JUDGMENT No 263 YEAR 2022

In this case, the Court considered a referral from the Ordinary Court of Turin questioning the constitutionality of a provision of the Consolidated Law on Banking. The provision under review dealt with the scenario of early repayment of consumer credit agreements. The referring court alleged that the legislator, in adopting the provision, breached Italy's obligations as a member of the European Union *post factum* because the provision clashed with EU Directive 2008/48/EC as interpreted by the European Court of Justice. The Banking Law provision specified that, for early repayment of certain past agreements, an earlier set of rules applied – rules which had since been replaced by new ones aiming to comply with the *Lexitor* case, a recent European Court interpretation of the European Directive. Given the principle of retroactive effect of the European Court's preliminary rulings – an effect which may only be temporally limited by the European Court itself, and only in the text of the same preliminary ruling – the referring court alleged that the Italian legislator improperly required the application of different rules to past agreements in an attempt to shield these agreements from the retroactive effect of the European Court's interpretation of the European Directive. The Court agreed that the provision was unconstitutional, but only in part. It left in place the portion of the provision referring merely to an earlier provision of law, finding that this earlier legal provision could be interpreted in such a way as to conform with the EU Directive, as interpreted by the European Court. On the contrary, the Court struck down a portion of the provision that tied its application to earlier secondary provisions of the Bank of Italy's transparency and supervision rules. Since these could not be interpreted in such a way as to comply with the European Directive as interpreted by the European Court, the reference to them was held to be unconstitutional.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

[omitted]

Findings of fact

[omitted]

Conclusions on points of law

1.– With a referral order of 2 November 2021, registered as No 8 of the 2022 Register of Referral Orders, the First Civil Division of the Ordinary Court of Turin raises questions as to the constitutionality of Article 11-*octies*(2) of Decree-Law No 73/2021, as converted, in reference to Articles 3, 11, and 117(1) of the Constitution in relation to Article 16(1) of Directive 2008/48/EC, as interpreted by the Court of Justice of the European Union in its judgment in the *Lexitor* case. The questions as to constitutionality are raised "to the extent that: - [the provision] sets forth that, in the event of early extinguishment of credit agreements concluded prior to the entry into force of the conversion law of the present Decree, the provisions of Article 125-*sexies* of the consolidated text found in Legislative Decree No 385/1993 and the secondary rules contained in the Bank of Italy's transparency and supervision provisions in force at the time the contracts were concluded shall continue to apply; [and] – [the provision] limits the principle, expressed in Article 16(1) of Directive 2008/48/EC, as interpreted by the

Court of Justice of the European Union in its judgment of 11 September 2019 in Case C-383/18, and implemented in amended Article 125-*sexies*(1) of the Consolidated Law on Banking by which 'consumers who, in whole or in part, pay the credit owing to the creditor in advance shall have the right to a reduction of interest and of all the costs included in the total cost of the credit, excluding taxes'" to only those agreements concluded after the law's entry into force.

2.– As to the relevance requirement, the referring court points out that its constitutional questions affect its decision, "because the contract at issue in the case was concluded while Directive 2008/48/EC was in force, but before 25 July 2021, and was extinguished early when the customer fully paid off the capital." As a result, "the existence of the right to request compensation, *pro rata temporis*, of the upfront costs, which is the specific object of the appeal," depends upon this Court's acceptance of the challenges raised.

As to the requirement that the question not be manifestly unfounded, the Order states that the challenged provision, in contrast with Articles 11 and 117(1) of the Constitution, entails a *post factum* breach of Directive 2008/48/EC and violates the principle of retroactive effect of the preliminary rulings of the Court of Justice, which requires courts to apply the rule as interpreted, including when it comes to legal relationships formed prior to the preliminary ruling.

The referring court further alleges that the provision breaches Article 3 of the Constitution to the extent that, contrary to European rules, it effects an unreasonable disparity of treatment between agreements concluded prior to 25 July 2021 and those concluded after that date.

[omitted]

8.– On the merits, the questions are well founded, as described below.

9.– As a preliminary matter, this Court must reconstruct the regulatory and judicial frameworks that led to the adoption of the challenged provision, that is, Article 11-*octies*(2) of Decree-Law No 73/2021, added by conversion to Law No 106/2021.

9.1.– On 23 April 2008 Directive 2008/48/EC was approved, regulating credit agreements for consumers and repealing Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations, and administrative provisions of the Member States concerning consumer credit.

Unlike its predecessor, the new set of rules took the approach of full harmonisation, intended to guarantee that "all consumers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market" (recital 9). To that end, Article 22(1) provides that, "[i]nsofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive".

The harmonised provisions include Article 16(1), according to which "[t]he consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement. In such cases, he shall be entitled to a reduction in the total cost of the credit, such reduction consisting of the interest and the costs for the remaining duration of the contract".

