

# FRI CoRe

Judicial Training Project

Fundamental Rights In Courts and Regulation

# CASEBOOK

EFFECTIVE CONSUMER PROTECTION  
AND FUNDAMENTAL RIGHTS



UNIVERSITY  
OF TRENTO



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## ***Effective Consumer Protection and Fundamental Rights***

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# Introduction: A Brief Guide to the Casebook

## Cross-project methodology

The FRICoRe Casebook on “Effective Consumer Protection and Fundamental Rights” builds upon the collaborative venture developed in previous projects of judicial training and, more recently, in the Re-Jus project. The core element of its methodology is the active dialogue established between **academics and judges in various European countries** concerning the role of the Charter, and in particular of its Article 47, in the field of consumer law. In continuity with previous projects, including Re-Jus, this one combines rigorous methodologies with judicial practices, and provides the trainers with the sort of rich comparative material that should always characterize transnational training schemes. We firmly believe that the transnational training of judges should be based on a rigorous analysis of judicial dialogue between national and European courts and, when they exist, among national courts. Training includes not only the transfer of knowledge but also the creation of a learning community composed of different professional skills. As in previous experiences, this Casebook is expected to evolve both in content and in method over time, with additional suggestions arising from its use in training contexts.

As in previous projects, **judicial dialogue** is a key dimension of the approach followed in this Casebook. We investigate the full life-cycle of a case from its birth with the preliminary reference to its impact in different Member States. We examine the ascendant phase and analyse how the preliminary reference is made, and whether and how it is reframed by the Advocate General and the CJEU. We then analyse the judgements and distinguish them according to the chosen degree of detail when they provide guidance both to the referring court and to the other courts that have to apply the judgements in the various Member States. Compared with the Re-Jus Casebook, a larger set of national case law can be considered in this edition.

Judicial dialogue develops both vertically and horizontally, at both national and supranational levels. Preliminary references are the main drivers of this dialogue. Linked with preliminary reference procedures, horizontal interaction among national courts takes place when the principles identified by the CJEU are applied in pertinent cases, mostly in the same fields but sometimes in connected ones. Also depending on the type of reference enacted, the guidance provided by the CJEU may consist in specific rules or in general principles to be applied. Very frequently, the latter may comprise the principle of effectiveness or the one of equivalence, which are balanced against the principle of national procedural autonomy (see cases C-33/76 Rewe; C-295/04 Manfredi). Diverging approaches may be prompted by the same CJEU judgement, and a national vertical dialogue may emerge, involving constitutional courts, higher courts, and first instance courts. This has often occurred in the Spanish case law on unfair consumer contract terms, and in other contexts. In several cases, legislators have intervened, triggering new streams of judicial dialogue at both national and EU levels. Different paths may be simultaneously or sequentially followed by different courts and legislators in different Member States, as, for example, in the field of unfair terms in loan agreements, where Spanish and Hungarian courts and legislators have simultaneously engaged in a very dynamic discussion concerning the content, the time of effect, and the consequences of certain contractual terms deemed unfair in previous practice.

Comparison among different cases taking national specificities into account enables national courts different from the referring ones to better anticipate the impact of EU law on the adjudication of national cases. In this regard, it should be noted that the CJEU clearly signals the degree of specificity of the question and provides the answer accordingly. Sometimes it gives a highly context-specific answer, one not easy to generalize or to apply to other legal systems; sometimes it defines general principles that can be flexibly applied to different legal systems. This is clearly the case of those judgements on *ex officio* power and *res judicata* where procedural laws significantly differ among Member States. This is why the **comparative perspective** adopted by this Casebook may clarify the impact of a judgement or of a cluster of judgements addressing the same issue (for example *ex officio* power to examine the unfairness of contract clauses) on the case law of Member States different from that of the referring court. In some cases, the impact can be examined through judgements expressly referring to the CJEU's decisions; in other cases, the Casebook suggests interpretative tools with which to address issues discussed in national case law through the lens of the CJEU's decision. The **impact analysis** is very important for judges other than the referring one. Their efforts to interpret and to adapt the judgement to their national legal context are often underestimated. While formally the CJEU's judgements are binding on Member State courts, their application requires a careful analysis of which substantive and procedural rules may be affected by the judgement, in particular the application of Article 47 of the Charter and the principle of effectiveness.

Being based on the methodology adopted in Re-Jus, the analysis does not focus on single CJEU judgements but on **clusters of judgements** around common issues. Often, CJEU judgements touch on many questions according to how the preliminary references are framed. Hence it might be more effective to choose a subset of complementary issues and examine them in sequence across several cases, rather than focusing on a single judgement. This approach may slightly increase the complexity of the analysis, but it reflects the problem-solving approach, rather than the conventional doctrinal perspective. The internal coordination of the chapters of this Casebook ensures that a judgement can be reconstructed across different chapters.

The Casebook is complemented by a **Database** (<https://www.fricore.eu/content/database-index>) that adopts the methodological approach of judicial dialogue. It does so by giving continuity to the one established in the Re-Jus Project and integrating the whole set of materials therein developed. It is organized around EU judgements and their impact on national legal systems. Two series of national judgements are examined in the Database: those directly concerning cases brought before the CJEU within a preliminary reference procedure, and those that apply or take into consideration the CJEU case law when addressing national cases externally to a referral procedure. Hence, the database is specific, and it reflects the idea that judicial dialogue is a pillar of EU consumer protection.

We want to encourage the use in training courses organized by national Schools of both the Casebook and the Database, which was subject to constant updating during the course of the project thanks to contributions made by both the Schools of the Judiciary and the participants in the workshops.



## The main issues addressed and the new approach of the FRICoRe Project

Building on the Re-Jus Casebook on Effective Consumer Protection, the FRICoRe edition inherits some of the core issues that it addressed: primarily the **impact of the Charter** – and, particularly, of **Article 47 on the right to an effective remedy and to a fair trial** – on judicial dialogue in both EU and national case law in the field of consumer protection. The frequent joint application of the principle of effective judicial protection with other principles, such as those of equivalence, proportionality, dissuasiveness, good administration, also continues to attract especial attention in the Casebook.

Compared with the Re-Jus edition, the present one develops **two new lines of analysis**. First, it pays especial attention to the technological and digital dimension of consumer markets and consumer transactions. This dimension not only modifies the contexts and modes in which consumer infringements occur (sometimes amplifying their effects) but also raises new legal issues that require new forms of consumer protection attuned to the principles of effective protection and those of proportionality and dissuasiveness. Second, by further developing an approach initiated in Re-Jus, the analysis considers the link between different areas of EU law and fundamental rights in order to understand the extent to which the instruments of effective consumer protection should be adapted when some fundamental rights are at stake, such as protection of personal data or the right to health.

