Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 14 November 2018 [1]

Case C-630/17

Anica Milivojević
v
Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen

(Request for a preliminary ruling from the Općinski sud u Rijeci (Municipal Court, Rijeka, Croatia))

(Free movement of services — Contracts for provision of credit concluded prior to Accession of Croatia to the European Union — Retroactive Member State law providing for nullity of such contracts when they feature international elements — Admissibility)

I. Introduction

1. This reference for a preliminary ruling from the Općinski sud u Rijeci (Municipal Court, Rijeka, Croatia; 'the referring court') essentially concerns the compatibility with EU law of a Croatian law providing for the nullity from their date of conclusion of loan contracts, secured by mortgages on Croatian properties, that were made between Croatian debtors and foreign lenders who were not authorised to provide credit services in Croatia by the Hrvatska narodna banka ('the National Bank of Croatia'). The terms of the Treaty of Accession of Croatia to the EU [2] also come into play, given that the law in issue encompasses loan agreements concluded prior to Croatian accession on 1 July 2013.

2. The referring court has sent three questions which are concerned with the interpretation of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, [3] and one addressing the element of the dispute detailed above, which entails consideration of EU free movement law and the Court's case-law on the impact *ratione temporis* of EU law upon accession of a new Member State. As requested by the Court, this Opinion will address these latter issues.

1 Original language: English.
2 OJ 2012 L 112, p. 21.
3 OJ 2012 L 351, p. 1.

A. Legal framework

1. EU law

3. The first paragraph of Article 56 TFEU states:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'

4. Article 63(1) TFEU states:

'Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

2. Member State law

5. The Zakon o ništetnosti ugovora o kreditu s međunarodnim obilježjima sklopljenih u Republici Hrvatskoj s neovlaštenim vjerovnikom (Law on the nullity of loan contracts with international features concluded in the Republic of Croatia with an unauthorised creditor, 'the Law of 14 July 2017')[4] states as follows in the first paragraph of Article 1, Articles 2 to 5 and 7 to 11:

'Law on the nullity of loan contracts with international features concluded in the Republic of Croatia with an unauthorised creditor

Object of the law

Article 1

(1) The present law applies to credit contracts featuring international elements which have been concluded in the Republic of Croatia between debtors and unauthorised lenders, with the exception of contracts which have been concluded by the following debtors;

…

(2) The present law equally applies to other legal acts established in the Republic of Croatia between debtors and non-authorised lenders that are aimed at a credit contract featuring international elements in the sense of the first paragraph of the present article or which are founded on such a contract.

Definitions

Article 2

In the sense of the present law, the term:

— "debtor" refers to all physical or moral persons to whom a credit has been granted by virtue of a credit contract featuring international elements, or all persons who profit from a person to whom such a credit has been granted in its capacity as a co-debtor, debtor creditor, co-debtor creditor, or guarantor.

4 *Narodne novine* (Official Gazette) No 72/2017.

— "non-authorised lender" refers to all moral persons who have agreed to provide a credit to a debtor pursuant to a credit contract featuring international elements, and whose statutory seat is situated outside of the Republic of Croatia at the date of the contract featuring international elements and which propose or supply credit services in the Republic of Croatia, even though such a lender does not satisfy the conditions required by regulation for the supply of such services, and more precisely, it does not have the authorisations and/or agreement of the competent authorities of the Republic of Croatia.

…

Nullity of credit contracts

Article 3

(1) Credit contracts featuring international elements which have been concluded in the Republic of Croatia between debtors and unauthorised lenders are null and void.

(2) By way of derogation from paragraph 1 of the present article, nullity cannot be invoked when a contract has been completed in its entirety.

Nullity of other legal acts

Article 4

All acts of a notary established on the basis of, or having a link with, a null and void contract in the sense of Article 3 of the present law shall be null and void.

Exclusion of forced execution

Article 5

When a judgment establishing the nullity of a credit contract or the nullity of an act of a notary founded on a null and void contract has acquired the status of *res judicata*, all execution procedures against the debtor before courts or financial agencies shall be closed at the request of the debtor.

…

Effects of nullity

Article 7

Each contracting party is bound to give restitution to the other party of everything it has received by virtue of the null and void contract, and if that is not possible or if the nature of that which was executed precludes restitution, an appropriate pecuniary indemnity must be provided, which is to be fixed as a function of the price in place on the date on which the judicial decision is rendered.

Competence

Article 8

(1) In the framework of litigation concerning credit contracts featuring international elements, in the sense of the present law, an action initiated by the debtor against an unauthorised lender can be brought either before the courts of the State on the territory of which the unauthorised lender has its seat (whatever the seat of the unauthorised creditor) or before the courts of the place where the debtor has his domicile or his seat.

(2) The action instituted against the debtor by the unauthorised lender, in the sense of paragraph 1 of the present article, can only be brought before the courts of the State on the territory on which the debtor has his domicile or seat. The law applicable to null and void contracts in the sense of the present law is, exclusively, the law of Croatia and the court seised of an action concerning the nullity of such a contract will apply the present law to such an action, without examining if there exist presumptions for the application of the law of the place of the conclusion of the contract by virtue of other legislative instruments

Transitory and final provisions

Article 9

The present law is without prejudice to rights conferred on debtors by special laws when they are more favourable.

Article 10

(1) Credit contracts featuring international elements, in the sense of the present law, which have been concluded in the Republic of Croatia, before the entry into force of the present law, between debtors and unauthorised creditors, are null and void from the date of their conclusion, resulting in the effects indicated in Article 7.

(2) Other legal acts established in the Republic of Croatia, before the entry into force of the present law, between debtors and unauthorised creditors, which follow from a credit contract featuring international elements aimed at paragraph 1 of the present article which are founded on such a contract, are null and void from the date of their establishment, entailing the effects set out in Article 7.