The right to the reduction is, therefore, connected to the "total cost of the credit". This term is defined in Article 3(1)(*g*) to include "all the costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor, except for notarial costs; costs in respect of ancillary services relating to the credit agreement, in

particular insurance premiums, are also included if, in addition, the conclusion of a service contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed".

With these provisions in place to offer protection to consumers, the subsequent paragraphs of Article 16 provide, for the benefit of creditors, that they "shall be entitled to fair and objectively justified compensation for possible costs directly linked to early repayment of credit provided that the early repayment falls within a period for which the borrowing rate is fixed". The limits on this compensation are established in paragraph 2, and paragraph 4(*b*) allows Member States to derogate from the harmonised rules concerning these limits. Under this provision, a creditor may "exceptionally claim higher compensation if he can prove that the loss he suffered from early repayment exceeds the amount determined under paragraph 2".

9.2.– Directive 2008/48/EC was implemented in the Italian legal system by Legislative Decree No 141/2010, Article 1 of which entirely replaced Title VI, Heading II, of the Consolidated Law on Banking.

In particular, the rules governing early repayment were inserted in Article 125-*sexies* of the Consolidated Law on Banking, paragraph 1 of which, prior to the recent modifications, read: "[t]he consumer shall be entitled to make early repayment at any time, in whole or in part, of the amount owed to the creditor. In the event of early repayment, the consumer has the right to a reduction of the total cost of the credit equal to the amount of interest and costs owed for the remaining life of the contract".

The concept of the total cost of the credit appears in Article 121(1)(*e*) of the Consolidated Law on Banking, which states that "the 'total cost of the credit' refers to the interest and all other costs, including commissions, taxes, and any other kind of fee, with the exception of notarial expenses, which the consumer must pay in relation to the credit agreement, and which are known to the creditor". Article 121(2) further specifies that "also included in the total cost of the credit are costs for ancillary services relating to the credit agreement, including insurance premiums, if the conclusion of a service contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed".

9.3.– In the early years of applying Article 125-*sexies*(1) of the Consolidated Law on Banking, the courts and the Banking and Financial Ombudsman (*Arbitro Bancario Finanziario* – ABF) adopted an interpretation of the provision that tied the right to a reduction of costs arising from early repayment exclusively to types of costs which accrue over time (so-called recurring costs), and excluded costs associated with obtaining the loan, which are paid in full prior to the potential early repayment (so-called upfront costs). The provision may be interpreted in light of the doctrine of consideration: costs associated with services useful for the duration of the agreement are considered reimbursable, while the opposite is true for one-time costs associated with services whose purpose has already been fulfilled.

While the legal practice drew a distinction between upfront, non-recurring costs and recurring costs that qualify for reduction, in reality, misconduct in categorizing and allocating costs has been reported. In its decisions, the ABF reacted to this by providing that, in cases of conduct lacking transparency at the time the terms of the agreement were stipulated, any costs established for reasons not clearly provided would be considered reimbursable.

The Bank of Italy, in turn, issued a regulation on 9 February 2011 on "Transparency of operations and of banking and financial services – integrity in intermediary-client

interactions – Implementation of the Directive on consumer credit" (published in the *Official Journal of the Italian Republic* of 16 February 2011, general series No 38 – ordinary supplement No 40), which amended its earlier document of 29 July 2009.

Section VII of this regulation (Consumer Credit, paragraph 5.2.1(*q*), note 3) reads as follows: "[i]n credit agreements backed by one fifth of one's salary or pension, and in legally equivalent agreements, the calculation of the reduction of the total cost of the credit to which the consumer is entitled in the event of early repayment includes the charges that accrue over the contract period and that must, therefore, be reimbursed to the consumer by the creditor or third parties to the extent they have not accrued, provided that the consumer has paid them to the creditor in advance". Later sections explain that the internal procedures of intermediaries must quantify "in a clear, detailed, and unequivocal way any charges that will accrue over the contract period and which, in the case of early repayment, must be reimbursed to the consumer by the creditor or third parties to the extent not accrued, where the consumer has paid them to the creditor in advance" (Section VII-*bis*, "Surrender of portions of salary, wages or pension", and Section XI, "Organizational Requirements", paragraph 2(1), point 3, note 1).

Ultimately, secondary rules support the interpretation that the costs subject to reduction correspond to recurring costs and, accordingly, they emphasise the duty of transparency.

9.4.– While the rules and their application at the national level were developing as just described, the Court of Justice handed down a ruling on a reference from a Polish Court on 11 September 2019, the aforementioned *Lexitor* judgment, in Case C-383/18. The judgment interprets Article 16(1) of Directive 2008/48/EC to mean that "the right of the consumer to a reduction in the total cost of the credit in the event of early repayment of the credit includes all the costs imposed on the consumer" (point 36).

The Court of Justice acknowledged that the reference to the reduction of costs in the cited provision – in its various language versions – could indicate either exclusively costs "which depend objectively on the duration of the contract" or a calculation method for reducing the total cost of the credit "in proportion with the remaining duration of the contract" (*Lexitor*, point 24).

