

Anonymised version

Translation

C-50/22 – 1

Case C-50/22

Request for a preliminary ruling

Date lodged:

25 January 2022

Referring court:

Cour d'appel de Paris (France)

Date of the decision to refer:

16 December 2021

Appellant:

SOGEFINANCEMENT

Respondents:

RW

UV

[...]

COUR D'APPEL DE PARIS (COURT OF APPEAL, PARIS, FRANCE)

Division 4 – Chamber 9 – A

**JUDGMENT OF 16 DECEMBER 2021 REFERRING A QUESTION TO THE
COURT OF JUSTICE OF THE EUROPEAN UNION FOR A
PRELIMINARY RULING**

[...]

APPELLANT

SOGEFINANCEMENT, a simplified joint stock company, acting through its legal representatives, with address as such at the registered office mentioned herein

[...]
92724 NANTERRE CEDEX

[...]

RESPONDENTS

RW

[...]
93160 NOISY LE GRAND

[...]

UV

[...]
93160 NOISY LE GRAND

[...] [Procedural formalities]

FACTS, PROCEDURE AND CLAIMS OF THE PARTIES

On 5 November 2011 Sogefinancement granted RW and UV a personal loan of EUR 15 362.90, repayable in 84 monthly instalments of EUR 430.85, excluding insurance, at an annual fixed borrowing rate of 7.60%.

On 20 October 2015 the parties agreed to restructure the debt of EUR 15 362.90, repayable in 83 monthly instalments of EUR 258.54 with effect from 15 December 2015.

In an action brought before it by Sogefinancement seeking, primarily, an order against RW and UV requiring them to pay the outstanding balance, the tribunal d'instance du Raincy (District Court, Raincy, France), by an *inter partes* judgment delivered on 25 January 2018:

- declared the action for payment admissible;
- declared the agreement concluded between the parties on 5 November 2011 null and void;

- disapplied Article 1231-6 of the code civil (French Civil Code) and Article L. 313-3 of the code monétaire et financier (French Monetary and Financial Code);
- ordered RW and UV to pay Sogefinancement EUR 1 309.65 under the loan agreement and declared that no interest would be payable on that sum;
- drew attention to Article L. 311-48 (now Article L. 341-8) of the code de la consommation (French Consumer Code) and stated that interest at the statutory rate calculated on the interest received by the lender would be deducted from the sum payable by RW and UV;
- set a payment deadline by which RW and UV would have to repay the debt in six monthly instalments of EUR 200 and one final instalment comprising the balance of the debt, failing which all outstanding sums would become repayable forthwith;
- dismissed the remainder of Sogefinancement's claims.

After examining the admissibility of the action, the District Court raised of its own motion a ground alleging infringement of Article L. 312-25 of the Consumer Code and held that, since the funds had been disbursed to the borrowers less than seven days after acceptance of the loan offer, the agreement had to be annulled under Article 6 of the Civil Code.

By declaration dated 24 May 2018, Sogefinancement appealed against that decision.

As set out in its most recent heads of claim submitted on 8 February 2021, the appellant claims that the Court of Appeal should:

- set aside, or at least vary, the judgment under appeal in its entirety;
- dismiss all of RW and UV's claims;
- declare the ground based on the nullity of the agreement to be inadmissible or, in the alternative, dismiss that ground;
- declare the borrowers' application for forfeiture of the entitlement to contractual interest to be inadmissible; dismiss that application;
- declare the repayment term accelerated or, in the alternative, declare the termination the loan agreement;
- order RW and UV jointly and severally to pay it EUR 13 974.41, together with interest at the contractual rate of 7.60% per annum from 31 July 2018, in cash or using other valid means of payment for settlements carried out after 30 July 2018;

— in the alternative, in the event that the agreement is null and void, to order them jointly and severally to pay it EUR 28 000 by way of repayment of the loan capital, together with interest at the statutory rate, and to declare that they remain liable to pay EUR 517.40 together with interest at the statutory rate;

— in the alternative, in the event of forfeiture of the entitlement to contractual interest, order RW and UV jointly and severally to pay it EUR 2 504.36 together with interest at the statutory rate from 6 March 2017;

— dismiss RW and UV’s application for further time or, in the alternative, declare the debt to be repayable forthwith in the event of failure to comply with only one of the due dates;

— order them to pay it EUR 1 000 under Article 700 of the code de procédure civile (French Civil Procedure Code).