Both these two new lines of analysis (the digital element of consumer markets and the cross-sector dimension of consumer protection) reflect the new approach adopted by EU consumer law in enactment of **recent reforms**, as shown below.

The new legislative framework is a third novel feature of the FRICoRe Casebook. Indeed, a profound revision of consumer protection law began with the Consumer Protection Cooperation Regulation (Regulation EU 2017/2394), being further developed with the adoption of the twin Directives on certain aspects concerning contracts for the supply of digital content and digital services (Directive (EU) 2019/770 of 20 May 2019) and on certain aspects concerning contracts for the sale of goods (Directive (EU) 2019/771 of 20 May 2019), Regulation (EU) 1150/2019 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services and, most recently, Directive (EU) 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules. The most recent outcome of this evolution has been the Directive (EU) 2020/1828 25 November 2020 on representative actions for the protection of the collective interests of consumers (repealing Directive 2009/22/EC).

All these initiatives are part of the Digital Agenda for Europe drawn up by the EU Commission within the context of the Europe 2020 Strategy defined by the EU institutions in 2015. The need to boost **digital marketing and e-commerce** in the internal market has been one of the main drivers of these reforms, together with the need to provide more effective consumer protection in circumstances where digitalization may increase vulnerability, increase unfairness, and generate a lack of transparency. As made clear in the CPC Regulation, the challenge does not only imply the definition of new rules and duties; also and more crucially, it requires greater effectiveness of

enforcement, including better coordination among competent authorities within and among Member States.

This coordination is even more crucial if the **cross-sector dimension** is taken into account, as said above. Indeed, consumer protection often interacts with other forms of protection of rights, such as data protection, the protection of health, or the like. Moreover, the EU legislation itself adopts sector-specific instruments designed to regulate markets and provide protection for market users, including consumers. In several cases, a national judge has been confronted with multiple legislative sources and multiple sets of possible remedies; or a court has been requested to adjudicate the assessment provided by one of many administrative authorities potentially involved in addressing a particular business practice, even more so if its impact extends across borders. The Directive on representative collective actions emphasises this aspect when it extends to representative actions brought against infringements by traders of provisions of the Union listed in Annex I and including, e.g. EU legislation on data protection, financial services, travel and tourism, energy, telecommunications, *when these infringements harm or may harm the collective interests of consumers*. To what extent can the combination of general consumer instruments and sector-specific measures improve the effectiveness of consumer protection? How should these be coordinated so that effective remedies can be provided? When a court reviews decisions taken by administrative authorities, should it consider the possible interactions among multiple authorities and apply the principle of proportionality and that of dissuasiveness in order to ensure that a lack of coordination does not lead to over-deterrence, disproportionate sanctions, or *bis in idem*? The FRICoRe Casebook deals with these issues (see, particularly, Chapters 3 and 9, and even more specifically the Appendix to this Introduction concerning the consumer status and the scope of application of consumer protection).

### **The structure of the Casebook: a brief guide**

The developments that have occurred in judicial dialogue show that the application of the Charter, and in particular **Article 47**, is promoting substantive and procedural changes in consumer protection. Its link with general principles of EU law, particularly the **principle of effective judicial protection and that of equivalence**, for long established in EU case law, has enabled the Court to gradually expand the force and scope of the right to being an effective remedy as a fundamental right capable of direct application even in horizontal relations among private parties (*Bauer*, C-569/16 and C-570/16). Beyond the demolition effect brought by the principle of effectiveness in cases in which national procedural rules (e.g., on limitation periods, evidence or appeal) could prove too burdensome for harmed consumers, the affirmative dimension of effective justice is increasingly invoked. The need for positive answers in terms of effective remedies challenges the principle of national procedural autonomy even more, despite its constant recognition by the CJEU in its rulings. **Conforming interpretation** remains the main path to follow in order to overcome possible conflicts between EU principles and national legislation or established case law; **disapplication** is available, however, should interpretative instruments be insufficient in this regard.

On this basis, the FRICoRe Casebook provides judges and other legal experts with concrete examples of judicial dialogue in order to identify specific forms of conforming interpretation or disapplication of national rules in light of the Charter and other EU general principles.

*Chapter 1* starts this exploration by considering a consolidated trend in EU consumer case law, that of the **expansion of *ex officio* judicial powers in civil litigation**: powers to ascertain the consumer status of parties; to ascertain the unfair nature of contract terms or other infringements; to conduct investigation accordingly; to provoke parties' intervention so that their views may be confronted in a fair trial. In all these respects, expanded judicial powers counterbalance consumer weakness, providing access to an effective space for a fair trial and an effective remedy.

The concrete analysis of cases shows that the implications of this approach are strong and critical. They are so for two reasons: firstly, because such an expansion of judicial powers challenges the principle of national procedural autonomy in several respects, including the principle of demand in civil litigation and, at least partially, that of *res judicata*; and secondly because the concrete implications of these trends may differ greatly according to the type of secondary legislation adopted at EU level or to the Member State in which litigation takes place. For example, in *Banco Primus* (C-421/14), the CJEU concluded that the principle of *res judicata*, intrinsic to national procedural autonomy, should not limit the judicial power to ascertain the unfairness of clauses that have not been assessed in previous decisions, become final, concerning other clauses of the same contract. By contrast, in a more recent case (*Salvoni*, C-347/18) the principle of *res judicata* has been considered an obstacle to the exercise of *ex officio* powers to inform the consumer about the right to apply for refusal of the recognition or enforcement of a judgement abroad under Article 45, Regulation 1215/2012. The availability of specific measures within the EU Regulation has probably induced the CJEU to be more cautious in challenging the principle of *res judicata*, whose strength has remained questioned since *Banco Primus*. This example is even more striking if the different implications at national level are considered. Thus, in Spain for example, the judgement issued in *Banco Primus* induced the Constitutional Court (28 February 2019) to exclude that an execution admission judgement may imply a tacit assessment of all contractual terms, an express assessment in this regard being mandatory.

By contrast, under consolidated Italian case law, *res judicata* exerts its effects not only on explicit content of the judgement become final but also on the grounds representing its logic antecedent, although they are implicit (Cass., 28 November 2017, no. 28318; Cass., S. U., 12 December 2014, no. 26242). The issue received further attention in the EU judicial dialogue after the CJEU decision of 17 May 2022 (*Banco di Desio e della Brianza and Others*, Case C-831/19). The Court held that Article 6(1) and Article 7(1) of Directive 93/13/EEC on unfair terms in consumer contracts must be interpreted as precluding national legislation which provides that, when an order for payment issued by a court on application by a creditor has not been the subject of an objection lodged by the debtor, the court hearing the enforcement proceedings may not – on the ground that the force of *res judicata* of that order applies by implication to the validity of those terms, thus excluding any examination of their validity – subsequently review the potential unfairness of the contractual terms on which that order is based. The ruling is likely to have a major impact on the doctrine of implied *res judicata*, commonly applicable at national level also in the domain of

consumer protection. As a consequence, it is also likely to change the role of judges in charge of the enforcement of orders of payment; a change that is even more challenging in the framework of pending reforms intended to reduce the length of proceedings for a more effective access to justice under both national and EU law.