Faced with this interpretative uncertainty, the Court of Justice decided to give weight to the phrase "reduction in the total cost of the credit" in the text of the provision, which had replaced the earlier reference to "the general concept of 'an equitable reduction'" found in Article 8 of Directive 87/102/EEC (*Lexitor*, point 28). In its reasoning, the Court applied teleological interpretation to this phrase, which must be coordinated with Article 3(1)(*g*) of Directive 2008/48/EC, containing the definition of the total cost of the credit, in view of ensuring "a high level of consumer protection" (*Lexitor*, point 29).

Specifically, the Court of Justice stated that "limiting the possibility of reducing the total cost of the credit solely to costs expressly connected with the duration of the contract would entail the risk that the consumer would be required to make a higher one-off payment when concluding the credit agreement since the creditor could be tempted to reduce the costs depending on the duration of the contract to a minimum" (*Lexitor*, point 32).

At the same time, the Court specified that its interpretation does not disproportionately disadvantage creditors, to whom the directive grants "the right to compensation for possible costs directly linked to early repayment of the contract," as well as leaving Member States free, in this case, "to ensure that that compensation is

adapted to the conditions of the credit and the market in order to protect the creditor's interests" (*Lexitor*, point 34).

Lastly, the Court of Justice noted that early recovery of the borrowed sum ahead of schedule is, in itself, another advantage for the creditor, since it would allow them to conclude a new credit agreement and generate additional profits as well as benefits for the market (*Lexitor*, point 35).

Ultimately, the Court of Justice interpreted Article 16(1) of Directive 2008/48/EC starting from a portion of the text, that is, the reference to the reduction of the total cost of the credit, to reach an interpretation geared toward a high level of consumer protection – which prevents the risk of abuses, to the benefit of free competition, among other things – given the existence of what it held to be sufficient counterweights in favour of creditors.

9.5.– In Italy, the *Lexitor* judgment has inspired a significant number of ABF decisions and court judgments, all of which have applied Article 125-*sexies*(1) of the Consolidated Law on Banking in conformity with the Court of Justice's ruling.

In particular, they have held that, despite the difference in wording between the Italian version of Article 16(1) of the Directive and Article 125-*sexies*(1) of the Consolidated Law on Banking, "no great importance could reasonably be attributed" to this discrepancy (ABF, coordinating panel, Decision No 26525 of 2019).

The decisions determined that interpreting Article 125-*sexies*(1) of the Consolidated Law on Banking in keeping with the *Lexitor* judgment cannot amount to a *contra legem* interpretation, since there was no breach of the provision as written.

The conclusion, therefore, was an interpretation of Article 125-*sexies*(1) of the Consolidated Law on Banking in compliance with the reconstruction offered by the Court of Justice. The need to include upfront costs in the criteria for calculating the reduction does not preclude this conclusion since the Directive harmonized only the method of the reduction, which does not include the aforementioned criterion.

10.– After this complex judicial response, the legislator, in converting Decree-Law No 73/2021 into Law No 106/2021, introduced Article 11-*octies*, paragraph 2 of which is the provision at issue here.

Specifically, paragraph 1(*c*) of Article 11-*octies* replaced Article 125-*sexies* of the Consolidated Law on Banking, amending it as follows.

The second part of paragraph 1 was reformulated to provide that the consumer, in the event of early repayment, "has the right to a reduction of the interest and all the costs included in the total cost of the credit, excluding taxes, to an extent proportional to the remaining life of the contract".

A new paragraph 2 was added, laying down the criteria for reducing the interest and costs, as well as a new paragraph 3, governing the creditor's right of recourse in respect of the credit intermediary, which may be derogated by agreement.

The rules on the creditor's right to equitable compensation in the case of early repayment of the credit remained unchanged and were simply transferred into the new paragraphs 4 and 5 of Article 125-*sexies* of the Consolidated Law on Banking.

Paragraph 2 of Article 11-*octies* also introduced the rules at issue in this case, under which "Article 125-*sexies* of the Consolidated Law on Banking, pursuant to Legislative Decree No 385 of 1 September 1993, as replaced by paragraph 1(*c*) of the present article, applies to agreements concluded after the date of the entry into force of the conversion law of the present Decree. In cases of early repayment of contracts concluded prior to the date of entry into force of the conversion law of the present Decree, the provisions of Article 125-*sexies* of Legislative Decree No 385/1993 and the secondary rules contained

in the Bank of Italy's transparency and supervision provisions in force at the time the contract was concluded continue to apply".

11.– Now, in order to evaluate whether challenged Article 11-*octies*(2) breaches Articles 11 and 117(1) of the Constitution, this Court must examine the import of following the interpretation provided by the Court of Justice in the *Lexitor* judgment, in the context of the obligations arising from Italy's membership in the European Union.

