

Anonymised version

Translation

C-665/23 – 1

Case C-665/23

Request for a preliminary ruling

Date lodged:

9 November 2023

Referring court:

Cour de cassation (Court of Cassation, France)

Date of the decision to refer:

8 November 2023

Appellant:

IL

Respondent:

Veracash SAS

[...]

IL, [...] against the judgment delivered on 3 January 2022 by the cour d'appel de Paris (Court of Appeal, Paris) [...], in its dispute with the company Veracash, [...] the respondent in the appeal proceedings.

The appellant relies, in support of his appeal on a point of law, on two grounds of appeal.

[...]

[procedural wording]

Facts and procedure

- 1 According to the contested judgment [...], on 24 March 2017, Veracash, in whose books of account IL had opened a gold deposit account, sent to IL's address a new cash withdrawal and payment card. Claiming that he had neither requested nor received that card and that daily withdrawals from his account had been made from 30 March to 17 May 2017 which he had not authorised, IL brought proceedings against Veracash for reimbursement and payment of damages.
- 2 His application was dismissed at first instance and on appeal on the ground, in particular, that he could not rely on the provisions of Article L. 133-18 of the code monétaire et financier (Monetary and Financial Code) in so far as he had not reported to Veracash the transactions at issue 'immediately' and 'without undue delay'.

Summary of the applicable legislation

- 3 The texts applicable are those in force at the time of the withdrawals at issue, from 30 March to 17 May 2017.

Directive 2007/64/EC of 13 November 2007

- 4 Directive 2007/64/EC of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, contains an Article 56, entitled 'Obligations of the payment service user in relation to payment instruments', which provides:

'1. The payment service user entitled to use a payment instrument shall have the following obligations:

- (a) to use the payment instrument in accordance with the terms governing the issue and use of the payment instrument; and
- (b) to notify the payment service provider, or the entity specified by the latter, without undue delay on becoming aware of loss, theft or misappropriation of the payment instrument or of its unauthorised use.

2. For the purposes of paragraph 1(a), the payment service user shall, in particular, as soon as he receives a payment instrument, take all reasonable steps to keep its personalised security features safe.'

- 5 According to Article 58 of that directive, entitled 'Notification of unauthorised or incorrectly executed payment transactions':

'The payment service user shall obtain rectification from the payment service provider only if he notifies his payment service provider without undue delay on becoming aware of any unauthorised or incorrectly executed payment transactions

giving rise to a claim, including that under Article 75, and no later than 13 months after the debit date, unless, where applicable, the payment service provider has failed to provide or make available the information on that payment transaction in accordance with Title III’.

- 6 Article 60 of the directive, entitled ‘Payment service provider's liability for unauthorised payment transactions’, provides:

‘1. Member States shall ensure that, without prejudice to Article 58, in the case of an unauthorised payment transaction, the payer's payment service provider refunds to the payer immediately the amount of the unauthorised payment transaction and, where applicable, restores the debited payment account to the state in which it would have been had the unauthorised payment transaction not taken place.

2. Further financial compensation may be determined in accordance with the law applicable to the contract concluded between the payer and his payment service provider.’

- 7 According to Article 61 of that directive, entitled ‘Payer's liability for unauthorised payment transactions’:

‘1. By way of derogation from Article 60 the payer shall bear the losses relating to any unauthorised payment transactions, up to a maximum of EUR 150, resulting from the use of a lost or stolen payment instrument or, if the payer has failed to keep the personalised security features safe, from the misappropriation of a payment instrument.

2. The payer shall bear all the losses relating to any unauthorised payment transactions if he incurred them by acting fraudulently or by failing to fulfil one or more of his obligations under Article 56 with intent or gross negligence. In such cases, the maximum amount referred to in paragraph 1 of this Article shall not apply.

3. In cases where the payer has neither acted fraudulently nor with intent failed to fulfil his obligations under Article 56, Member States may reduce the liability referred to in paragraphs 1 and 2 of this Article, taking into account, in particular, the nature of the personalised security features of the payment instrument and the circumstances under which it was lost, stolen or misappropriated.

4. The payer shall not bear any financial consequences resulting from use of the lost, stolen or misappropriated payment instrument after notification in accordance with Article 56(1)(b), except where he has acted fraudulently.

5. If the payment service provider does not provide appropriate means for the notification at all times of a lost, stolen or misappropriated payment instrument, as required under Article 57(1)(c), the payer shall not be liable for the financial

consequences resulting from use of that payment instrument, except where he has acted fraudulently.’