Article 11

The present law enters into force 8 days after its publication in "*Narodne novine*"

Zagreb, 14 July 2017.'

II. The facts in the main proceedings and the questions referred for a preliminary ruling

6. On 5 January 2007, Anica Milivojević ('the applicant'), a national of the Republic of Croatia, and her husband, since deceased, concluded with Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen ('the defendant'), whose registered office is in the Republic of Austria, a single-loan contract in the amount of EUR 47 000. This sum was transferred in cash in the defendant's office in Austria, and the contract in issue was concluded with the help of an intermediary resident in Croatia who was paid a commission.[5] The credit was sought with a view to enlargement and renovation of the applicant's

5 According to the written observations of the Commission which were uncontested in this regard.

home, partly for private reasons and partly to rent out apartments on the tourism market.[6] It is common ground that the defendant had no authorisation from the National Bank of Croatia to provide financial services involving the grant of mortgage loans within the territory of the Republic of Croatia.

7. To guarantee repayment of the loan, on 12 January 2007 the applicant signed a memorandum of guarantee before a notary on the basis of which a mortgage on her immovable property was registered in the Land Registry.

8. On 23 April 2015, the applicant commenced proceedings in the referring court against the defendant, seeking a declaration of nullity of the single-loan contract of 5 January 2007 ('the contract') and of the memorandum of guarantee signed before a notary on 12 January 2007, and also seeking cancellation of the mortgage entry made in the Land Registry.

9. The referring court brought the proceedings to an end on 3 July 2017, but re-opened the case by decision of 10 August 2017 owing to the entry into force of the Law of 14 July 2017, on the basis that its provisions might be applicable to the main proceedings. The Government of the Republic of Croatia declared in its Opinion of 25 May 2017 that the, then, draft Law of 14 July 2017 should be allowed to take effect retroactively, given that the aim of the measure could not be attained in any other way.

10. According to the order for reference, it is not apparent from the Opinion of the Government of the Republic of Croatia that there is any protection of the rights of the debtor (of consumers and/or small businesses) in issue against dishonest dealing that might be recognised under EU law as an exception to the freedom to provide services. The contracts in question are those concluded within the period between 2000 and 2010, and after that period the Republic of Croatia acceded to the European Union, enabling foreign credit establishments temporarily to provide financial services, without any permit from the National Bank of Croatia.

11. Article 3(1) of the Law of 14 July 2017 provides for the nullity of loan contracts with international features concluded in the Republic of Croatia between a debtor and unauthorised creditor. Pursuant to Article 10, nullity takes effect from the moment the contract was entered into, and includes other legal acts that are consequential upon that contract.

12. Under Article 2, second indent, of the Law of 14 July 2017, an unauthorised creditor is a legal person who, by means of a loan contract with international features, has granted a loan to the debtor and, at the time the said contract was concluded, had its registered office outside of the Republic of Croatia and who provides or offers services involving the approval of loans in the Republic of Croatia, despite not fulfilling the requirements laid down in the relevant provisions for offering such services or not holding prescribed permits and/or approvals from the competent authorities of the Republic of Croatia.

13. Finally, the referring court states that it has been declared in the Croatian courts that the loan contracts are not void under Member State law in force at the time these contracts were concluded. The referring court also mentions paragraph 3.2 of the Conclusion of 12 April 2016 of the Supreme Court of the Republic of Croatia, pre-dating the Law of 14 July 2017, and drawn up following a meeting held between the President of the Civil Chamber of the Supreme Court of the Republic of Croatia and the Presidents of the Civil Chambers of the County Courts, which indicated that the said contracts are not void, since no such consequence is envisaged in the Zakon o bankama (Law on Banks), or in the Zakon o kreditnim institucijama (Law on Credit Establishments), that being the case up to 30 September 2015, when that consequence was provided for in the Law amending the Zakon o potrošačkom kreditiranju (Consumer Credit Law).

6 Ibid.

14. However, the referring court states that it remains unresolved as to whether, having regard to the assertion of the Government of the Republic of Croatia in the abovementioned Opinion, to the effect that, as a result of the retroactive effects of the Law of 14 July 2017, 'the same legal rules are established', discrimination has occurred against a creditor by virtue of changes to his legal status in the pending proceedings and from the economic losses suffered by it in the form of *lucrum cessans* due to non-payment of contractually prescribed interest.

15. By virtue of the declaration of nullity of the loan contracts and of the other related legal acts, the defendant is henceforth prevented from providing financial services. Therefore the referring court asks whether this is contrary to the freedom to provide services in the internal market in the EU and, possibly to the free movement of capital.

16. It is disputed between the parties whether the Law of 14 July 2017 applies to the defendant at all, whether the law of Croatia or the law of Austria applies to the contract, and whether vesting the courts of Croatia with jurisdiction, under Article 8(1) and (2) of the Law of 14 July 2017 is compatible with Regulation No 1215/2012.

17. Thus, the referring court has sent to the Court the following questions for a preliminary ruling.

'(1) Must Articles 56 and 63 of the Treaty on the Functioning of the European Union be interpreted as precluding the provisions of the Law on the nullity of loan contracts with international features concluded in the Republic of Croatia with an unauthorised creditor …, in particular the provisions of Article 10 of that law, which provides for the nullity of loan contracts and other legal acts that are consequential upon the loan contract concluded between a debtor (within the meaning of Articles 1 and 2, first indent, of the said law) and an unauthorised creditor (within the meaning of Article 2, second indent, of the same law) or are based on that contract, even if they were concluded before the entry into force of that law, that nullity taking effect from the moment the contract was entered into, with the result that each of the contracting parties is obliged to return to the other party everything received by it on the basis of the void contract and, when that is impossible or when the nature of the action taken is incompatible with restoration, adequate pecuniary compensation must be paid, based on the prices in force when the judicial decision is delivered?