11.1.– In accordance with this Court's well-established case law, these obligations include the duty to abide by preliminary rulings handed down by the Court of Justice of the European Union, in keeping with the role entrusted to the Court of Justice pursuant to Article 19(1) of the Treaty on the European Union (see, most recently, Judgments No 67/2022 and 54/2022, and, among many, 227/2010, 285/1993, 389/1989, and 113/1985, as well as Orders No 225/1999 and 132/1990; the same goes for Judgments of the Court of Justice striking down a legal act of the European Union: on this point, see Judgment No 232/1989).

Therefore, the judgments handed down in the form of preliminary rulings are parameters of the international framework that, through the filter of Articles 11 and 117(1) of the Constitution, permit this Court to exercise constitutional scrutiny. As the Court of Justice itself explains, speaking in its role as authoritative interpreter of European Union law: "a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force" (Court of Justice of the European Union, Judgment of 16 January 2014, in Case C-429/12, *Pohl*, point 30, and the judgments cited therein, as well as, among many, those of 10 March 2022, in Case C-177/20, *Grossmania*, point 41; 20 December 2017, in Case C-516/16, *Erzeugerorganisation Tiefkuhlgemuse eGen* (hereinafter ETG), point 88; and 28 January 2015, in Case C-417/13, *Starjakob*, point 63).

It follows that, "[i]t is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith" (Court of Justice of the European Union, Judgments of 20 December 2017, in Case C-516/16, ETG, point 89; 27 February 2014, in Case C-82/12, *Trasportes Jordi Besora SL*, point 41; 12 October 2000, in Case C-25/14, *Union des syndicats de l'immogilier* (UNIS), point 50; 8 April 1976, in Case 43/75, *Defrenne*, points 71-75).

In any case, "it is for the Court alone, in the light of the fundamental requirement of a general and uniform application of EU law, to decide upon the temporal limitations to be placed on the interpretation it lays down in respect of such a rule" (Court of Justice of the European Union, Judgment of 21 December 2016, in Joined Cases C- 154/15, C- 307/15 and C- 308/15, *Gutiérrez Naranjo and others*, point 70; see also the Judgments of 6 March 2007, in Case C-292/04, *Meilicke and others*, point 37; 28 September 1994, in Case C-57/93, *Vroege*, point 31; 2 February 1988, in Case 309/85, *Barra and others*, point 13; 27 March 1980, in Case 61/79, *Amministrazione delle Finanze dello Stato*, point 18). The Court of Justice may do this "only in the actual judgment ruling upon the interpretation sought", in order to ensure "the equal treatment of the Member States and of other persons subject to Community law", and in compliance with "the requirements arising from the principle of legal certainty" (Court of Justice of the European Union, Judgment of 6 March 2007, in Case C-292/04, *Meilicke and others*, point 37).

In short, according to the case law of the Court of Justice, the temporal effects of a

preliminary ruling can only be altered by the Court itself, and only in that same ruling.

11.2.– Since, then, the Court of Justice has maintained that, since it cannot limit the temporal effects of one of its earlier interpretations *a posteriori*, *a fortiori*, by the same reasoning, individual Member States may not alter the temporal effects of that interpretation, and certainly not where there is a Directive envisaging complete harmonization, with specified exceptions.

Therefore, while implementing a Directive, Member States may, for one, establish limitation periods for the exercise of the rights granted by the European Union, as long as they comply with the principles of equivalence and effectiveness (Court of Justice of the European Union, Judgments of 12 December 2013, in Case C-362/12, *Test Claimants*, points 30-33 and 44-45; 6 October 2009, in Case C-40/08, *Asturcom Telecomunicaciones*, point 41; 11 July 2002, in Case C-62/00, *Marks & Spencer*, points 35 and 36; and 17 April 1998, in Case C-228/96, *Aprile*, points 19 and 20).

Where there is a reference for a preliminary ruling asking the Court of Justice to provide an interpretation, Member States may also submit their arguments in favour of modulating the temporal effects of the ruling, indicating that "those concerned […] have acted in good faith" as well as the presence of "a risk of serious economic repercussions" (Court of Justice of the European Union, Judgment of 20 December 2017, Case C-516/16, *ETG*, points 89 and 91). They may submit these arguments in the same reference for a preliminary ruling or by producing observations in the course of proceedings on that reference.

12.– Having clarified the scope of the obligations flowing from *Lexitor*, which was handed down by the Court of Justice on a reference for a preliminary ruling without any pronouncements modulating the temporal scope of its effects, this Court may now move on to its review of the challenged provision.

As mentioned above, the legislator replaced earlier Article 125-*sexies* of the Consolidated Law on Banking with Article 11-*octies*(1)(*c*) of Decree-Law No 73/2021, as converted in Law No 106/2021, reformulating paragraph 1 to be in strict compliance with the *Lexitor* holding. Then, with paragraph 2, it limited the application of the new provision to only those contracts concluded after the entry into force of Law No 106/2021, stating that, for contracts concluded prior to that time, "the provisions of Article 125-*sexies* of the consolidated text under Legislative Decree No 385/1993 and the secondary rules contained in the Bank of Italy's transparency and supervision provisions in force at the time the contracts were concluded shall continue to apply".