National law

8 Directive 2007/64/EC was transposed into national law by the ordonnance No 2009-866 du 15 juillet 2009 relative aux conditions régissant la fourniture de services de paiement et portant création des établissements de paiement (Order No 2009-866 of 15 July 2009 on the conditions governing the supply of payment services and creating payment institutions), which introduced, in particular, Articles L. 133-17, L. 133-18, L. 133-19 and L. 133-24 of the Monetary and Financial Code adopting the provisions of Articles 56, 58, 60 and 61 of the directive.

9 Under Article L. L. 133-17, I, of the Monetary and Financial Code, in the version resulting from that order, ‘upon becoming aware of the loss, theft, misappropriation or unauthorised use of his payment instrument or of the data associated with it, the payment service user shall, without undue delay and for the purposes of blocking the instrument, inform his payment service provider, or the entity specified by his provider.’

10 According to Article L. 133-18 of that code:

‘In the case of an unauthorised payment transaction reported by the user under the conditions prescribed in Article L. 133-24, the payment service provider shall refund to the payment service user forthwith the amount of the unauthorised payment transaction and, where applicable, shall restore the payment account that had been debited with that amount to the situation that would have existed if the unauthorised payment transaction had not taken place.

The payer and his payment service provider may decide on additional compensation on a contractual basis.’

11 Under Article L. 133-19 of the same code:

I. In the case of an unauthorised payment transaction following the loss or theft of a payment instrument, the payer shall, prior to the notification stipulated in Article L. 133-17, bear the losses associated with the use of the lost or stolen instrument subject to a ceiling of 150 euros.

The payer shall not be held liable, however, in the case of an unauthorised payment transaction carried out without the use of the personalised security features.

II. The payer shall not be held liable where the unauthorised payment transaction was carried out by misappropriation, without the payer's knowledge, of the payment instrument or of the data associated with it.

Likewise, he does not incur liability in the event of misuse of the payment instrument if he was in physical possession of his instrument when the unauthorised payment transaction took place.

III. Except where he has acted fraudulently, the payer shall not bear any financial consequences if the payment service provider does not provide appropriate means of notification so that the payment instrument may be blocked, as stipulated in Article L. 133-17.

IV. The payer shall bear all the losses relating to any unauthorised payment transactions if he incurred them by acting fraudulently or by failing to fulfil, with intent or gross negligence, one or more of the obligations imposed by Articles L. 133-16 and L. 133-17.'

12 Finally, under Article L. 133-24 of the code:

'The payment service user shall notify his payment service provider without undue delay of any unauthorised or incorrectly executed payment transactions and no later than 13 months after the debit date, failing which he or she will be time-barred, unless the payment service provider has failed to provide or make available the information on that payment transaction in accordance with Book III, Title I, Chapter IV.

Except where the user is a natural person acting otherwise than for business or professional purposes, the parties may decide to derogate from this article.'

Examination of the grounds of appeal

The second ground of appeal, in the first part

Wording of the ground of appeal

13 IL criticises the judgment for holding that it was unnecessary to order Veracash to return to him the gold deposit of 794.513 grams or, failing that, to pay to him the value in euros, and for rejecting all his other requests, whereas 'the payment service user shall notify his payment service provider without undue delay of any unauthorised or incorrectly executed payment transactions and no later than 13 months after the debit date, failing which he or she will be time-barred, unless the payment service provider has failed to provide or make available the information on that payment transaction [...]; that, in this case, the appeal court held that IL could not rely on the provisions of Article L. 133-18 of the Monetary and Financial Code in so far as the payment service user must notify the provider of an unauthorised transaction 'immediately' and 'without undue delay', and that IL failed to demonstrate that he had fulfilled that obligation since he had sent to Veracash a dispute form on 23 May 2017, almost two months after the first disputed withdrawal, when the bank card user has 13 months after the debit date

to make that notification; and complains that, by ruling as it did, the appeal court infringed Article L. 133-24 of the Monetary and Financial Code, as worded before Order No 2017-1252 of 9 August 2017.’

The Court’s reply

Admissibility of the ground of appeal

14 [...]

15 [...]

16 The ground of appeal is [...] admissible.

Merits of the ground of appeal

17 The outcome of the dispute depends on whether the payment service provider can refuse to reimburse the amount of an unauthorised transaction where the payer, although he notified that transaction within 13 months after the debit date, delayed in doing so, without that delay having been intentional or the result of gross negligence on his part.

18 [IL], the appellant, claims, primarily, that the payment service user has 13 months after the debit date to make the notification.