Relying on Article L. 311-14 and Article R. 632-1 of the Consumer Code in the version applicable to the case, the appellant submits that the court of first instance was not entitled to declare the agreement null and void of its own motion, since only the consumer can plead a public policy provision designed to protect specific interests. In that connection, it alleges misuse of powers. It submits that the nullity of the agreement cannot be raised beyond the five-year limitation period laid down in Article L. 110-4 of the code de commerce (French Commercial Code).

The appellant also argues that the seven-day period before the funds can be released was indeed observed and complains of confusion between the internal ‘release’ of the funds and their actual payment to the borrowers. It notes that the borrowers do not provide proof of the date on which they received the funds.

It provides details of the amount of the debt owed to it.

Lastly, the appellant pleads that RW and UV’s claim relating to the forfeiture of the entitlement to contractual interest is time-barred.

By their heads of claim submitted on 29 October 2018, RW and UV contend that the Court of Appeal should:

— confirm the judgment under appeal in its entirety, save in so far as it determined the debt owed to Sogefinancement to be the principal sum of EUR 1 309.65;

— order them jointly and severally to pay the appellant company the principal sum of EUR 517.40, plus interest at the statutory rate from the date of service of the present judgment;

— in the alternative, order the forfeiture of Sogefinancement’s entitlement to contractual interest and grant them the longest payment period possible to discharge their debt;

— dismiss Sogefinancement's claims and order it to pay them EUR 2 000 under Article 700 of the Civil Procedure Code.

The respondents submit that the public policy nature of the applicable provisions justifies the court of first instance having raised of its own motion the nullity of the agreement under Article L. 141-4 of the Consumer Code. On the basis of Article 2224 of the Civil Code, they also argue that the five-year limitation period for applications for nullity does not begin on the date on which the agreement was entered into but on the date on which the holder of a right knew or ought to have known of the facts enabling him or her to bring an action, which in this case was the hearing before the court of first instance.

They maintain that the appellant did not observe the seven-day period for release of the funds, laid down in Article L. 311-14 of the Consumer Code in the version applicable in the instant case, and express surprise that the bank has not provided proof of the date on which the amount borrowed was transferred.

They argue that the elimination of interest is justified under Article 1343-5 of the Civil Code and contend that the court of first instance erred in calculating the sum outstanding for payment by them.

They describe their precarious financial situation.

[...] [Procedural matters]

After receiving the observations of the parties and the opinion of the public prosecutor's office, this court, by judgment delivered on 1 July 2021, submitted a request for an opinion to the Cour de cassation (Court of Cassation, France) on the following two questions:

— in the light of Article L. 141-4, now Article R. 632-1, of the Consumer Code, Article 6 of the Civil Code, Article L. 110-4 of the Commercial Code and the Court of Justice of the European Union's interpretation of Directive 2008/48/EC of 23 April 2008 on the role of the courts in ensuring compliance with the provisions of European economic public policy, may a court raise of its own motion the nullity of a consumer credit agreement, in particular pursuant to Article L. 312-25 of the Consumer Code, after the expiry of the five-year limitation period enforceable against a party?

— in the light of Article L. 141-4, now Article R. 632-1, of the Consumer Code, Article 6 of the Civil Code, Article L. 110-4 of the Commercial Code, Articles 4 and 5 of the Civil Procedure Code and the Court of Justice of the European Union's interpretation of Directive 2008/48/EC of 23 April 2008 on the role of the courts in ensuring compliance with the provisions of European economic public policy, may a court declare a consumer credit agreement null and void, in particular pursuant to Article L. 312-25 of the Consumer Code, without any application for annulment having been made by one of the parties?

On 21 October 2021 the Court of Cassation issued its opinion that the questions should be referred by the court hearing the case to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union.

The appellant submitted observations on 30 November 2021 stating that Article L. 311-17 of the Consumer Code, which provides that funds may not be made available before the expiry of a period of seven days, has only an indirect connection with Article 14 of the abovementioned directive and proposes that two questions be submitted for a preliminary ruling referring to the principles of legal certainty and of States' procedural autonomy.

The respondents made it known on 10 November 2021 that they had no observations on the possible reference for a preliminary ruling.

[...]

GROUND FOR THE DECISION

It is not disputed that the provisions applicable to the dispute are Article L. 311-1 et seq. of the Consumer Code resulting from Law No 2010-737 enacted on 1 July 2010, which transposes into national law the provisions of Directive 2008/48/EC of the European Parliament and of the Council of 28 April 2008 (now Article L. 312-1 et seq. of that code).