(2) Must [Regulation No 1215/2012], in particular Articles 4(1) and 25, be interpreted as precluding provisions of Article 8(1) and (2) of the Law on the nullity of loan contracts with international features concluded in the Republic of Croatia with an unauthorised creditor, in which it is laid down that, in disputes relating to loan contracts with international features within the meaning of that law, the debtor may sue an unauthorised creditor before the courts of the State in which the latter has its registered office or, irrespective of where the unauthorised creditor has its registered office, before the courts of the place where the debtor resides or has his registered office, whereas an unauthorised creditor, within the meaning of that law, may commence proceedings against the debtor only in the courts of the State in which the latter resides or has his registered office?

(3) Is it a consumer contract within the meaning of Article 17(1) of Regulation No 1215/2012 and of the legal *acquis* of the Union if the recipient of the loan is a natural person who has concluded a loan contract in order to invest in holiday apartments with the aim of carrying on the business of offering tourists private board and lodging?

(4) Must Article 24(1) of Regulation No 1215/2012 be interpreted as meaning that jurisdiction is enjoyed by the courts of the Republic of Croatia to hear and determine proceedings seeking a declaration of nullity of a loan contract and of the corresponding memoranda of guarantee, together with cancellation of the registration of a mortgage in the Land Registry, when, in order to guarantee performance of the obligations under the loan contract, that mortgage was secured upon immovable property of the debtor situated within the Republic of Croatia?'

18. As noted above, the Court has requested an Opinion only in respect of the first question. Written observations were filed with the Court by the defendant, the Republic of Croatia, and the European Commission. All were present at the hearing that took place on 5 September 2018.

III. Summary of written observations with respect to the first question

19. The defendant argues that the Law of 14 July 2017 is not applicable to it for two reasons. First, the defendant is not an unauthorised lender within the meaning of Article 2 of that law, and second, the contract was not concluded in Croatia but in Austria, placing it outside of the Law of 14 July 2017 due to Article 1.

20. The defendant states that it has never proposed or provided credit services on the territory of Croatia, so that it cannot be considered an unauthorised lender. The application for credit was signed by the applicant and then sent to the defendant to its seat in Austria. Under the text of the contract it was concluded in the Republic of Austria.

21. The defendant operates only in the territory of Austria, in conformity with Austrian law. The fact that the contract was concluded with nationals of Croatia does not mean that the defendant operated in Croatia. The defendant contends that Croatian law actively allows Croatian nationals to contract with foreign lenders,[7] and that Croatian law also provides that loan contracts are concluded at the place of the seat of the lender or its domicile at the moment of the presentation of the offer.[8] The defendant points out that the applicant came to Austria, and poses the question as to why the Law of 14 July 2017 is directed at the defendant and not the applicant.

22. The defendant further argues that its position is supported by three judgments of Croatian courts issued after the entry into force of the Law of 14 July 2017,[9] and in this context questions whether Member States can derogate from EU rules on choice of law of a contract.[10]

23. Freedom to provide services prohibits both restrictions on the freedom across Member States and discrimination against service providers that are not established in the State of provision.[11] The effects of the Law of 14 July 2017 are more important for foreign lending services than lenders established in Croatia, so that indirect discrimination arises,[12] but direct discrimination is also present due to the definition of 'unauthorised lender' set out in Article 2 of the Law of 14 July 2017. Under EU law, a provider of services possessing all the authorisations in the Member State where the provider is established is equally authorised to provide services in other Member States.[13] It is further contended by the defendant that the Law of 14 July 2017 renders the provision of services in Croatia less attractive.

7 Reference is made in this regard to Article 28(3) of Zakona o deviznom poslovanju (Croatian law on foreign exchange transactions).

8 Reference is made in this regard to Article 252(2) of the Zakon o obveznim odnosima (the Croatian law relevant to obligation), *Narodne novine* No 35/2005, 41/2008, 125/2011, 78/2015.

9 Reference is made in this regard to the judgment of 26 September 2017 rendered by the Županijski sud u Zagrebu (County Court, Zagreb, Croatia) in case Gž-3798/15 and the judgments rendered on 18 October 2017 in case Gž-1811/17 and of 30 November 2017 in case Gž-2459/2017 by the Županijski sud u Splitu (County Court, Split, Croatia, and various judgments rendered at first instance, namely the judgments rendered by the Općinski građanski sud u Zagrebu (Municipal Civil Court, Zagreb, Croatia) in cases P-7448/14, P-123/17, P-4873/13 and P-1677/16, the judgment rendered by the Općinski građanski sud u Zagrebu, Stalna služba u Sesvetama (Municipal Civil Court, Zagreb, permanent branch of Sesvete), in case P-2334/2015 and the judgments rendered by the Općinski građanski sud u Varaždinu Municipal Civil Court, Varaždin, Croatia) in cases P-137/16 and P-1095/14.

10 The defendant refers to 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.

11 The defendant refers to the judgments of 3 December 1974, *van Binsbergen* (33/74, EU:C:1974:131, paragraph 22); and of 25 July 1991, *Collectieve Antennevoorziening Gouda* (C-288/89, EU:C:1991:323, paragraph 10).

12 The defendant refers to the judgment of 3 February 1982, *Seco and Desquenne & Giral* (62/81 and 63/81, EU:C:1982:34).

13 The defendant refers to the judgments of 25 July 1991, *Säger* (C-76/90, EU:C:1991:331, paragraph 12); of 26 October 1999, *Eurowings Luftverkehr* (C-294/97, EU:C:1999:524, paragraph 33); and of 20 October 2005, *Commission* v *France* (C-264/03, EU:C:2005:620, paragraph 66).

24. The defendant states that on no occasion has the Croatian legislature explained why it considers that the special regime applicable under the Law of 14 July 2017 to foreign nationals is justified in order to safeguard public order, public security, or the public health of the Republic of Croatia, and nor has the principle of proportionality been respected.[14] The defendant asserts that a restriction on competition has arisen.

