 30 days in the payment of a single instalment of principal, interest or incidental amounts, as contemplated by the provision at issue, can constitute sufficiently serious non-compliance in the light of the term and amount of the loan.

- 14 In order to apply the third criterion, it is necessary to determine whether the contractual term derogates from the applicable common law rules, where specific contractual provisions are lacking. The general law requires a formal written demand to be sent before the loan is called in, while leaving it open to the parties to dispense with this, in which case reasonable notice is required. The notice period in the clause at issue is 30 days, and it is questionable whether this allows sufficient time for the borrower to contact the lender, explain the default imputed to him and find a solution to clear the amount or amounts outstanding. The contract at issue also provides, however, for the borrower to request an amendment to the payment schedule and, where appropriate, this may enable him to avoid the risk of non-payment.
- 15 It is nevertheless important to establish whether 30 days' notice can be regarded as creating a significant imbalance to the detriment of the consumer.
- 16 Finally, the judgment of the Court of Justice of 26 January 2017 does not specify whether the four criteria to be used by the national court in assessing the potential unfairness of the term relating to accelerated repayment resulting from a failure on the part of the debtor to comply with his obligations during a limited specific period are cumulative or alternative. This point is decisive as regards the ground of appeal, and the national court is in need of clarification as to the approach to be taken in assessing whether the term at issue is unfair.
- 17 If the criteria are cumulative, the further question arises of whether the term can nevertheless be held not to be unfair on the basis of the relative importance of a particular criterion.
- 18 The questions raised by the ground of appeal, the answers to which will determine the outcome of the appeal and which require a uniform interpretation of the EU legislation applicable in the matter, justify a reference being made to the Court of Justice of the European Union.
- 19 The proceedings must therefore be stayed until the Court of Justice has given a ruling on those points.

ON THOSE GROUNDS, the court:

[...];

REFERS the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Are Article 3(1) and Article 4 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts to be interpreted as meaning that a consumer contract may not dispense with the requirement for a formal written demand, even if it is expressly and unequivocally provided for in the contract?

2. Is the judgment of the Court of Justice of the European Union of 26 January 2017, *Banco Primus*, C-421/14, [EU:C:2017:60,] to be interpreted as meaning that a delay of over 30 days in the payment of a single instalment of principal, interest or incidental amounts may constitute sufficiently serious non-compliance in the light of the term and amount of the loan and the overall balance of the contractual relationship?

3. Are Article 3(1) and Article 4 of Council Directive 93/13/EEC of 5 April 1993 to be interpreted as precluding a clause which provides that accelerated repayment of loan may be triggered in the event of a delay in payment of over 30 days, when national law, which requires a formal written demand to be sent before the accelerated repayment of the loan, permits the parties to dispense with that step, in which case reasonable notice is required?

4. As to the four criteria identified by the Court of Justice of the European Union in its judgment of 26 January 2017, *Banco Primus*, C-421/14, [EU:C:2017:60], for use by the national court in assessing the potential unfairness of the term relating to accelerated repayment resulting from a failure on the part of the debtor to comply with his obligations during a limited specific period, are those criteria cumulative or alternative?

5. If the four criteria referred to above are cumulative, can the clause nevertheless be held not to be unfair in the light of the relative importance of a particular criterion?

STAYS the proceedings pending the decision of the Court of Justice of the European Union;

[...][Grounds of appeal in cassation annexed to the judgment]