12.1.– For purposes of interpretation, the most important indicator of legislative intent and the meaning of the challenged rule lies in the choice to associate the previous rules on early repayment, which continue to apply to contracts concluded prior to the entry into force of the new law, with the reference to the secondary rules in effect at the time the contract was concluded. This reference was not included in the new formulation of the provision, where the intention was to render it explicitly compliant with *Lexitor*.

The objective context of the reference to the secondary rules, which appears only in connection with earlier Article 125-*sexies* of the Consolidated Law on Banking, and its temporal delineation, which limits it to the secondary rules in force at the time the contracts were concluded (the contracts for which the earlier formulation found in Article 125-*sexies* continues to apply) point us to the precise secondary rules that the legislator of 2021 intended to invoke.

The reference is to the regulations on transparency and supervision that were operational between the entry into force of Legislative Decree No 141/2010, which

introduced Article 125-*sexies* of the Consolidated Law on Banking, and the entry into force of Law No 106/2021, that is, the provisions issued on 9 February 2011, amending the earlier ones approved on 29 July 2009 (point 9.3.).

These provisions lay down rules on the reduction of the total cost of the credit as a result of early repayment as pertinent to Article 125-*sexies*, justifying their invocation in this context. These include, first, provisions stating that the right to the reduction refers to recurring costs (Section VII) and, second, provisions describing the requirement that "the expenses that accrue over the contract period" be quantified "in a clear, detailed, and unequivocal way". They specify that, in case of early repayment, only costs that have not already accrued must be reimbursed to the consumer, making it necessary to refer only to the scenario in which the consumer has paid non-accrued costs in advance (Sections VII-*bis* and XI).

Contrary to State Counsel's argument, it is not relevant to point out that, after the *Lexitor* judgment, the Bank of Italy has complied with the indications of the Court of Justice in its "orientation guidelines" of 4 December 2019.

First of all, the Bank of Italy guidelines do not contain provisions dealing with transparency and supervision, which could be invoked by Article 11-*octies*(2), in that the provisions neither supplement nor amend the previous provisions published in the *Official Journal of the Italian Republic*. The Bank of Italy itself made this clear with the communication that followed on 1 December 2021, in which it specified "that the 'orientation guidelines' of 4 December 2019 ought to be considered obsolete in light of the new legal provisions (which do not refer to the 'orientation guidelines' in any way)."

Second, even supposing that there is some implicit reference to the guidelines would not make the reference to them correct, since the guidelines themselves refer only "to new consumer credit agreements", while the *Lexitor* judgment requires a conforming interpretation even for contracts concluded prior to 2019.

In essence, the secondary rules of the Bank of Italy referred to in Article 11-*octies*(2) confirm that Article 125-*sexies*(1) should be interpreted as referring exclusively to recurring costs, and they emphasise the duty of transparency, which functions to indicate only the reimbursable costs. This is the case notwithstanding the fact that the Court of Justice's interpretation chose to protect consumers more broadly than simply under transparency, holding that the risk of abuse of consumers was such that substantial and effective protection was needed in the form of the proportional reduction of all the costs of the credit, a tool which operates separately and apart from the fulfilment of the aforementioned obligations.

Ultimately, in light of the reference to precise regulatory provisions contained in the Bank of Italy's transparency and supervision provisions, and specifically to their temporal and objective parameters, the legislator did intend to establish, for past situations, a rule limited to the pre-*Lexitor* interpretation, and which diverges from the contents of that ruling.

This outcome results from a technique that this Court – albeit for the different purpose of allowing judicial review of secondary rules – has qualified as mandatory integration of the primary rule (Judgments No 3/2019, 200/2018, 178/2015, and 1104/1988).

Indeed, this Court has previously reviewed rules constituted by the combined provisions of primary and secondary rules, in cases in which the former were "concretely applicable through the specifications laid out in the secondary sources" (Judgment No 1104/1988; see also Judgments No 200/2018 and 178/2015).

The provision at issue in the present challenge fits into this framing, with the distinction that, in the case at issue, a later primary provision serves to supplement the pre-existing primary provision with a reference to rules of secondary rank. These secondary rules have crystallized a certain interpretation of earlier Article 125-*sexies*(1) of the Consolidated Law on Banking due to their temporal and objective limitations. Given this, the duty to apply the cited Article and these secondary rules simultaneously is tantamount to attributing to the earlier formulation of Article 125-*sexies* (which remains in force by virtue of Article 11-*octies*(2) of Decree-Law No 73/2021, as converted), by law, only that meaning which complies with the secondary rules. Because of this, the challenged provision, by law, imposes a prescriptive content derived from the provisions of earlier Article 125-*sexies*(1) of the Consolidated Law on Banking, which does not conform to the holdings of the *Lexitor* judgment.