25. Croatia contests the admissibility of the first to third questions. With regard to the first question, Croatia argues that the Court is competent to interpret EU law from the date of accession of a Member State to the European Union.[15] Given that Croatia joined the European Union on 1 July 2013, and that the nullity of the contract will take place from the date of its conclusion, namely 5 January 2007, the Court is not competent to respond to the first question.

26. Croatia also argues that Question 1 is hypothetical. The referring court is yet to determine that the contract was concluded in Croatia.[16]

27. In terms of substance, Croatia contends that the Law of 14 July 2017 was adopted for the legitimate goal of protecting the large number of Croatian citizens who, in the period prior to accession of Croatia to the EU, concluded credit contracts with lenders that exercised their activities without the authorisations required by the Croatia authorities.

28. For Croatia, Articles 53 and 63 TFEU can only be called on to protect lawful rather than unlawful activities, and no trader can have legitimate expectations with respect to the latter.[17] Croatia adds that the Law of 14 July 2017 was passed after all other legal avenues had been exhausted for protecting Croatian citizens against these illegal activities.

29. Finally, Croatia points out that the Law of 14 July 2017 amounts only to 'false' or 'quasi' retroactivity, given that the law on nullity does not apply to legal situations that are extinguished. There is no register of unauthorised lenders in Croatia so the "quasi" retroactivity was the only effective way of protecting debtors. The absence of a register of foreign lenders also means that it is impossible to impose sanctions or administrative measures in a uniform manner.

30. The Commission makes no specific arguments on the admissibility of the first question. However, it states that if the national court were to decide that Austrian law applies, EU law would not be pertinent to the dispute. The Commission therefore answers the questions referred on the contingency that the contract is governed by Croatian law.

31. The Commission argues that EU law applies *ratione temporis* to the main proceedings because, in the absence of contrary provision in the Treaty of accession of a new Member State, EU law applies from the date of accession to the future effects of situations arising prior to that new Member State's accession to the European Union.[18] There is no such derogation in Croatia's Treaty of Accession.[19] Given that the effects of the contract in issue were not extinguished on 1 July 2013, the main proceedings are governed by EU law. The Commission also places reliance more generally on the fact that the Law of 14 July 2017 came into force after Croatian accession.

14 The defendant refers to the judgment of 13 May 2003, *Müller-Fauré and van Riet* (C-385/99, EU:C:2003:270, paragraph 68).

15 Croatia relies on the order of 5 November 2014, *VG Vodoopskrba* (C-254/14, not published, EU:C:2014:2354, paragraph 10 and the case-law cited).

16 Croatia refers to Article 1 of the Law of 14 July 2017 and the judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 35 and the case-law cited).

17 Croatia refers to the judgment of 30 June 2005, *Branco* v *Commission* (T-347/03, EU:T:2005:265, paragraph 102).

18 The Commission refers to the judgments of 2 October 1997, *Saldanha and MTS* (C-122/96, EU:C:1997:458, paragraph 14); of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212, paragraphs 27 to 34); and of 29 January 2002, *Pokrzeptowicz- Meyer* (C-162/00, EU:C:2002:57, paragraph 50).

19 Above, footnote 2.

32. The Commission is of the view that, in the context of freedom to provide services under Article 56 TFEU, the Law of 14 July 2017 is both discriminatory on the basis of the nationality of the Member State in which the service provider is established,[20] and an indistinctly applicable measure restricting the freedom to provide services.[21]

33. With respect to the former, the Commission argues that unauthorised lenders established outside of Croatia are treated less favourably than unauthorised lenders inside Croatia, because there is no retroactivity in the law applicable to nullity of certain contracts entered into by unauthorised lenders established inside Croatia,[22] and in any event, according to a conclusion of the Supreme Court of 12 April 2016, nullity can only apply to consumer credit contracts.

34. With respect to the latter, the Commission contends that precluding future lenders having all the necessary authorisations from their home Member States from providing loan services in Croatia is a manifest breach of mutual recognition and an infringement of the freedom to provide services.[23] Further, nullity from the date that a credit contract is concluded and the obligations with respect to restitution imposed by the Law of 14 July 2017 renders less attractive, to the point of rendering impossible, the provision of services.

35. The Commission states that if a restrictive provision is discriminatory, it may be justified only on the grounds of public policy, public safety or public health, laid down in Article 52 TFEU.[24] Overriding reasons in the public interest, which may justify a restriction on the freedoms guaranteed by Articles 49 and 56 TFEU, cannot justify discriminatory restrictions.[25]

36. The Commission acknowledges that, with regard to indistinctly applicable impediments to the freedom to provide services, the Court has recognised certain overriding reasons of public interest, capable of justifying a restriction on the freedom to provide services, such as the fidelity of commercial contracts, consumer protection, protection of the recipient of services from services provided by unqualified persons, the maintenance of the good reputation of the national financial sector, and the proper functioning of financial services.[26] However, the Law of 14 July 2017 mentions none of these objectives, does not protect them in any coherent manner, and is disproportionate, particularly given the breadth of its scope to all credit contracts with a foreign element. The retroactivity of the Law of 14 July 2017 also offends legal certainty.

20 In this context the Commission refers to the judgment of 25 July 1991, *Collectieve Antennevoorziening Gouda* (C-288/89, EU:C:1991:323, paragraph 10).

21 In this context the Commission refers to the judgments of 10 May 1995, *Alpine Investments*, (C-384/93, EU:C:1995:126, paragraphs 28 and 34); of 15 June 2006, *Commission* v *France* (C-255/04, EU:C:2006:401, paragraph 37); of 25 June 2009, *Commission* v *Austria* (C-356/08, EU:C:2009:401, paragraph 39); of 12 July 2012, *HIT and HIT LARIX* (C-176/11, EU:C:2012:454, paragraph 16); and of 18 January 2018, *Wind 1014 and Daell* (C-249/15, EU:C:2018:21, paragraph 21).