19 Veracash, the respondent, contends that, although, in Article L. 133-24 of the Monetary and Financial Code, the legislature required the user to notify an unauthorised transaction without undue delay whilst setting a 13-month time limit, it intended to establish a double time limit and that the 13-month time limit is a final deadline. It adds that, in view of what is at stake, the scheme of that provision requires that, as soon as the service user sees something abnormal, he should react immediately by notifying his service provider of the abnormality.

20 The provisions of the Monetary and Financial Code applicable to the dispute must be interpreted in accordance with the articles of Directive 2007/64/EC which they transpose.

21 The Court of Cassation finds that a literal reading of Article 58 of Directive 2007/64/EC may, as the appeal court held, lead to the conclusion that the payment service provider is entitled to refuse to reimburse the amount of an unauthorised payment transaction on the sole ground of the payment service user’s late notification, even though the notification was made within the 13-month time limit. It notes that such an interpretation finds support in recital 31 of that directive, which states, first, that ‘the payment service user shall obtain rectification from the payment service provider only if he notifies his payment service provider without undue delay on becoming aware of any unauthorised or incorrectly executed payment transactions giving rise to a claim’ and, second, that ‘in order to reduce the risks and consequences of unauthorised or incorrectly

executed payment transactions, the payment service user should inform the payment service provider as soon as possible about any contestations concerning allegedly unauthorised or incorrectly executed payment transactions [...]. If the notification deadline is met by the payment service user, he should be able to pursue those claims within the prescription periods pursuant to national law.'

- 22 However, such an interpretation seems difficult to reconcile with Article 61(2) of Directive 2007/64/EC, which provides that the payer will bear all the losses relating to any unauthorised payment transactions, in other words, he will be deprived of his right to reimbursement, only if, in particular, he failed to fulfil one or more of his obligations under Article 56 of that directive with intent or gross negligence, which include that of informing his payment service provider without undue delay of the loss, theft or misappropriation or any unauthorised use of his payment instrument. In any event, the payer's payment service provider is not required to reimburse the payer for the amount of an unauthorised transaction which the payer has been late in notifying to it, regardless of whether the delay was intentional or the result of gross negligence.
- 23 When interpreting Article 58 of Directive 2007/64/EC in its judgment of 2 September 2021, *CRCAM* (C-337/20, paragraph 36), the Court of Justice of the European Union held that 'a service user who has not notified his or her service provider, within 13 months of the debit, of an unauthorised transaction, cannot invoke liability on the part of the service provider, including under the general law, and therefore cannot obtain a refund in respect of the unauthorised transaction', but did not rule on the consequences of the payer's non-compliance with the obligation to inform his payment service provider without undue delay that he has become aware of an unauthorised transaction.
- 24 Even though the Court of Cassation recognises the interest in encouraging the payer to be diligent in informing his payment service provider, it considers, in the light of Article 61(2) of Directive 2007/64/EC, that the EU legislature did not intend to penalise any delay, whatever the circumstances, by totally depriving the payer of the right to reimbursement. It is inclined to interpret that directive as meaning that, apart from the case of the payer acting fraudulently and that of notification after the expiry of the 13-month time limit, the fact that the payer delays in notifying his payment service provider of the loss, theft, misappropriation or any unauthorised use of his payment instrument has no effect on his right to reimbursement of the losses caused by unauthorised transactions which notification without undue delay could have prevented, and that the payer should not be deprived of the right to reimbursement of the losses caused by an unauthorised transaction which notification without undue delay could have prevented, unless the lateness of the notification is intentional or the result of gross negligence on his part.
- 25 However, since the exact interpretation of Articles 56, 58, 60 and 61 of Directive 2007/64 EC is not immediately obvious, the proceedings must be stayed and the

following questions contained in the operative part of this judgment must be referred to the Court of Justice for a preliminary ruling.

ON THOSE GROUNDS, the Court:

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

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

‘1. Must Articles 56, 58, 60 and 61 of Directive 2007/64 EC of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, be interpreted as meaning that the payer is deprived of the right to reimbursement of the amount of an unauthorised transaction if he delayed in notifying his payment service provider of the unauthorised payment transaction, even though he did so within 13 months from the debit date?’

2. In the event that the answer to Question 1 is in the affirmative, is the deprivation of the payer’s right to reimbursement conditional on the fact that the lateness of the notification is intentional or the result of gross negligence on the part of the payer?

3. In the event that the answer to Question 1 is in the affirmative, is the payer deprived of the right to reimbursement of all the unauthorised transactions or only those which could have been prevented if the notification had not been late?’

[...]