*Chapter 2* examines the role played by the principle of effective judicial protection in CJEU competition cases concerning private antitrust enforcement: this role, highly influential in the development of EU secondary law on **damages in antitrust cases**, may suggest future developments in neighbouring areas of consumer law, such as that of unfair commercial practices. The CJEU, in the landmark decisions *Courage* (C-453/99) and *Manfredi* (C-295/04), referred to the principle of effectiveness as the main criterion to guide national courts in providing judicial relief in asymmetrical relations between consumers and business entities. Consequently, national judges derived from the principle of effectiveness case-by-case solutions pertaining to the proof of the causal link between antitrust infringement and damage, to limitation periods, to the amount of compensation, and to jurisdiction. Some of the solutions developed by courts have now been embraced by Directive (EU) 2014/104, while both European and national case law are trying to define the role of the principle of effectiveness in shaping the boundaries of private antitrust enforcement. Hence, national decisions concerning proof of the causal link between infringement and damages and the evidence status of NCAs decisions still represent, in the absence of clear EU rules, the main reference points. Furthermore, the CJEU – albeit in decisions not directly concerning consumers – has endeavoured to strike a balance between public and private enforcement, for instance in cases concerning leniency procedures, as such covered by confidentiality measures (for instance in *Pfleiderer*, C-360/09). More recently, the CJEU has used the principle of effectiveness to expand the scope of application of private enforcement, for instance by extending protection to situations not covered by the Directive (*Cogeco*, C-637/17) or by allowing private parties to seek damages against a business entity which, in concrete, is the successor of the infringer (*Skanska*, C-724/17).

The chapter addresses some of the main issues that have arisen in the past decade. It seeks to highlight which principles and practical solutions are relevant to ensuring consumer protection in private antitrust enforcement cases. Furthermore, the chapter briefly analyses recent national case law which, on the basis of the principle of effectiveness, has sought to provide consumers with restitutory remedies linked to the nullity of contracts whose content was affected by anti-competitive agreements. The issue stimulates further discussion, as well as hypothetical questions to be referred to the CJEU.

*Chapter 3* addresses the **relationship between judicial and administrative consumer protection**. Despite the lack of a direct application of Article 47 CFREU to purely administrative enforcement procedures, the general principles of effectiveness, proportionality and dissuasiveness, together with the principle of good administration, are influencing the functioning of these proceedings – as becomes clear when the administrative enforcement proceeding is followed by a judicial one, either in the form of judicial review or as a follow-up procedure, e.g. concerned with the award of damages. Indeed, the CJEU has considered judicial review as an intrinsic element of Article 47 CFREU; this applies to cases in which judicial enforcement is complemented by administrative proceedings intended to create registries of terms found unfair,

which are therefore banned for any possible professional wanting to use those or equivalent ones (*Biuro*, C-119/15).

The possible role of the principle of effective consumer protection in the field of administrative enforcement concerns not only the coordination between administrative and judicial enforcers but also the coordination among administrative authorities, especially when multiple bodies are in charge of monitoring the market and their relationship is not specifically defined in law, both at national and, with further implications, at supranational level (see Regulation EU/2017/2394). In regard to the co-existence of multiple administrative authorities, some of them in charge of specific sectors (e.g. telecommunications), *Chapter 3* shows how, in EU case law, the competence of each authority is defined by taking into account the need for effective application of EU law, which remains a linked component of effective consumer protection (*Wind Vodafone*, Joined Cases C-54/14 and C-55/17). In the near future, similar questions could be brought before the Court of Justice in light of Article 47 and the that of the principle of proportionality and dissuasiveness. Indeed, better coordination among administrative authorities and between administrative and judicial enforcers not only helps to avoid loopholes in the enforcement and lack of effectiveness (of EU law and consumer protection); it also contributes to guaranteeing an adequate level of deterrence and preventing the adoption of disproportionate measures.

The role of administrative enforcement as a means for effective consumer protection is today clearly acknowledged in EU legislation. It is so by the above-cited Regulation EU/2017/2394 on Consumer Protection Cooperation, as well as by the pending proposal on representative actions for the protection of the collective interests of consumers (COM/2018/0184 final-2018/089 (COD)), covering actions brought before administrative or judicial authorities. The **collective dimension of consumer protection** (which is somehow an intrinsic element of administrative enforcement and may be achieved through judicial enforcement as well) is the subject matter of *Chapter 4*. In this regard, the role of the principle of effectiveness, as evidenced in the courts' dialogue with CJEU, has been at least twofold. On the one hand, at times in which national legislation has not yet been harmonized through EU intervention except for soft law, the principle of effectiveness has helped national courts to interpret national procedural legislation consistently with the need to improve consumer protection: e.g., by acknowledging the *erga omnes* effects of the *in abstracto* ascertainment referred to unfairness of contract terms (*Invitel*, C-472/10; *Biuro*, C-119/15), or by limiting the suspensive effects of collective proceedings with respect to individual ones (*Sales Sinuès*, C-381/14). On the other hand, the Court has refrained from taking too proactive an approach by filling in gaps left by EU and national legislation (*Schrems*, C-362/14, AG Opinion). Thus, in the *EOS KSI* case (C-448/17) for example, the principle of equivalence was applied rather than that of effective protection. As a result, the right of intervention by consumer organizations in consumer proceedings, initiated by the professional without the consumer's objection being lodged, shall be assessed by comparing national procedural rules that are applicable in disputes falling within the scope of either EU or national law. This more cautious approach is part of an implicit dialogue with the EU legislator, which, within the framework of Article 47 CFR and that of general principles of EU law, for long defined by the CJEU, has adopted the above-cited Directive on representative actions.

The adoption of a Directive on representative actions certainly creates new opportunities for judicial dialogue in light of Article 47, CFR. The nature of qualified entities, the scope and effects of so-called injunctive and redress measures, the coordination among and between administrative and judicial proceedings, the effects of previous decisions on follow-up proceedings, the individual consumer's right to join or depart from collective actions: all these aspects will engage, first, national legislators and, later, courts in a collective venture due to define the future framework of collective consumer protection.

Chapter 5 examines the impact of the principles of effectiveness, proportionality and dissuasiveness on the **choice and application of civil remedies** in consumer cases in three areas: unfair terms, unfair commercial practices, and consumer sales. Lying well beyond the scope of Article 47 CFREU, these principles are shaping national rules on the adjudication of civil remedies, raising constant challenges to the everyday work of civil courts.