22 The Commission refers to Article 19 j of the law on Consumer Credit (Official Journal of the Republic of Croatia Nos 75/2009, 112/2012, 143/2013, 147/2013, 9/2015, 78/2015, 102/2015 and 52/2016), inserted by the law modifying and complementing the law on consumer credit (Journal officiel de la République de Croatie nº 102/2015).

23 The Commission refers to Article 33 and Annex 1 to Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338); judgments of 9 March 2000, *Commission* v *Belgium* (C-355/98, EU:C:2000:113, paragraphs 37 and 38); and of 25 July 1991, *Säger* (C-76/90, EU:C:1991:331, paragraph 14).

24 The Commission refers to the judgments of 23 September 2003, *Ospelt and Schlössle Weissenberg* (C-452/01, EU:C:2003:493, paragraph 34), and of 28 January 2016, *Laezza* (C-375/14, EU:C:2016:60, paragraphs 25 and 26).

25 Judgment of 28 January 2016, *Laezza* (C-375/14, EU:C:2016:60, paragraph 25).

26 The Commission refers to the judgments of 10 May 1995, *Alpine Investments* (C-384/93, EU:C:1995:126, paragraph 44); of 9 July 1997, *De Agostini and TV-Shop* (C-34/95 to C-36/95, EU:C:1997:344, paragraph 53); of 25 July 1991 *Collectieve Antennevoorziening Gouda* (C-288/89, EU:C:1991:323, paragraph 14); of 30 March 2006, *Servizi Ausiliari Dottori Commercialisti* (C-451/03, EU:C:2006:208, paragraph 38); of 18 July 2013, *Citroën Belux* (C-265/12, EU:C:2013:498, paragraphs 38 to 40), and Case E-08/16 *Netfonds* [2017] EFTA Ct. Rep. 163, paragraph 113.

37. Finally, the Commission acknowledges that the Court will in principle examine the measure in dispute in relation to only one of the two freedoms, that is the freedom to provide services or free movement of capital, if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it.[27] The Commission adds that in any event the Law of 14 July 2017 is also inconsistent with the free movement of capital under Article 63(1) TFEU.[28]

IV. Assessment

A. Preliminary observations

1. Admissibility

38. The arguments made by Croatia to the effect that the order for reference is hypothetical because the referring court is yet to decide whether the contract in issue is governed by the law of Croatia or Austria is to be rejected. The presumption of relevance is not to be set aside.[29]

39. There are no hypothetical facts in the main proceedings,[30] and the EU rules the interpretation of which has been sought by the referring court already display legal effects.[31] The fact that the Court may be constrained to work on assumptions,[32] such as that the referring court will ultimately decide that the contract is governed by the law of Croatia, does not render the judgment advisory,[33] particularly when Regulation No 593/2008, relied on by the defendant, on the law applicable to contractual obligations, is closely bound up with Regulation No 1215/2012, on which the referring court has sent three questions for a preliminary ruling.

40. An answer to Question 1 is therefore necessary for the effective resolution of a dispute,[34] particularly when, under the established case-law of the Court, in the light of the division of responsibilities between the national courts and the Court of Justice, 'the referring court cannot be required to make all the findings of fact and of law required by its judicial function first before it may then bring the matter before the Court. It is sufficient that both the subject matter of the dispute in the

27 Judgment of 3 October 2006, *Fidium Finanz* (C-452/04, EU:C:2006:631, paragraphs 30 and 34).

28 The Commission refers, inter alia, to the judgments of 16 March 1999, *Trummer and Mayer* (C-222/97, EU:C:1999:143, paragraph 23); of 26 April 2012, *van Putten* (C-578/10 to C-580/10, EU:C:2012:246, paragraphs 32 to36); of 3 October 2013, *Itelcar* (C-282/12, EU:C:2013:629, paragraph 14); of 26 September 2000, *Commission* v *Belgium* (C-478/98, EU:C:2000:497, paragraph 18); of 13 May 2003, *Commission* v *United Kingdom* (C-98/01, EU:C:2003:273, paragraph 43); of 4 June 2002, *Commission* v *France* (C-483/99, EU:C:2002:327, paragraph 40); of 1 July 2010, *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397, paragraph 31); of 4 June 2002, *Commission* v *Portugal* (C-367/98, EU:C:2002:326, paragraphs 44 and 45); of 28 September 2006, *Commission* v *Netherlands* (C-282/04 and C-283/04, EU:C:2006:608, paragraph 18); of 8 July 2010, *Commission* v *Portugal* (C-171/08, EU:C:2010:412, paragraph 48); of 25 January 2017, *Festersen* (C-370/05, EU:C:2007:59, paragraph 24); of 8 May 2013, *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 44), and of 22 October 2013, *Essent and Others* (C-105/12 to C-107/12, EU:C:2013:677, paragraph 39, and the case-law cited).

29 See e.g. judgment of 27 October 2016, *Audace and Others* (C-114/15, EU:C:2016:813, paragraph 34).

30 Cf. the judgment of 28 September 2006, *Gasparini and Others* (C-467/04, EU:C:2006:610, paragraphs 44 and 45).

31 See, in this regard, the Opinion of Advocate General Szpunar in *RO* (C-327/18 PPU, EU:C:2018:644, point 34).

32 Ibid., point 36.

33 See my Opinion in *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU EU:C:2018:517, point 32), referring to judgments of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraph 38); and of 27 February 2014, *Pohotovosť* (C-470/12, EU:C:2014:101, paragraphs 28 and 29).