12.2.– All of this leads to a conclusion confirming that, after the intervention by the legislator in 2021, it is impossible, as the referring court correctly assumes, to reach an EU-law-compliant interpretation of Article 125-*sexies*(1) of the Consolidated Law on Banking which remains in force for agreements concluded prior to 25 July 2021, by reason of Article 11-*octies*(2) of Decree-Law No 73/2021, as converted.

The referring court also correctly alleges that it is impossible to interpret all of Article 11-*octies*(2) in a way conforming with the Court of Justice ruling, as a few courts have attempted to do, by attributing the non-retroactive effect enshrined in the challenged provision only to newly added paragraphs 2 and 3 of amended Article 125-*sexies* of the Consolidated Law on Banking. Indeed, although a formal, but non-substantive divergence exists between the old and new Articles 125-*sexies*(1), as laid out below […], the significant fact remains that paragraph 2 of Article 11-*octies*, with its peculiar reference to secondary rules, limits the contents of the earlier version of Article 125-*sexies*(1) of the Consolidated Law on Banking to a meaning that is incompatible with the *Lexitor* judgment (point 12.1.).

12.3.– At this point it is worthwhile to outline the meaning of the legislative action undertaken with the conversion of Decree-Law No 73/2021.

12.3.1.– The legislator aimed at protecting the expectations creditors and intermediaries may have formed on the basis of the interpretation of the earlier wording of Article 125-*sexies*(1) of the Consolidated Law on Banking that developed prior to the *Lexitor* ruling and was supported by the secondary rules adopted by the Bank of Italy. It also intended to provide protection for to those who entered into agreements after the publication of *Lexitor*.

It does not appear that the legislator thought that expectations were created solely by the text of the earlier wording of Article 125-*sexies*(1) of the Consolidated Law on Banking.

If this were true – if, that is, the contents of the provision had been unequivocal, in the sense that only recurring costs could be reduced – then the legislator would not have had to specify that the provisions predating the reformulation continued to apply for past situations, together with the concomitant obligation to comply with secondary rules, which shored up the reference to the reduction of recurring costs only.

12.3.2.– In any case, this Court must reject the theory that the texts of former Article 125-*sexies* and Article 16(1) of Directive 2008/48/EC are clearly divergent, rendering it impossible to incorporate the content laid out in the *Lexitor* judgment.

First of all, the distinction between the texts of Article 16(1) of the Directive and former Article 125-*sexies*(1) of the Consolidated Law on Banking, while not entirely

negligible, was not (and is not) so great as to preclude their substantial overlap.

While it is true that a reduction "including interest and costs" is broader than a reduction "consisting of the interest and the costs", nevertheless, upon careful consideration, it is clear that the crux of the interpretation of the provision lies in other textual clues.

Here the paradigm the reduction refers to, that is to say "the total cost of the credit", is decisive, together with the notion of "costs owed for the remaining duration of the contract period".

Specifically, the preposition "for" may refer either to costs owed "over" the contract period (recurring costs only) or to those costs owed "in relation to" the contract period, which evokes the measure of the reduction. The preposition's second possible meaning, moreover, refers to the paradigm to which the reduction refers, that is, the total cost of the credit, because that reference is justified inasmuch as all the costs are reducible, and this reduction may be carried out based on the remaining duration of the contract period, which serves as the measure for the proportional reduction. It bears noting that the reference to the total cost of the credit played a decisive role in the interpretation provided in *Lexitor*.

12.4.– Therefore, this Court must conclude that, prior to the action taken by the legislator in 2021, the interpretation in keeping with the *Lexitor* judgment adopted by the ABF and by the courts was not *contra legem*, and was not only possible, but actually required, in accordance with the Court of Justice ruling.

The European Court acknowledged that compliance with the general principles of law, in addition to rejecting *contra legem* interpretations, limits how national courts may interpret provisions to comply with European Union Law (see, most recently, the Judgment of 18 January 2022 in Case C-261/20, *Thelen*, point 28, and that of 7 August 2018, in Case C-122/17, *David Smith*, point 40, and the judgments cited therein). At the same time, it explains that national courts cannot avoid the requirement to interpret national law in conformity with EU law "by mere reason of the fact that it has consistently interpreted [a] provision in a manner that is incompatible with EU law" as interpreted by the Court of Justice (Judgment of 19 April 2016, in Case C-441/14, *Dansk Industri*, point 34). As a result, "the principles of legal certainty and the protection of legitimate expectations" cannot "alter that obligation" (*Dansk Industri*, point 43). Nor can the court impose temporal limitations on the effects of a preliminary ruling (as laid out in the Judgment of 21 December 2016, in Joined Cases C-154/15, C-307/15, and C-308/15, *Gutiérrez Naranjo and others*, point 70, citing the Judgment of 2 February 1988, in Case 309-85, *Barra and others*, point 13).

It follows that the legislator of 2021, by adopting a provision (Article 11-*octies*(2)) establishing the regulatory content of the original formulation of Article 125-*sexies*(1) of the Consolidated Law on Banking to have a meaning different from that found in *Lexitor*, and thus preventing an interpretation of it that conforms with European Union law, has infringed the duties "deriving from EU legislation" (Article 117(1) of the Constitution).