Close attention is paid to a topic that has become crucial in recent EU case law: the extent to which judicial powers can intervene in **substituting contract terms**, once these have been declared unfair and therefore not-binding. While Article 47, CFR, as such has been only occasionally referred to in these cases (*Sziber*, C-483/16), the Court has mostly combined the principle of effective judicial protection with those of dissuasiveness and proportionality. As a general rule, the pure non-bindingness of unfair terms has been considered an effective measure with which to ensure an adequate level of deterrence (*Credit-Lyonnaise*, C-565/12; *Home Credit*, C-42/15; *Kásler*, C-26/13). Indeed, in the view of the CJEU, the dissuasive effects of non-bindingness would be undermined by judicial intervention, which allows for a substitution of unfair terms by means of judicial moderation or application of legislative default provisions (*Banco Espanol*, C-618/10; *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17; *Gómez del Moral Guasch*, C-125/18). National courts have recently been denied the possibility to uphold a claim based on the statutory compensation provided for by a supplementary provision of national law (*Dexia Nederland*, C-229/19 and C-289/19); they have also been denied the possibility to interpret a contractual term in order to remedy its unfairness, even if the interpretation by the national court of the standard term attempted to give effect to the shared understanding of the clause by the parties (*A. S.A.*, C-212/20).

Recent developments of judicial dialogue, mainly involving Spanish and East-European courts (particularly, the Hungarian ones), show that many distinctions should be considered by the national judge. First, the penalty function of non-bindingness should be subject to the proportionality principle; it is for the national judge to assess whether a contractual term's non-bindingness represents a measure proportionate to the infringement's seriousness (*Home Credit*, C-42/15). Second, when the contract may not continue to exist without the non-binding clause, the term's substitution becomes the only available way to substitute the formal balance established by the contract between the rights and obligations of the parties with a real balance re-establishing equality between them (*Kasler*, C-26/13). Recent judgements examined in *Chapter 5* also address the extent to which a (subjective or objective) consumer's interest shall be taken into account when the national judge has to choose between mere non-bindingness or a term's substitution, and whether a third option exists – one consisting in total contract nullity when the contract may not continue in existence without the non-binding term, and setting-aside is either

not harmful for the consumer (*Dunai*, C-118/17) or, though it is harmful in abstract terms, the consumer opposes the protection provided through partial nullity and term's substitution (*Dziubak*, C-260/18). In *Banca B.* (C 269/19), the CJEU ruled that nothing prevents a national court from inviting the parties to a consumer dispute to negotiate a replacement for an unfair contract term, provided that certain conditions are satisfied. Article 6(1) of Directive 93/13, read in conjunction with Article 47 CFREU, must be interpreted as meaning that it is for the national court – on finding that a term in a contract concluded between a seller or supplier and a consumer is unfair – to inform the consumer, in the context of the national procedural rules after both parties have been heard, of the legal consequences entailed by annulment of the contract, irrespective of whether the consumer is represented by a professional representative (*Bank BPH*, C-19/20).

Future evolutions in judicial dialogue will show the extent to which the need to provide effective, proportionate, and dissuasive remedies through contract non-bindingness (mainly invalidity, partial or total) will also extend to the area of unfair practices. To date, the principle of effectiveness has not been deemed a sufficient reference for targeting invalidity as *the* effective remedy against unfair practices, since there lacks any automatic link between unfair practice and unfair term (*Perenicova*, C-453/10; *Bankia*, C-109/17). The new legal framework introduced by Directive 2019/2161, amending the UCPD and expressly calling for 'effective and proportionate remedies' against unfair practices (including contract termination) may engage EU and national courts in a new confrontation for the years to come (see Article 11a).

Together with the use of invalidity and termination, the role of restitution receives especial attention in the CJEU's eyes through the lens of article 47 CFR, and the principle of effectiveness (*Naranjo*, C-154/15; *Dunai*, C-118/17), not only in the field of unfair terms and unfair practices, but also in the area of sales, where the new Sale of Goods Directive (EU/2019/771) has made contract termination relatively more accessible for consumers, though ensuring effective access to repair and replacement. In regard to the latter, the new Directive only partially incorporates the principles applied by the CJEU in *Weber and Putz* (C-65/09), which leaves space for further developments in judicial dialogue.

Chapter 6 builds another bridge: one **between judicial procedures and settlement procedures or other alternative dispute resolution (ADR and ODR) mechanisms**. The application of procedural safeguards to these procedures, increasingly affected by EU secondary legislation, is greatly influenced by the role played by the CJEU, starting from the *Alasini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), which remains a milestone in any case law on consumer ADR, although the proceeding has never been resumed before a national court.

Chapter 7 deals with **cross-border cases**, the application of private international law, and the impact recently exerted by the CJEU. It does so by considering the principle of effectiveness as applied to consumer cases. Both the identification of competent jurisdiction and the identification of applicable law require due recognition of the role played by the principle of effectiveness and Article 47 in cross-border cases. This application requires rethinking the interpretation of Rome I and Rome II and Brussels *bis* Regulation in the area of consumer protection in light of the role of fundamental rights.

*Chapter 8* takes national judges into the world of **online platforms**. The principle of effective consumer protection is used as a lens through which the CJEU's judgements may be examined with especial regard to issues linked to the digital dimension of trade: e.g., the extent to which a consumer with high competence in the use of digital platforms and social networks can be still considered a consumer (*Schrems*, C-362/14), or whether a natural person posting renting advertisements on the Web may be qualified as a professional or a consumer depending on a long list of factors (*Kamenova*, C-105/17), or the extent to which the mere possibility of creating a durable record of an electronic communication represents an effective safeguard for e-purchasers (*Jaouad El Majdoub*, C-322/14), or certain contract terms and commercial practices become particularly misleading within a digital environment and require a special assessment that takes into account the cross-border scope of a platform's activity (*Amazon*, C-191/15). All these aspects may be examined through the lens of effective consumer protection in order to ensure that infringements are found and remedies applied consistently with the characteristics of electronic commerce and the objective of close protection of consumers under Article 38, CFR.

From this perspective, the issue of a digital platform's liability is crucial: can the consumer seek from the platform the same remedies that he/she could seek from the supplier offering goods or services through that platform? By contrast, should the platform enjoy the same 'immunity' awarded by the E-commerce Directive for intermediaries remaining 'passive' in respect of the transaction taking place through the platform? Is this approach, read together with the notion of platform control, developed by the CJEU in the *Uber* (C-434/15) and *Airbnb* (C-390/18) cases, consistent with the principle of effective consumer protection and Article 47, CFR?