The court of first instance declared the contested credit agreement null and void of its own motion the ground that the funds had been disbursed to the borrowers before expiry of the withdrawal period, in breach of former Article L. 311-14 (now Article L. 312-25) of the Consumer Code.

The appellant complains that the court of first instance exceeded its powers because only one party may invoke the nullity of an agreement on the basis of those provisions, which are public policy provisions designed to protect specific interests. It observes that the nullity at issue here is a relative nullity and that it is open to the consumer to confirm an agreement which falls to be annulled. The appellant states that the borrowers, appearing before the District Court, did not seek annulment of the agreement or claim infringement of Article L. 312-25.

The appellant also maintains that the District Court was not entitled to raise of its own motion a ground capable of bringing about the annulment of the agreement beyond the limitation period within which the borrowers themselves may seek annulment of the agreement.

Before the Court of Appeal, the respondents endorse the grounds of the judgment which they seek to have upheld. They contend that the court of first instance was entitled to raise of its own motion a public policy provision, in respect of which

the parties were able to exchange arguments, even though the respondents had not applied for annulment of the agreement.

Referring to Articles 1179 and 1180 of the Civil Code, they submit that the public policy provisions relating to consumer credit are penalised by absolute nullity which may be applied for by any interested party and by the public prosecutor's office and that the limitation period begins on the date on which the person invoking nullity became aware of the irregularity, that is to say, in the present case, so far as the courts are concerned, the date of the originating application or the hearing.

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 was transposed into French law by Law No 2010-737 of 1 July 2010. It is directly applicable by national courts.

Under Article 14 of that directive:

'1. The consumer shall have a period of 14 calendar days in which to withdraw from the credit agreement without giving any reason. That period of withdrawal shall begin

either from the day of the conclusion of the credit agreement, or from the day on which the consumer receives the contractual terms and conditions and information in accordance with Article 10, if that day is later than the date referred to in point (a) of this subparagraph.

...

7. This Article shall be without prejudice to any rule of national law establishing a period of time during which the performance of the contract may not begin.'

Article 22 provides that *'Member States shall ensure that consumers may not waive the rights conferred on them by the provisions of national law implementing or corresponding to this Directive'*.

Under Article 23, *'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'*.

Under Article L. 311-14 of the Consumer Code, in the version applicable to the dispute (now Article L. 312-25), *'during a period of seven days from the borrower's acceptance of the agreement, no payment in any form or for any reason whatsoever may be made by the lender to the borrower or for the*

borrower's account, or by the borrower to the lender. Nor may the borrower, during that period, make any deposit to the lender or for the lender's account in respect of the operation in question. If the borrower signs a direct debit authorisation in respect of his or her bank account, its validity and entry into effect shall be subject to the validity and entry into effect of the credit agreement'.

It should be noted that that provision falls within the framework of Article 14(7), cited above.

National law accepts that disbursement of the loan before expiry of the seven-day period entails the nullity of the agreement pursuant to Article 6 of the Civil Code, which provides that it is not possible, by private agreement, to derogate from laws that concern public policy and accepted principles of morality. Annulment of the agreement triggers repayment by the borrower of the loan capital.

Under Article L. 141-4, now Article R. 632-1, of the Consumer Code, *'a court may, of its own motion, raise all the provisions of this Code in disputes arising from its application. It shall, of its own motion, after receiving the observations of the parties, disapply a term the unfairness of which is evident from the arguments submitted before it'.*

Article L. 311-52 of the Consumer Code provides that *'actions for payment by the lender following non-performance by the borrower shall be time-barred two years after the event giving rise to them'.*

According to Article L. 110-4 of the Commercial Code, *'obligations deriving from trade between traders or between traders and non-traders shall be time-barred after five years unless they are subject to special shorter limitation periods'.*

Article 2224 of the Civil Code provides that *'personal actions or actions involving moveable property shall be time-barred five years from the date on which the holder of a right knew or ought to have known of the facts enabling him or her to bring such an action'.*

Consumer actions – including actions with a view to having an agreement annulled – such as applications for annulment of an agreement brought by way of objection by the consumer are subject to the limitation period of five years from the conclusion of the agreement, as provided for in both Article 110-4 of the Commercial Code and Article 2224 of the Civil Code. However, those rules on time bar do not prevent the consumer in any circumstances from raising a substantive ground of defence in an action for payment such as to frustrate the lender's claim in whole or in part, without deriving any other benefit from doing so.