13.– Having identified the partial breach committed by the national legislator, this Court cannot, however, endorse the objection, found in V. Spa's defence, that State liability is the only remedy for such a breach (pursuant to the teaching of the Court of Justice beginning with its Judgment of 5 March 1996 in Joined Cases C-46/93 and C-48/93, *Brasserie du pêcheur* and *Factortame*, points 46 e 47, and reiterated in numerous later judgments, most recently those of 25 January 2022, in Case C-181/20, *Vysočina Wind a.s.*, point 69; 8 July 2021, in Case C- 120/20, *Koleje Mazowieckie – KM sp. z o.o.*,

point 61; and 19 December 2019, in Case C- 752/18, *Deutsche Umwelthilfe e.V.*, point 54).

It is true that no recourse can be made to any conforming interpretation of the provision introduced in 2021 and at issue in this case, and, by the same token, the provision cannot be disapplied, given that Article 16(1) of Directive 2008/48/EC does not have direct effect in horizontal disputes, and, therefore, courts may not disapply the provision of national law that conflicts with it. Nor can it be denied that, if the conflict between the national legal system and the Directive cannot be allayed either by reference to a conforming interpretation or by disapplication of the national provision (where horizontal cases are concerned), the private parties suffering damages can make use only of the civil liability of the State for either failure to fulfil its obligations or incorrect transposition of the Directive.

This notwithstanding, the scenario in which a court raises questions of constitutionality before this Court and argues, in the context of rules lacking in direct effect and the impossibility of proceeding with a conforming interpretation, that the legislator has failed to fulfil its obligation to comply with the constraints deriving from Italy's membership of the European Union, is on a different level entirely.

By virtue of Articles 11 and 117(1) of the Constitution, this Court guarantees compliance with the constraints of EU membership and must, therefore, hold, by a judgment with retroactive effect, that a rule conflicting with the content of a Directive as interpreted by a Court of Justice's decision on a reference for a preliminary ruling is unconstitutional. "[I]n case of conflict with an EU rule lacking in direct effect […] and where it is impossible to resolve the conflict by means of interpretation" – we read in one of the many analogous decisions of this Court – "the ordinary court must raise a question as to constitutionality, as it falls to this Court to evaluate the existence of a conflict that cannot be remedied by means of interpretation and to, potentially, strike down the law that conflicts with EU law (see Judgments No 284/2007, 28/2010 and 227/2010, and 75/2012)" (Order No 207/2013; see also Judgment No 269/2017).

This Court must, therefore, guarantee compliance with the obligations Italy has assumed vis-à-vis the European Union and must, in consequence, safeguard the interests that the European framework is intended to protect: in this case, the interests of consumers.

The claim that the Italian version of the Directive aims to protect the expectations of creditors and intermediaries cannot justify the breach of the State's obligations to the European Union.

As explained above (point 11.2.), only the Court of Justice itself may modify the temporal effects of one of its judgments, and only in the preliminary ruling itself, potentially at the request of the court that made the reference or of the Member States that intervene in the proceedings to present their observations. And, as mentioned earlier, the Court of Justice here provided no temporal modification and adopted an interpretation on the basis of a part of the text present in all the language versions of paragraph 1 of Article 16: the reference to the reduction of the total cost of the credit.

If, on the contrary – as held above (point 12.3.1.) – the legislator intended to protect the expectations created by the formulation of the transposed rule and, specifically, by its interpretation at the national level, this certainly does not justify the breach of the duties that the State has assumed vis-à-vis the European Union. Legislative action to protect the parties who have formed such expectations could not (and cannot) impact the obligations to the European Union or prejudice the interests of consumers. In any case, the points

made by the Court of Justice bear noting here: creditors are protected, first, by the right to fair compensation, on the basis of the later paragraphs of Article 16 of the Directive (incorporated into the Consolidated Law on Banking at Article 125-*sexies*(2) and (3), which later became (4) and (5)) as well as by the fact that they can conclude a new credit agreement by lending the funds they have recovered early.

14.– Here this Court must specify the exact terms of its acceptance of the questions as to constitutionality raised concerning Article 11-*octies*(2) of Decree-Law No 73/2021, as converted, in reference to Articles 11 and 117(1) of the Constitution.

14.1.– As mentioned above, the referring court alleges that the cited provision is generally unconstitutional "to the extent that: - [the provision] sets forth that, in the event of early extinguishment of credit agreements concluded prior to the entry into force of the conversion law of the present Decree, the provisions of Article 125-*sexies* of the consolidated text found in Legislative Decree No 385/1993 and the secondary rules contained in the Bank of Italy's transparency and supervision provisions in force at the time the contracts were concluded shall continue to apply; [and] – [the provision] limits the principle, expressed in Article 16(1) of Directive 2008/48/EC, by which 'consumers who, in whole or in part, pay the credit owing to the creditor in advance shall have the right to a reduction of interest and of all the costs included in the total cost of the credit, excluding taxes'".