Introducing the cross-sectoral analysis, *Chapter 9* deals with the interactions between consumer protection and data protection. Although most of the above-examined applications of Article 47 CFR and of the principle of effective protection have been developed with specific regard to consumer cases and EU secondary legislation in the field of consumer law, a question is the extent to which they may be extended to other areas of EU law. In fact, judges may be confronted with cases in which the same practices represent infringements of consumer rights and other rights, particularly fundamental rights, protected under EU law. Breach of information duties may violate consumer law and deprive data subjects of rights acknowledged by the GDPR; contract terms aimed at obtaining consent for data processing for totally unspecified purposes may be deemed unfair under the UCTD and in breach of the GPDR. What associations may represent the interests of these victims in collective redress procedures: consumer associations, data protection ones, or both? Can consumer remedies be extended to protect data subjects in order to improve the effectiveness of both consumer protection and data protection?

*Chapter 10* deals with a different type of **interaction**: that **between consumer protection and the right to health** (Article 35, CFR; Article 168, TFEU). Focusing mostly on product liability, the analysis shows how the reference to health as a fundamental right enters the evaluation of the effectiveness of consumer protection remedies by encouraging the use of presumptions (*Sanofi*, C-443/12), the application of concurring liability regimes, such as those concerning product liability and service liability (*Dutreux*, C-495/10.), the introduction of information duties aimed at reducing the burden of proof for consumers (*Novonordisk*, C-249/09).



## Appendix: The status of ‘consumer’ and its boundaries

In light of the principles of equivalence, of effectiveness and proportionality, and of Article 47 CFR, could the notion of consumer be interpreted extensively so as to expand the scope of effective consumer protection?

Could, in light of the principles of equivalence, of effectiveness and proportionality, and of Article 47 CFR, provisions not mentioning the consumer be interpreted as protecting consumers’ interests? With what consequences?

### The notion of ‘consumer’

Various EU legal instruments of consumer law define a consumer as a natural person who is acting for purposes which are external to his/her trade, business, profession, or craft.

This definition varies slightly among the several Directives which have adopted it, such as the Unfair Terms Directive (1993/13/EEC, Article 2, lett. b), Consumer Rights Directive (2011/83/EU, Article 2, no. 1), Unfair Practices Directive (2005/29/EC, Article 2, lett. a), Directive 2008/48/CE (Article 3, lett. a), Directive 2019/771/EU (Article 2, no. 2) on certain aspects concerning contracts for the sale of goods, which from 1 January 2022 will replace Directive 199/44/CE, and the recent Directive 2019/770 on digital content (Article 2, no. 6). In the field of international private law, a similar definition of ‘consumer’ is provided in Article 6 of Regulation No 593/2008/EC. Another approach is taken in Regulation No 864/2007/EC and Regulation No 1215/2012/EU, which repealed Regulation No 2001/44: these Regulations not define the notion of consumer but use it in their texts.

With regard to the definition’s interpretation, in *Kamenova* (C-105/17, 4 October 2018) the CJEU stated that the interpretation of the notion of ‘trader’ should be uniform with regard to Directives 2005/29 and 2011/83, considering that both Directives are based on Article 114 TFEU, and, as such, pursue the same objectives, identified in contributing to the proper functioning of the internal market and in ensuring a high level of consumer protection. The same legal basis is used for Directive EU 2019/770 and Directive EU 2019/771, and Directive 2008/48/EC is based on Article 95 EEC Treaty, which now is part of Article 114 TFEU. Furthermore, the legal basis of Directive 1993/13 is Article 100 A EEC Treaty, where the subject was the establishment and the functioning of the internal market.

The uniform interpretation can be developed also with regard to the notion of ‘consumer’, considering that it is strictly related to that of ‘professional’. CJEU case law confirms this view. In the *Schrems* case (C-498/16, 25 January 2018) the Court stated that the notion of ‘consumer’ for the purposes of Regulation No 44/2001 must be interpreted by taking into account the definitions provided in other EU legal instruments, in order to ensure compliance with the objectives pursued by the EU in the sphere of consumer contracts and to ensure the consistency of EU law (see also, *mutatis mutandis*, CJEU, *Vapenik*, C-508/12, 5 December 2013).

Moreover, with regard to the interpretation of the **notion of consumer** in EU law, the CJEU stated that:

- this is objective in nature and distinct from the concrete knowledge that the person in question may have, or from the information that person actually has (*Costea*, 3 September 2015, C-110/14; see also: *Tarcău*, C-74/15, 19 November 2015; *Schrems*, C-498/16, 25 January 2018; *Milivojević*, C-630/17, 14 February 2019; *Pouvin*, C-590/17, 21 March 2019).
- when national courts decide on the qualification of a natural person as a consumer, they must take all the circumstances of the case into account, particularly the nature of the goods or service covered by the contract in question (*Costea*, 3 September 2015, C-110/14; see also: *Tarcău*, C-74/15, 19 November 2015; *Pouvin*, C-590/17, 21 March 2019).
- a person can act as a consumer in some transactions and as a seller or supplier in others (*Costea*, 3 September 2015, C-110/14)

Classifying a natural person as a consumer is the basis for the application of a set of specific rules. On the one hand, this is a reason for the importance of identifying the notion's boundaries; on the other hand, as shown in CJEU case law, the notion of consumer should be interpreted in light of the rationale of the related disciplines. As regards case law, in the *Costea* judgement (3 September 2015, C-110/14), where the qualification of the natural person as a consumer was related to the application of Directive 1993/13/EEC, the CJEU considered as relevant the purposes of the Directive, i.e. to remedy the weaker position of the consumer *vis-à-vis* the seller or supplier, with regard to the consumer's level of knowledge and to his/her bargaining power under terms drawn up in advance by the seller or supplier and the content of which that consumer is unable to influence. These rationales are used as arguments in *Siba* (C-537/13, 15 January 2015) where the CJEU defines a lawyer's client, acting for purposes external to his/her trade, business or profession, as a consumer. In this case, the CJEU applied Directive 1993/13/EEC, considering that there is an informational asymmetry between the lawyer and his client. The Court confirmed this functional approach in other cases, such as *Pouvin* (C-590/17, 21 March 2019; see also CJEU, *Vapenik* judgement, C-508/12, 5 December 2013) in which the CJEU stated that the employee of an undertaking and his wife who had concluded with that undertaking a loan contract – one reserved, principally, to members of its staff – with a view to financing the purchase of real estate for private purposes, must be regarded as 'consumers'. The Court considered that the exclusion from the scope of Directive 93/13/EEC of contracts concluded by consumers with their employers would deprive all of those consumers of the protection granted by that Directive.

Considering the specific purposes and rules of consumer law, it is important to look at the **boundaries** of the notion of consumer, also in order to understand if and how remedies or disciplines of other kinds should be coordinated with consumer law.

In this regard, account should be taken of the following:

- the interpretation in borderline cases of the definition of a 'consumer';
- the consumer/professional distinction in the online context;
- the restriction of the notion to natural persons;

- the relationship between different definitions and sets of rules.