34 Judgment of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraph 38 and the case-law cited).

main proceedings and the main issues raised for the [EU] legal order may be understood from the reference for a preliminary ruling, in order to enable the Member States to submit their observations in accordance with Article 23 of the Statute of the Court of Justice and to participate effectively in the proceedings before the Court'. [35]

41. The first question is therefore admissible.

2. Applicability ratione temporis of EU law

42. As argued by the Commission (see point 31 above) under the established case-law of the Court, in the absence of contrary provision in the Treaty of accession of a new Member State, EU law applies from the date of accession to the *future effects* of situations arising prior to that new Member State's accession to the European Union. [36] At the hearing nothing was tabled to suggest that the position of debtors such as the applicant were a feature of the negotiations with Croatia. As noted in the Commission's written observations, there is no such derogation in Croatia's Treaty of Accession. [37]

43. The effects of the contract in issue were not extinguished on 1 July 2013, so the main proceedings are governed by EU law. The general approach to the applicability of EU law *ratione temporis* when a Member State accedes to the EU is one of ongoing legal effects. Legal relationships that are unexhausted at the time of a Member State's accession 'must adapt to the new legal framework'. [38] It is inarguable that the contract in issue has on-going legal effects, given that it is still subject to guarantee by a mortgage, which the applicant seeks in the main proceedings to have set aside, and the contract itself states that it terminates on 31 October 2021. The Court has held that non-payment of a contract debt after accession, with respect to a contract concluded before accession, is governed by EU law. [39]

44. EU law is therefore applicable *ratione temporis* to the main proceedings.

3. Which provisions of EU law are pertinent?

45. The Court has consistently held that, where a matter has been subject to exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law [40] such as freedom to provide services under Article 56 TFEU and free movement of capital under Article 63 TFEU.

35 Ibid., paragraph 39 and the case-law cited. See also recently the judgment of 20 September 2018, *Danko and Danková* (C-448/17, EU:C:2018:745, paragraphs 55 to 58), where a question referred was declared admissible by the Court, even though it was argued that the referring court would not adjudicate on the unfair nature of the relevant contractual term should a consumer organisation be granted standing.

36 My emphasis. As noted above, the Commission refers to the judgments of 2 October 1997, *Saldanha and MTS* (C-122/96, EU:C:1997:458, paragraph 14); of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212, paragraphs 27 to 34); and of 29 January 2002, *Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 50).

37 Above, point 31.

38 Opinion of Advocate General Bobek in *Nemec* (C-256/15, EU:C:2016:619, point 40). See principally in this regard the judgments of 2 October 1997, *Saldahna and MTS* (C-122/96, EU:C:1997:458); of 14 June 2007, *Téléfonica O2 Czech Republic* (C-64/06, EU:C:2007:348); of 12 November 2009, *Elektrownia Pątnów II* (C-441/08, EU:C:2009:698); of 15 April 2010, *CIBA* (C-96/08, EU:C:2010:185); of 12 September 2013, *Kuso* (C-614/11, EU:C:2013:544), and of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72). I put to one side the judgment of the Grand Chamber of the Court of 10 January 2006, *Ynos* (C-302/04, EU:C:2006:9), given that pertinent facts occurred after the legal system of Hungary had been approximated with the relevant directive but before Hungarian accession to the EU on 1 May 2004.

39 See the judgment of 15 December 2016, *Nemec* (C-256/15, EU:C:2016:954, paragraphs 21 to 27, particularly at paragraph 23).

40 Judgment of 22 June 2017, *E. ON Biofor Sverige AB* (C-549/15, EU:C:2017:490, paragraph 76 and the case-law cited).

46. Directive 2013/36 entered into force on 17 July 2013 and, subject to conditions, this directive guarantees the provisions of cross-border credit services.[41] However, the contract in issue was signed, and the funds were supplied, on 5 January 2007, and in any event Directive 2013/36 is not a measure providing for exhaustive harmonisation.

47. The Court has held recently that it 'follows from recital 15 of [Directive 2013/36] that it seeks to achieve *the necessary and sufficient degree of harmonisation* to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the European Union and the application of the principle of home Member State prudential supervision.'[42]

48. That being so, the main proceedings fall to be determined by primary EU law, and more specifically freedom to provides services under Article 56 TFEU, and to the exclusion of the free movement of capital under Article 63 TFEU.[43]

49. Under the established case-law, in order to determine whether national legislation falls within the scope of one or other of the fundamental freedoms guaranteed by the EC Treaty, the purpose of the legislation concerned must be taken into consideration.[44]

50. The court has held that, 'in the light of the Treaty rules concerning the freedom to provide services, it is clear from the Court's settled case-law that the business of a credit institution consisting of granting credit constitutes a service within the meaning of Article 56 TFEU'.[45] National legislation 'whose purpose relates principally to the provision of financial services falls within the Treaty provisions relating to the freedom to provide services, even though it could result in or involve capital movements'.[46] On the other hand, 'national measures whose purpose relates at least principally to capital movements falls within the field of application of Article 64(1) TFEU'.[47]

51. The Law of 14 July 2017 exhibits no feature suggesting that it aims at regulation of capital markets. On the contrary, it is addressed to relations between 'debtors and unauthorised lenders', it is confined to "credit contracts" only, rather than concerning more generally the broader capital market. It is only credit contracts that are to be declared null and void.

52. Given that the Law of 14 July 2017 impedes access to the Croatian market for the provision of credit for companies established outside of Croatia, it primarily affects freedom to provide services, and it is inarguable that this effect is merely secondary to any impediment to the free movement of capital.[48] The restrictive effects of those rules on the free movement of capital are merely an inevitable consequence of the restriction imposed on the provisions of services, and it is not necessary to consider whether the rules are compatible with Article 63 TFEU.[49]

41 Ibid., Article 33 and Annex 1.

42 My emphasis. See judgment of 13 September 2018, *Buccioni* (C-594/16, EU:C:2018:717, paragraph 23).

43 It is to be noted that, on 5 January 2007, the date of the contract, Croatia was bound, under Article 57(1) of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part (OJ 2005 L 26, p. 3), to refrain from taking 'any measures or actions which render the conditions for the supply of services by Community or Croatian nationals or companies which are established' in a Party to the Agreement, 'other than that of the person for whom the services are intended significantly more restrictive as compared to the situation existing on the day preceding the date of entry into force of the Agreement', that is 1 February 2005 (http://europa.eu/rapid/press-release_IP-05-122_en.htm?locale=en). Pursuant to Article 57(2), disagreements with respect to Article 57(1) were to be resolved by consultation between the parties.