It has been held that the setting of appropriate time limits for bringing actions in the form of limitation periods is not liable to make it impossible in practice or excessively difficult to exercise the rights conferred on consumers; it seeks to forestall endless challenges to an agreement and thus takes account of the fundamental principle of legal certainty (judgment of 6 October 2009, *Asturcom Télécommunications*, C-40/08).

However, it has also been held that the principle of effectiveness of the provisions of the abovementioned directive precludes the penalty of nullity of the credit agreement linked with an obligation to return the capital amount from being subject to the condition that the nullity must be raised by the consumer within a limitation period of three years (judgment of 5 March 2020, *OPR – Finance*, C-679/18).

It is therefore necessary to refer a question to the Court of Justice of the European Union for a preliminary ruling in the terms set out below.

Furthermore, according to Articles 4 and 5 of the Code of Civil Procedure, ‘*the subject matter of the dispute shall be determined by the respective claims of the parties*’ and ‘*the court shall rule on the entire subject matter of the dispute and shall go no further than that subject matter*’.

Those provisions, which derive from States’ procedural autonomy, prevent a court from ruling *ultra petita*.

The principle that the subject matter of an action is delimited by the parties (*‘principe dispositif’*), which is recognised by EU law in particular in so far as it contributes to legal certainty, also precludes a court from raising a counterclaim.

Nonetheless, Article L. 141-4, now Article R. 632-1, of the Consumer Code provides – in order to ensure the effectiveness of the consumer protection established by the abovementioned directive – that a court may, of its own motion, raise all the provisions of that code in disputes arising from its application; it must, of its own motion, after receiving the observations of the parties, disapply a term the unfairness of which is apparent from the arguments submitted before it.

Pursuant to the latter provision, national law accepts that a court may, of its own motion, declare the forfeiture of the lender’s entitlement to collect contractual interest even where the consumer has not taken a view on that matter, whether he or she be the appearing party or the defaulting party, provided that the ground has been the subject of an exchange of arguments.

In national law, invoking the nullity of the agreement is not only a substantive ground of defence against an action for payment brought by the lender, but also a self-standing claim.

In addition to what has been said on the associated limitation period, the annulment of the agreement by a court in the absence of an application to that

effect by the consumer – whether he or she be the appearing party or the defaulting party – or of the consumer’s acquiescence to such annulment, after the court has raised of its own motion the irregularity liable to be penalised by such nullity, is capable of undermining the principle that the subject matter of an action is delimited by the parties and undermine individual and collective legal certainty.

Nonetheless, the principle of effectiveness, which must seek in general terms to discourage traders from engaging in non-compliant practices, must take into account the low level of consumer participation in judicial proceedings, from which neither the consumer’s acceptance of the merits of the lender’s claims nor his or her acquiescence to the possible annulment of the agreement can be inferred at individual level.

It is therefore necessary to ask the Court of Justice, in the terms set out below, about the criteria for striking a balance between the principle of effectiveness, the principle that the subject matter of an action is delimited by the parties and the principle of legal certainty in relation to the declaration by a court, of its own motion, that a credit agreement is null and void, where the consumer has not taken a view on that matter.

ON THOSE GROUNDS

THE COURT OF APPEAL,

[...]

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

— refers the case and the parties to the Court of Justice of the European Union, to which the following questions are submitted for a preliminary ruling:

1. Does the principle that penalties must be effective, deriving from Article 23 of Directive 2008/48/EC, in the light of the principles of legal certainty and of States’ procedural autonomy, preclude a situation whereby a court may not raise of its own motion a national legal provision, resulting from Article 14 of that directive and penalised under national law by the nullity of the agreement, beyond the five-year limitation period within which the consumer may seek the annulment of the credit agreement by bringing legal proceedings or by raising an objection?

2. Does the principle that penalties must be effective, deriving from Article 23 of Directive 2008/48/EC, in the light of the principles of legal certainty and of States’ procedural autonomy and the principle that the subject matter of an action is delimited by the parties, preclude a situation whereby a court may not declare a credit agreement null and void after raising of its own motion a provision of national law, resulting from Article 14 of that directive, where the consumer has not applied for or at least acquiesced in such annulment?

[...]

WORKING DOCUMENT