The broad account of the questions raised as to the challenged provision must now be read in light of the grounds provided in the referral order. These focus the allegations on one precise "element of the text", present in the "second sentence of paragraph 2 of Article 11-*octies*, which provides that, in the event of early repayment of contracts concluded prior to 25 July 2021, not only does the previously in force provision 'continue to apply', but so do 'the secondary rules contained in the Bank of Italy's transparency and supervision provisions in force at the time the agreements were concluded". The referral order alleges that it is precisely the link created between Article 125-*sexies* of the Consolidated Law on Banking and the secondary rules identified in the challenged provision that delineate "a sharp disconnect between past and present", preventing former Article 125-*sexies*(1) from being interpreted in conformity with *Lexitor* and in continuity with the case law that, after the Court of Justice ruling, has followed its interpretation.

Not without reason, the referring court holds that, "with Article 11-*octies*(2), Italy placed [itself] deliberately in breach of the Directive *post factum*, creating an extreme case in which the judiciary is no longer reasonably capable of using the ordinary tools of interpretation granted to it by the system to interpret Article 125-*sexies* of the Consolidated Law on Banking (under Legislative Decree No 141/2010), as supplemented by Article 11-*octies*(2) of Decree-Law No 73/2021, in conformity with the corresponding provision of the Directive, as interpreted by the Court of Justice."

Now, given that the earlier wording of Article 125-*sexies*(1) of the Consolidated Law on Banking, which, by virtue of Article 11-*octies*(2), is still in force for agreements concluded prior to the entry into force of Law No 106/2021, it is this Court's view that it is compatible with an interpretation conforming with *Lexitor* at the textual level […], and, indeed, has already been subject to conforming interpretation. And given that, again in the view of this Court (point 12.1.), the alleged breach of constitutional principles lies in the link with the specific secondary rules evoked by Article 11-*octies*(2), the questions as to constitutionality can be accepted as framed by the referring court.

14.2.– The challenged provision must, therefore, be held unconstitutional only to the extent it reads "and the secondary rules contained in the Bank of Italy's transparency

and supervision provisions", such that Article 125-*sexies*(1) of the Consolidated Law on Banking, which remains in force for agreements concluded prior to the entry into force of Law No 106/2021 by virtue of Article 11-*octies*(2), may once again include only regulatory content that conforms to the *Lexitor* judgment.

The removal of this part of the provision eliminates the conflict with the constraints imposed by Italy's membership in the European Union.

At the same time, the new text of Article 125-*sexies*(1) of the Consolidated Law on Banking, introduced by Article 11-*octies*(1)(*c*), in addition to being in force for the future, contributes to consolidating the regulatory contents of the earlier formulation of Article 125-*sexies*(1) of the Consolidated Law on Banking, in conformity with *Lexitor*.

Now, despite the fact that the text of the two provisions does not entirely overlap, the contents of the two rules are similar.

Just as paragraphs 4 and 5 of the new version of Article 125-*sexies* of the Consolidated Law on Banking differ in their placement but overlap in terms of their contents with former paragraphs 2 and 3 of the same Article (which continues to apply to agreements concluded prior to the entry into force of the new law under Article 11-*octies*(2)), so, too, the text of paragraph 1 of new Article 125-*sexies* of the Consolidated Law on Banking is formulated differently, but its regulatory content corresponds to paragraph 1 of former Article 125-*sexies*, which also remains in force as applied to the past.

As for the provisions introduced with paragraphs 2 and 3 of Article 125-*sexies*, as reformulated in 2021, they have no corresponding provisions in the earlier text and, therefore, are in force as applied to the future. Consequently, it falls to interpreters to determine how the framework regulated by them should play out with regard to the past.

Finally, all the secondary rules invoked by the many references appearing in the Consolidated Law on Banking clearly continue to apply, excluding the ones referring to the old interpretation of former Article 125-*sexies*(1).

15.– In conclusion, Article 11-*octies*(2) of Decree-Law No 73/2021, as converted, is unconstitutional only to the extent it reads "and the secondary rules contained in the Bank of Italy's transparency and supervision provisions".

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) declares that Article 11-*octies*(2) of Decree-Law No 73 of 25 May 2021 (Urgent provisions connected with the COVID-19 emergency on businesses, labour, youth, health, and local services), converted, with modifications, into Law No 106 of 23 July 2021, is unconstitutional to the extent it reads "and the secondary rules contained in the Bank of Italy's transparency and supervision provisions";

[omitted]

3) *declares* that the question as to the constitutionality of Article 11-*octies*(2) of Decree-Law No 73/2021, as converted, raised in reference to Article 3(1) of the Constitution by the First Civil Division of the Ordinary Court of Turin with the referral order indicated in the headnote, is inadmissible.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 8 November 2022.

Signed by:

Silvana SCIARRA, President

Emanuela NAVARRETTA, Author of the Judgment