44 See recently the Opinion of Advocate General Mengozzi in *Fidelity Funds* (C-480/16, EU:C:2017:1015, point 17, referring to judgments of 1 July 2010, *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397, paragraph 26), and of 21 May 2015, *Wagner-Raith* (C-560/13, EU:C:2015:347, paragraph 31).

45 Judgment of 12 July 2012, *SC Volksbank România* (C-602/10, EU:C:2012:443, paragraph 72 and the case-law cited).

46 Judgment of 21 May 2015, *Wagner-Raith* (C-560/13, EU:C:2015:347, paragraph 32).

47 Ibid., paragraph 34.

48 Cf. judgment of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraphs 39 to 41).

49 See by analogy judgment of 3 October 2006, *Fidium Finanz* (C-452/04, EU:C:2006:631, paragraph 49).

53. It is to be noted that, in any event, restrictions on the free movement of capital are subject to compliance with the principle of proportionality [50] as much as restrictions on the freedom to provide services. As observed by Advocate General Kokott in her Opinion in *Trustees of the P Panayi Accumulation & Maintenance Settlements*, in purely intra-Union situations, as is the case in the main proceedings, the relationship between the freedom of establishment, the free movement of capital and the freedom to provide services may need not be resolved, since the conditions governing those fundamental freedoms are largely identical. [51]

54. Therefore, if the Court were to disagree with this aspect of my analysis, and find that the main proceedings are governed by the free movement of capital rather than the freedom to provide services, the Law of 14 July 2017 would remain incompatible with EU law for non-compliance with the principle of proportionality (see analysis below at points 66 to 69).

55. Finally, the defendant is wrong when it argues that it was merely providing credit services within Austria, thereby implying that the cross-border element that is required before Article 56 TFEU can be applicable was absent from the main proceedings.

56. It was uncontested that the loan was secured via an intermediary resident in Croatia, and that the loan in issue has been secured via a mortgage against a property located in Croatia, where the debtor is resident. This is sufficient in the light of the fact that, under the established case-law of the Court, in order for Article 56 TFEU to apply 'there must be a foreign element', [52] in the sense that Article 56 TFEU prohibits restrictions on freedom to provide services within the European Union in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended, and the situation is not one which is confined in *all* respects within a single Member State. [53]

B. Substance

57. The concept of a restriction extends to measures taken by a Member State which, although applicable without distinction, affect access to the market with regard to undertakings from other Member States and thereby hinder trade within the European Union. [54]

58. The Law of 14 July 2017 amounts to a restriction because contracts concluded without authorisation from the National Bank of Croatia are declared void. The parties are barred from completing the terms of a contract for a service in respect of nationals of a Member State (Austria) who are established in a Member State (Austria) other than that of the person for whom the services are intended (Croatia).

59. However, the Law of 14 July 2017 is discriminatory against undertakings established outside of Croatia wishing to provide credit services in that Member State for two reasons.

60. First, the definition of 'unauthorised lender' in Article 2 of the Law of 14 July 2017 refers to 'all moral persons…whose statutory seat is situated outside of Croatia'. This means that the law does not apply to lenders established in Croatia.

50 E.g. judgment of 3 October 2013, *Itelcar* (C-282/12, EU:C:2013:629, paragraph 32).

51 C-646/15, EU:C:2016:1000, point 41. The Advocate General refers to her Opinion in *SGI* (C-311/08, EU:C:2009:545, points 37 to 38), where the Court held that the freedom of establishment was alone applicable — judgment of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 36).

52 Judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association* (C-591/15, EU:C:2017:449, paragraph 46).

53 My emphasis. Ibid., paragraphs 32 and 33 and the case-law cited.

54 Opinion of Advocate General Wahl, *Laezza* (C-375/14, EU:C:2015:788, point 56, referring to judgments of 12 December 2013, *SOA Nazionale Costruttori* (C-327/12, EU:C:2013:827, paragraph 45 and the case-law cited); and of 15 October 2015, *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:685, paragraph 67).

61. Second, as pointed out by the Commission (see point 33 above) it would seem that unauthorised lenders established outside of Croatia are treated less favourably than unauthorised lenders inside Croatia, due to the absence of retroactivity in the law applicable to nullity of certain contracts entered into by unauthorised lenders established inside Croatia,[55] and in view of the judgment of the Supreme Court of 12 April 2016, to the effect that nullity can only apply to consumer credit contracts.

62. Thus, to the extent that the Law of 14 July 2017 can be justified, it can only be on the grounds of public policy, public security or public health, laid down in Article 52(1) TFEU,[56] to the exclusion of certain overriding reasons of public interest, capable of justifying indistinctly applicable restrictions on the freedom to provide services, such as the fidelity of commercial contracts, consumer protection, protection of the recipient of services from services provided by unqualified persons, the maintenance of the good reputation of the national financial sector, and the proper functioning of financial services[57] (see Commission's observations above, point 36).

63. At the hearing reference was made by Croatia to the protection of public order, preservation of the reputation of the financial sector and its functioning, protection of the fundamental rights of Croatian citizens, and particularly the weaker party to a contract, and consumer protection. Mention was also made of the fact that between 2000 and 2010 Croatian nationals had taken three thousand credits from unauthorised lenders, in the vicinity of EUR 360 million, but that precise data was not available due to the illegal nature of the activities. This was said to prove that the activity influenced the functioning of financial services in Croatia and the creation of a parallel system of illicit credits that harmed the financial system of the State and public order.