### **The interpretation in borderline cases of the definition of a ‘consumer’**

There is a significant body of CJEU case law on interpretation of the notion of ‘consumer’ in borderline cases. Firstly, in *Di Pinto* (C- 361/89, 14 March 1991) the CJEU stated that, with regard to various acts performed in the context of a trade or a profession, in order to apply the qualification of ‘consumer’ it is not possible to draw a distinction between normal acts and those which are exceptional for the professional activity concerned.

Moreover, in order to define the distinction between professionals and consumers, an important group of judgements regard the situation in which a natural person acts for purposes which are in part within and in part outside his/her trade or profession. In *Gruber* (C-464/01, 20 January 2005), when adjudicating a case concerning application of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (henceforth: Brussels Convention), the CJEU stated that a person may not be classified as a ‘consumer’ unless his/her commercial or professional purpose is so limited as to be negligible in the overall context of the supply. In the Court’s reasoning, the fact that the private element was predominant was irrelevant in this case. With regard to the notion of ‘consumer’ related to Regulation 44/01, which the Court considered to be equivalent to the one defined in the Brussels Convention, the CJEU stated that the notion of ‘consumer’ “refers only to the private final consumer, not engaged in trade or professional activities” (CJEU, *Česká spořitelna*, C-419/11, 14 March 2013; see also with regard to the Brussels Convention: CJEU, C-89/91, *Lehman Hutton*, 19 January 1993). In this specific case, the Court stated that “a natural person with close professional links to a company, such as its managing director or majority shareholder, cannot be considered to be a consumer (...) when he gives an aval on a promissory note issued in order to guarantee the obligations of that company under a contract for the grant of credit” (CJEU, *Česká spořitelna*, C-419/11, 14 March 2013).

Furthermore, in a case related to application of the Brussels Convention, the CJEU stated that a natural person who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer (CJEU, *Benincasa*, C-269/95, 3 July 1997).

In this respect, the CJEU has recently seemed to advocate a less restrictive interpretation. In particular, in *Milivojević* (C-630/17, 14 February 2019), the Court stated that in applying Regulation No 1215/2012 a debtor who has entered into a credit agreement in order to have renovation work carried out in an immovable property which is his/her domicile with the intention, in particular, of providing tourist accommodation services, cannot be regarded as a ‘consumer’ within the meaning of that provision unless, in light of the context of the transaction, regarded as a whole, for which the contract has been concluded, that contract has such a tenuous link to that professional activity that it is evident that the contract is essentially for private purposes.

Another group of cases concerns the application of Directive 1993/13/EEC when there are two different and linked agreements, and only with regard to one of them can a party be classified as a consumer. In this respect, in the *Tarcău* judgement (C-74/15, 19 November 2015) the CJEU stated that a natural person who agrees to secure the contractual obligations owed by a commercial company to a banking institution under a credit agreement can be regarded as a ‘consumer’ when that natural person has acted for purposes external to his/her trade, business or profession and has no link of a functional nature with that company. The Court’s main argument was that the ancillary contract from the perspective of the parties constitutes a distinct contract, considering also that it is stipulated between persons other than the parties to the principal contract. Moreover, the *Costea* judgement (C-110/14, 3 September 2015) related to the notion of ‘consumer’ within Directive 1993/13/EEC should be taken into account. The case regarded a natural person who had concluded a credit agreement with a bank, the repayment of that loan being secured by a mortgage registered against a building belonging to that natural person’s law firm. The Court, relying on the argument that a person can act as a consumer in some transactions and as a seller or supplier in others, stated that in cases in which there are a main and an ancillary agreement, the fact that in the latter the person acts as a professional does not exclude that s/he is to be classified as a consumer with regard to the main contract.

### **The consumer/professional distinction in the online context**

The distinction between consumer and professional is called into question in the online context; in fact, some digital environments encourage the initiatives of individuals, who become frequent and expert users of them. In this respect, two CJEU judgements are particularly relevant: the *Schrems* and the *Kamenova* ones. In the *Schrems* case (C-498/16, 25 January 2018), the referring court asked whether, in order to apply Regulation No 44/2001, the activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of a private Facebook account user’s status as a ‘consumer’. The CJEU, recalling its previous case law, stated that the notion of ‘consumer’ is distinct from the knowledge and information that the person concerned actually possesses. Therefore, neither the expertise which that person may acquire in the field covered by those services nor his/her assurances given for the purposes of representing the rights and interests of the users of those services can deprive him/her of the status of a ‘consumer’ with regard to the application of Regulation No 44/2001. According to the CJEU, another interpretation of the notion would have the effect of preventing an effective defence of the consumers’ rights vis-à-vis their contractual partners who are traders or professionals. Therefore, a different interpretation would be in contrast with Article 169(1) TFEU, being in conflict with its purpose of promoting the right of consumers to organise themselves in order to safeguard their interests.

In the CJEU’s *Kamenova* judgement (C-105/17, 4 October 2018), a natural person simultaneously published on a website several advertisements offering new and second-hand goods for sale. The question referred to the Court regarded the classification of that natural person as a trader. The Court ruled that the notion of ‘trader’ must be determined in relation to the diametrically opposite concept of ‘consumer’, and that the consumer is in a weaker position because s/he is considered

to be less informed, economically weaker, and legally less experienced than the other party to the contract. Furthermore, the CJEU affirmed that classification as a ‘trader’ should be done using a “case-by-case approach”. The CJEU stated the following criteria on which to decide:

- if the sale on the online platform was carried out in an organised manner;
- if the sale was intended to generate profit;
- whether the seller had technical information and expertise relating to the products which s/he offered for sale which the consumer did not necessarily have, with the result that the former was placed in a more advantageous position than the latter;
- whether the seller had a legal status which enabled him/her to engage in commercial activities and the extent to which the online sale was connected to the seller’s commercial or professional activity;
- whether the seller was subject to VAT;
- whether the seller, acting on behalf of a particular trader or on his/her own behalf or through another person acting in his/her name and on his/her behalf, received remuneration or an incentive;
- whether the seller purchased new or second-hand goods in order to resell them, thus making such resale a regular, frequent and/or simultaneous activity in comparison with his/her usual commercial or business activity;
- whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated on a small number of goods.

These criteria are neither exhaustive nor exclusive, with the result that, “in principle, compliance with one or more of those criteria does not, in itself, establish the classification to be used in relation to an online seller with regard to the concept of ‘trader’”. The Court stated that the fact that the sale is intended to generate profit or that a person advertises new or second-hand goods for sale is not sufficient in itself to classify that person as a ‘trader’.

