

Case C-701/22

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:

15 November 2022

Referring court:

Curtea de Apel Cluj (Romania)

Date of the decision to refer:

15 December 2021

Applicant:

SC AA SRL

Defendant:

Ministerul Fondurilor Europene (MFE)

Subject matter of the main proceedings

An action brought by a commercial company, a recipient of non-repayable financing from the European Regional Development Fund (ERDF), requesting that the national public authority responsible for the management of European funds be ordered to pay default interest and compensation for the delay in the reimbursement of eligible expenditure.

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

Interpretation of the principle of sound financial management, the principle of equivalence and Directive 2011/7/EU

Questions referred for a preliminary ruling

1. Must the principle of sound financial management be interpreted, in conjunction with the principle of equivalence, as precluding a legal person, which operates a profit-making undertaking and is the recipient of non-repayable

financing from the ERDF, from obtaining from the public authority of a Member State default interest (penalty interest) in relation to the late payment of eligible expenditure for a period in which an administrative act was in force that excluded reimbursement and which was subsequently annulled by a judicial decision?

2. If the answer to the first question is in the negative, is the fault of the recipient of the financing established by that decision relevant to the quantification of the amount of default interest, having regard to the fact that the same public authority responsible for the management of the European funds declared, ultimately, after the adoption of that decision, all the expenditure eligible?

3. In interpreting the principle of equivalence with regard to the point in time at which default interest is awarded to the recipient of the non-repayable financing from the ERDF, is it relevant that a rule of national law provides that, in the event of a finding of irregularity, the only consequence is that the financial benefit concerned is not granted or, as the case may be, is withdrawn (repayment of the undue amounts), to the extent to which it was granted, without receipt of interest, notwithstanding that the recipient of those amounts has enjoyed the advantage of their use up to the time of repayment, and that it is only where that repayment does not take place within the statutory time limit, that is, 30 days from the notification of the credit instrument, that the provisions of Article 42(1) and (2) of the Ordonanța de urgență a Guvernului nr. 66/2011 (Government Emergency Order No 66/2011) permit the receipt of interest after the expiry of that time limit?

4. Do the provisions of the third paragraph of Article 288 TFEU preclude, in circumstances such as those of the present case, the applicability of Directive 2011/7/EU from being extended by a national rule also to the case of a contract for the grant of non-repayable financing from the ERDF concluded between the public authority responsible for the management of European funds and a legal person operating a profit-making undertaking?

Provisions of European Union law relied on

Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 – Article 60

Articles 288 and 325 TFEU

Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions – Articles 1 and 2

Provisions of national law relied on

Legea nr. 287/2009 privind Codul civil (Law No 287/2009 on the Romanian Civil Code) – Article 1 535 on default interest in the case of pecuniary obligations, according to which, when a sum of money is not paid by the due date, the creditor is entitled to default interest, from the due date until the time of payment, in the amount agreed upon by the parties or, failing that, in the amount provided for by law, without having to prove [that he or she has suffered] any damage.

Ordonanța Guvernului nr. 13 din 24 august 2011 privind dobânda legală remuneratorie și penalizatoare pentru obligații bănești, precum și pentru reglementarea unor măsuri financiar-fiscale în domeniul bancar (Government Order No 13 of 24 August 2011 on statutory remunerative and default interest in respect of pecuniary obligations and on the regulation of certain financial and tax measures in the banking sector) – Part I on statutory remunerative and default interest in respect of pecuniary obligations:

- Article 1, according to which the parties are free to set, in the contract, the interest rate both for the repayment of a loan of a sum of money and for the late payment of a pecuniary obligation;
- Article 3, in particular paragraph 2¹, according to which, in relations between professionals and between professionals and contracting authorities, statutory default interest is fixed at the level of the reference interest rate plus 8 percentage points;
- Article 10, according to which various provisions of the Civil Code, including Article 1 535, are applicable to default interest.

Legea nr. 72 din 28 martie 2013 privind măsurile pentru combaterea întârzierii în executarea obligațiilor de plată a unor sume de bani rezultând din contracte încheiate între profesioniști și între aceștia și autorități contractante (Law No 72 of 28 March 2013 on measures to combat delay in the performance of obligations to pay certain sums of money arising from contracts concluded between professionals and between professionals and contracting authorities) – Article 20, which inserts paragraph 2¹ in Ordonanța Guvernului nr. 13/2011 (Government Order No 13/2011) and Article 22, according to which the concept of ‘professional’ referred to in the abovementioned paragraph 2¹ means any natural or legal person operating a profit-making undertaking.