64. This was also said by Croatia to affect the fate of many thousands of the citizens of Croatia, and the Law of 14 July 2017 was a measure of last resort, and a suggestion was also made by Croatia that potential debtors of doubtful credit worthiness were contacted with a view to acquisition of their property, as evidenced by the fact that on the island of Rab 220 properties have been repossessed in this manner, and 344 procedures have been instituted.

65. As already mentioned, over-riding reasons of public interest (see point 62 above) cannot be relied on with respect to discriminatory restrictions on freedom to provide services. Nor are the considerations referred to by Croatia sufficient to justify the law of 14 July 2017 on the basis of any one of public policy, public security, or public health under Article 52(1) TFEU, given the breadth of the law's scope.

66. None of this is sufficient to provide a legitimate policy reason for the putting in place of a law which provides for the nullity of *all* loan contracts with international features, and extending back to contracts entered into up to 17 years ago. Generalised iterations of hardship that appear in Croatians written observations (see above, point 27) were not supplemented at the hearing to a degree that was sufficient to prove a legitimate basis of derogation, when balanced against the scale of the impediment to freedom to provide services imposed by the Law of 14 July 2017.

55 The Commission refers to Article 19j of the Law on consumer credit (*Narodne novine* Nos 75/2009, 112/2012, 143/2013, 147/2013, 9/2015, 78/2015, 102/2015 and 52/2016), inserted by the law modifying and complementing modifying and complementing the law on consumer credit (*Narodne novine* No 102/2015),

56 Judgment of 28 January 2016, *Laezza* (C-375/14, EU:C:2016:60, paragraph 26).

57 The Commission refers to the judgments of 9 July 1997, *De Agostini and TV-Shop* (C-34/95 to C-36/95, EU:C:1997:344, paragraph 53); of 25 July 1991 *Collectieve Antennevoorziening Gouda* (C-288/89, EU:C:1991:323, paragraph 14); of 18 July 2013, *Citroën Belux* (C-265/12, EU:C:2013:498, paragraphs 38 to 40); of 30 March 2006, *Servizi Ausiliari Dottori Commercialisti* (C-451/03, EU:C:2006:208, paragraph 38); of 10 May 1995, *Alpine Investments* (C-384/93, EU:C:1995:126, paragraph 44); and Case E-08/16 *Netfonds* [2017] EFTA Ct. Rep. 163, paragraph 113.

67. Further, under the established case-law of the Court, specific requirements in terms of qualifications or authorisations imposed by the Member State in which the services are provided must be objectively necessary and must not exceed what is necessary to attain those objectives. [58]

68. By virtue of its blanket nature, the Law of 14 July 2017 manifestly exceeds the limits of what was required to achieve a legitimate goal it might have pursued.

69. Alleviation of the (public policy) wrong pursued could only be justified by a discriminatory and blanket rule declaring null and void all loan contracts with international features that have been in place for up to 17 years, (and which remained operative for many years, notwithstanding the absence of authorisation by the National Bank of Croatia) by presentation by Croatia of cogent evidence of a pressing problem requiring extreme action. It is established in the case-law that 'it is the Member State wishing to rely on an objective capable of justifying the restriction of the freedom to provide services which must supply the court called on to rule on that question with all the evidence of such a kind as to enable the court to be satisfied that the measure does indeed comply with the requirements deriving from the principle of proportionality'. [59] Such evidence has not been presented.

70. Further, when Member States seek to justify rules restricting freedom to provide services, they are to comply with general principles of law, including legal certainty. [60] Under the classic formulation of the Court in *Fedesa*, 'in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respect'. [61]

71. The context of the main proceedings is Member State non-compliance with legal certainty when justifying restriction of free movement, but that makes no difference to the application of the substantive rule. [62] The case file features no evidence of consideration of the defendant's legitimate expectations, even though the contract in issue was in place for ten years before the decision of the Croatian legislature, reflected in the Law of 14 July 2017, to have it declared null and void with retroactive effect.

72. Finally, it is worth recalling that EU law indeed protects debtors who have been treated unfairly in the context of consumer credit contracts, including those featuring a foreign element. This is reflected in the Court's voluminous case-law interpreting Directive 93/13/EEC on unfair terms in consumer contracts [63] in such a factual context. [64] If such circumstances arise in Croatia, this case-law will self-evidently apply. [65]

58 Judgment of 25 July 1991, *Säger* (C-76/90, EU:C:1991:331, paragraph 15).

59 Judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 50 and the case-law cited).

60 E.g. judgment of 20 December 2017, *Global Starnet* (C-322/16, EU:C:2017:985, paragraphs 44 and 45 and the case-law cited).

61 The judgment of 13 November 1990, *Fédesa and Others* (C-331/88, EU:C:1990:391, paragraph 45).

62 See e.g. the judgment of 20 September 2018, *Motter* (C-466/17, EU:C:2018:758, paragraph 52).

63 OJ 1993 L 95, p. 29.

64 See e.g. recently the judgments of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750); of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367); and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703).

65 See also e.g. 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 (OJ 2008 L 133, p. 66) and the judgment of 12 July 2012, *SC Volksbank România* (C-602/10, EU:C:2012:443).

V. Conclusion

73. I therefore propose the following answer to the first question referred by the Općinski sud u Rijeci (Municipal Court, Rijeka, Croatia):

In the circumstances of the main proceedings, Article 56 TFEU is to be interpreted as precluding a Member State law which provides for the nullity of loan contracts, and retroactively from their date of conclusion, along with other legal acts that are consequential upon such loan contracts, when they are entered into between a lender established in a Member State other than of the person for whom the services are intended, although the lender was not in possession of the authorisations required from the competent authorities of that Member State at the time the contract was concluded.