### **The restriction of the notion of ‘consumer’ to natural persons**

The CJEU in *Idealservice* (C-541/99 and C-542/99, 22 November 2001), strictly interpreting the definition of ‘consumer’ set out in Directive 93/13/EEC, stated that this notion applied only to natural persons. A national court referred to the CJEU (C-329/19) the question as to whether the notion of consumer, as adopted by Directive 93/13/EEC, precludes classifying as a consumer an entity (such as the entity comprising owners of apartments in a building - *condominio* in Italian law) which does not fall within the concept of ‘natural person’ or ‘legal person’, in cases where that entity concludes a contract for purposes which are outside its trade, business or profession and where it is in a position of weakness vis-à-vis the seller or supplier, as regards both its bargaining power and its level of knowledge. With regard to the particular *condominio* entity, there is a significant impact of the *condominio*’s acts on consumers ‘behind’ that entity. The judgement following this preliminary reference is particularly interesting because the main issue was whether the notion of ‘consumer’ should be applied to entities that are neither natural nor legal persons in the national legal system. This case could prove particularly useful in the future, considering the proposals by scholars to conceive some digital entities (*e.g.* robots; artificial intelligence devices) as (partial) legal subjects.

In light of the principle of effectiveness and dissuasiveness and Article 47 CFR, could entities without full legal personality, which are neither legal nor natural persons and are ‘acting for purposes which are outside their trade, business, profession’, be classified as consumers?

In the case in which natural persons-consumers are part of that entity, are the effects of the entity’s actions on those consumers relevant to answering the previous question?

### **Different definitions and sets of rules. Toward a consumer that is also a ‘client’ or ‘passenger’ or ‘data subject’?**

The extension of the notion of consumer, and the broad scope of application of some legal instruments, such as Directive 1993/13/EEC, raise the issue of the coordination of different sets of rules and the related definitions which are to be applied to the specific case. Recent CJEU case law provides some examples of the practical questions to be resolved.

A first issue concerns the **compatibility of the application of consumer law with other sets of rules applicable to the specific profession of the trader**. In this regard, the CJEU considered the compatibility of the mandatory rules on the exercise of the lawyer’s profession with Directive 1993/13/EEC in the *Siba* judgement (C-537/13, 15 January 2015), related to the classification of the client/lawyer relationship as a consumer/professional one. The CJEU stated that application of Directive 1993/13 does not undermine the specific nature of the relations between the lawyer and his/her client and the principles underlying the practice of the legal profession, also considering that “in the light of the objective of consumer protection pursued by that directive, the public or private nature of the activities of the seller or supplier or his specific task cannot determine whether or not that directive is applicable”. The Court analysed the compatibility of the kind of protection provided by Directive 1993/13/EEC and its scope of application with the duties of lawyers, and concluded that the application of Directive 1993/13/EEC cannot undermine either the specific nature of the relations between a lawyer and his/her client or the principle which governs the legal profession.

Furthermore, there are two cases declared inadmissible by the CJEU in which the problem of coordination between consumer law and other sets of rules aimed at specific objectives was addressed by a national court, which referred questions to the CJEU. In *Giménez* (C-426/17, 25 October 2018) – a case declared inadmissible by the CJEU for reasons that are not relevant to our purposes here – the referring judge asked whether Article 6(1)(d) and 7(2) of Directive 2005/29/EC were applicable to situations in which a lawyer’s fee is regulated by a legal provision and whether a legal aid lawyer should be classified as a ‘trader’ or ‘seller or supplier’ for the purposes of Directive 93/13 and 2005/29. In the *Luminor* case (C-8/18), also declared inadmissible, the referring court asked if a person who had acquired a financial instrument could be classified, under certain conditions, as a consumer.

A second issue concerns the possible **synonymity of different terms such as ‘consumer’, ‘client’, ‘user’, considering also the rationales for the use of those terms**. In this respect, with regard to the notions of ‘consumer’ and of ‘user of payment services’ – although in a case not related to the application of consumer law – the CJEU in the *Bundeskammer* case (C-191/17, 4

October 2018) stated that with regard to Directive 2007/64/EC (now repealed by Directive 2015/2366/EU) and 2014/92/EU, the use of the term ‘consumer’ in a definition of payment account in Directive 2014/92/EU and replaced with regard to the same definition in Directive 2007/64/EC by the expression ‘user of payment services’, does not reflect a substantial difference in the definition of that concept; rather, it reflects a difference of purpose between the two Directives concerned. The *Finnair* judgment (C-258/16, 12 April 2018) is also relevant. It relates to the interpretation of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, implemented by Regulation 2027/97/EC. In this case, the CJEU interpreted the rules related to passengers’ complaints in light of the objective of consumer protection cited by the Montreal Convention.

In this respect, on 28 November 2019, a proposal for the adoption of a new Directive on representative actions for the protection of the collective interests of consumers was approved as a general approach of the Council.<sup>1</sup> That proposal should have repealed Directive 2009/22/EC on injunctions for the protection of consumers’ interests. One of the objectives of that proposal was to increase consumer protection in certain fields. The recital 6 of the proposal states:

“The scope of this Directive should reflect the recent developments in the field of consumer protection. Since consumers now operate in a wider and increasingly digitalised market, achieving a high level of consumer protection requires that areas such as data protection, financial services, travel and tourism, energy, and telecommunications are covered by the Directive, in addition to general consumer law. In particular, as there is increased consumer demand for financial and investment services, it is important to improve the enforcement of consumer law in these fields. Also in the field of digital services, the consumer market has evolved and there is an increased need for a more efficient enforcement of consumer law, including data protection.

The scope of application of that Directive is defined by means of a complex method in which the notion of ‘consumer’ plays a significant role. Article 2 of the proposal (version approved by the Council as a general approach) states that the Directive shall apply to representative actions brought against infringements by traders of provisions of the Union law listed in Annex I that harm or may harm the collective interests of consumers. Listed in that Annex are a number of EU Directives and Regulations – not all of them dealing directly with consumer protection – in the field of personal data protection (e.g. the GDPR, Directive 2002/58), product labelling (e.g. Directive 98/6/CE; Regulation 1272/2008; Regulation UE 1222/2009), passengers’ rights (e.g. Regulation CE 2027/97; Regulation CE 261/2004; Regulation CE 1107/2006), tourism (e.g. Directive 2008/122/CE; Directive UE 2015/2302), health (e.g. Directive 2001/83/CE; Regulation UE 1223/2009), electronic commerce and services (e.g. Directive 2000/31, Directive 2010/13/EU), energy markets (e.g. Directive 2009/72), financial services (e.g. Directive 2002/65/CE, Directive 2008/47; Regulation 924/2009, Directive 2009/110), investment services (e.g. Directive 2009/65/EC; Directive 2011/61/EU), insurance and retirement services (e.g. Directive 2009/138/EC).

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<sup>1</sup> New version: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_14600\\_2019\\_INIT&from=IT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_14600_2019_INIT&from=IT)

The interpretation of Article 2 on the scope of application of the Directive is particularly complex with regard to cases in which the legal instruments mentioned in Annex I do not refer directly to consumers.