Ordonanța de urgență a Guvernului nr. 66 din 29 iunie 2011 privind prevenirea, constatarea și sancționarea neregulilor apărute în obținerea și utilizarea fondurilor europene și/sau a fondurilor publice naționale aferente acestora (Government Emergency Order No 66 of 29 June 2011 on the prevention, detection and penalising of irregularities in obtaining and using European funds and/or national public funds related to them) – Article 42, which provides, among other things, that credits on the balance sheet arising from irregularities are due upon expiry of

the payment deadline set out in the credit instrument, that is to say within 30 days from the date of notification of that instrument.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant, a commercial limited liability company, is the recipient of non-repayable financing from the Programul operațional sectorial de creștere a competitivității economice (Sectoral operational programme for increasing economic competitiveness) under the European Regional Development Fund (ERDF) for the implementation of the project entitled ‘Achiziție de echipamente pentru creșterea capacității de producție SC AA SRL’ (Acquisition of equipment for increasing the SC AA SRL production capacity).
- 2 In the financing contract concluded on 22 April 2015 between the applicant and the defendant, the Ministerul Fondurilor Europene (MFE) (Ministry of European Funds), which is the managing authority for the programme, the latter undertakes to grant non-repayable financing in the maximum amount of RON 3 334 257.20 (Romanian lei), and the applicant [undertakes in turn to] co-finance the project with the amount of RON 3 334 257.20, which represents its own contribution to the eligible expenditure of the project, and with the amount of RON 2 385 556.64, which represents the non-eligible amount of the project.
- 3 Although the project was completed in full and on time, the defendant terminated the financing contract on 29 August 2016, citing a failure to comply with the principle of transparency when the applicant purchased a certain quantity of equipment.
- 4 Following an action brought by the applicant against the decision to terminate, the administrative court annulled that decision, finding that the measure terminating the contract was disproportionate in view of the fact that the project had been completed; the court also noted that the defendant could have taken less drastic measures against the applicant, such as applying financial corrections.
- 5 In that context, on 6 May 2021, the defendant paid the eligible expenditure in full.
- 6 Following the ruling on the claim for reimbursement of the eligible expenditure, the applicant currently seeks, by means of the action brought before the referring court (the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania)), payment of statutory interest from the date of bringing proceedings until the date of actual payment of the eligible expenditure mentioned above, as well as an order that the defendant pay compensation in the amount of RON 28 983.65, for interest and commission.
- 7 In that regard, the applicant relies on the provisions of the Civil Code concerning payment of interest from the due date of the credit of the defendant. With regard to the claim for compensation, it states that it was forced to conclude additional

acts in relation to the credit contract it had concluded for the implementation of the project and that those acts resulted in additional costs.

Succinct presentation of the reasoning in the request for a preliminary reference

- 8 In the reasoning on the first three questions, the referring court observes that, for the situation at issue, in which the decision to terminate a financing contract of the European Regional Development Fund (ERDF) has been definitively annulled by an administrative court, there are no specific provisions governing the possibility of requiring the competent public authority to pay interest in the event that the eligible amounts have been paid late, after the termination of the financing contract has been definitively annulled.
- 9 As regards whether EU law, and in particular the principle of sound financial management, recognises that possibility, the referring court considers that there is no uniform judicial practice. *Some* national courts have, therefore, considered that, in its capacity as a professional, the beneficiary of the financing contract may rely on the principles of legal certainty, protection of legitimate expectations, and equivalence in order to claim compensation for damages arising from the impossibility of using the sums due in a timely manner. In that regard, neither the fact that EU law and national law contain no express provisions to that effect, nor the fact that an administrative contract is concerned and the financial assistance is granted free of charge are relevant. Some courts have considered that the provisions of national law governing the legal regime on financing contracts are supplemented by the ordinary law provisions of the Civil Code and Government Order No 13/2011.

Other courts, by contrast, have considered that, since the national legislation governing non-repayable financing does not provide for the right to default interest, that interest cannot be recognised in a situation such as that in the present case. The provider of the financing is not a professional, and the rules of national law governing legal acts concluded between professionals are not applicable to the legal relationship between the parties concerned. According to the case-law of the Court of Justice, where EU law does not provide for the award of interest, it is for national law to determine the terms and conditions applicable to interest in accordance with the principle of procedural autonomy
- 10 The referring court asks whether, even if the provisions of civil law relating to the payment of default interest were applicable, the award of interest would not, nevertheless, be incompatible with the protection of the financial interests of the European Union and, in particular, with the principle of sound financial management, given the legal nature of the financing contract.
- 11 Moreover, the referring court also raises the issue of the possibility of limiting the amount of default interest in order to take into account the fault of the recipient of the financing.

- 12 With regard to the third question, the referring court states that, pursuant to Article 42(1) and (2) of the Government Emergency Order No 66/2011, where irregularities are found, the beneficiary of a financial advantage can be required to pay default interest only if repayment is not made within 30 days from the date of notification of the credit instrument. According to Article 325 TFEU, Member States are required to take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.
- 13 The referring court asks for a ruling on whether the principle of equivalence does not require even in the present case, which is not similar to that of withdrawal of the financial advantage, that default interest can be awarded only from the date on which the judgment annulling the decision to terminate the contract becomes final.
- 14 In the context of the fourth question, the issue arises as to whether the law that transposes Directive 2011/7 into national law (and more specifically, the provisions of Article 3, paragraph 2¹, of Government Order No 13/2011 which set the statutory rate of default interest in relations between professionals and contracting authorities) extends the scope of the directive to financing contracts, such as the one at issue in the present case, beyond the limits imposed by the third paragraph of Article 288 TFEU.