In this regard, recital 6 a) of the proposal states that the Directive should cover infringements of provisions of Union law listed in Annex I to the extent that these provisions protect the interests of consumers, regardless of whether they are referred to as consumers or as travellers, users, customers, retail investors, retail clients, data subjects, or others. However, it should protect the interests of natural persons that may be harmed or have been harmed by those infringements only if they qualify as consumers according to this Directive. Infringements harming natural persons qualifying as traders should not be covered. Moreover, according to recital 6 b), the Directive should not change or extend the definitions provided in the acts mentioned in Annex I or replace any enforcement mechanisms that those legal acts may contain. For example, the enforcement mechanisms provided for or based on the GDPR could, if applicable, still be used for the protection of the collective interests of consumers. Furthermore, according to recital 6 c), if the legal acts listed in Annex I contain provisions that do not relate to consumer protection, reference should be made to the specific provisions that protect consumers' interests. However, according to that recital, such references are not always feasible or possible due to the structure of certain legal acts, in particular in the field of financial services, including investment services.

The application of these provisions seems to require a complex judgement concerning the interpretation of legal acts mentioned in Annex I in order to understand if specific rules are related to consumer protection, for example with regard to Directive 2011/61/EU on alternative investment fund managers. In some cases, the Annex I mentions the specific articles to which the directive will apply. For example, Annex I refers expressly to Article 14 and Annex I of Directive 2009/125/EC establishing a framework for the definition of ecodesign requirements for energy-related products. That article concerns consumer information, and Annex I is related to methods for establishing generic ecodesign requirements.

Article 47 CFR, on the principle of effective consumer protection, and of dissuasiveness, could play a significant role in determining the scope of application of that Directive with regard to the identification of provisions which do not mention consumers but concern consumer interests. Firstly, it should be considered whether these norms could help in ensuring consumer protection. Secondly, the importance of collective actions for ensuring the dissuasiveness of sanctions, and for dissuading professionals from infringing EU law should be considered.

More generally, the EU legislator recognised that the acts mentioned in Annex I are important for ensuring consumer protection. The question then arises as to whether some CJEU case law related to the effectiveness of consumer protection, especially with regard to procedural issues, for example *ex officio* powers, could be applied also in other fields when a provision, although it does not mention the consumer, aims at protecting consumers' interests.



# 1. *Ex officio* powers of civil judges in consumer litigation.

## 1.1. Consumer status.

### Relevant CJEU case

- Judgement of the Court (First Chamber) of 4 June 2015, *Froukje Faber v Autobedrijf Hazet Ochten BV.*, Case C-497/13 (“**Faber**”)

### Main questions addressed

- Question 1 In light of the principle of effectiveness in consumer protection, shall a judge *ex officio* ascertain the status of the parties in order to conclude whether consumer law is applicable to the case, even though the consumer has not herself/himself made clear her/his status when filing the claim or in her/his defence?
- Question 2 If so, shall the judge make this assessment on the basis of the available documents, or shall the judge make investigations or require additional elements from the parties?

### Relevant legal sources

#### EU level

#### Article 47(1), CFREU, Right to an effective remedy and to a fair trial

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. [...]”

#### Directive 1999/44/EC (Consumer Sales Directive)

#### Article 1(1). Scope and definitions

“1. The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market. [...]”

#### National legal sources (Netherlands)

#### Articles 7:5(1), 7:17(1), 7:18(2) and 7:23 *Burgerlijk Wetboek* (Dutch Civil Code)

#### Article 7:5 Consumer sale agreements

“1. By a 'consumer sale' is understood in this Title: the sale agreement related to a good (movable thing), electricity included, concluded by a seller who, when entering into the agreement, acts in the course of his professional practice or business, and a buyer, being a natural person who, when entering into the agreement, does not act in the course of his/her professional practice or business.”

From the *Faber* (C-497/13) CJEU judgement:

- “14. Pursuant to Articles 23 and 24 of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, ‘the Rv’), the Court may rule only on the claims of the parties and must confine itself to the legal matters on which the claim, application or defence are based.
15. In appeal proceedings, the court dealing with those proceedings may rule only on the complaints which were put forward by the parties in the first claims lodged on appeal. The court hearing the appeal must, however, apply of its own motion the relevant provisions of public policy, even if such provisions have not been invoked by the parties.
16. However, under Article 22 of the Rv, ‘the court may in all circumstances and at each stage of the procedure ask either or both of the parties to explain certain claims or to provide certain documents relating to the case.’”

### 1.1.1. Question 1 and Question 2 – The *ex officio* ascertainment of the consumer’s status

Following the compact reasoning of the CJEU, the two questions will be dealt with together.

1. In light of the principle of effectiveness in consumer protection, shall a judge *ex officio* ascertain the status of the parties in order to conclude whether consumer law is applicable to the case, even though the consumer has not herself/himself made clear her/his status when filing the claim or in her/his defence?
2. If so, shall the judge make this assessment on the basis of the available documents or shall the judge make investigations or require additional elements from the parties?

#### The case

Ms Faber bought a used Range Rover (a car) for € 7,002 from a company called ‘Hazet’ on the 27th of May 2008. The car was delivered on the same day, and the agreement was put into writing in a (pre-printed) document. On the 26th of September 2008, the car caught fire on the highway and completely burned out on the side of the road. Faber at the time was travelling to a work appointment and was in the company of her daughter. She claimed that the selling party, Hazet, was liable for the damage to the car caused by the fire. However, Hazet’s defence was that Faber had complained too late, as a result of which she had forfeited all her claims (Article 7:23(1) BW).

When bringing an action against the seller, Ms Faber did not claim to have made her purchase in her capacity as a consumer. When rejecting Ms Faber’s claim because of the late notice to the seller (more than three months after the fire), the first instance court held that there was no need to examine further whether Ms Faber had acted in her capacity as a consumer; nor was this conclusion contested in appeal by Ms Faber, who continued not to specify whether she had bought the vehicle as a consumer.

### Preliminary questions referred to the CJEU:

The Court of Appeal raised the question of whether it had the duty to assess *ex officio* whether Ms Faber had acted as a consumer and would, thus, be able to rely on the consumer protection provided by Directive 1999/14 as implemented in Article 7:18(2) BW (presumption of non-conformity if the defect manifests itself within 6 months after the purchase). It also asked whether this would ever imply a duty to make investigations and whether the answer would change depending on whether a first instance or an appeal judge was concerned, and on whether the (potential) consumer was assisted by a lawyer.

- “(1) Is the national court, either on the grounds of the principle of effectiveness, or on the grounds of the high level of consumer protection within the [European] Union sought by Directive 1999/44, or on the grounds of other provisions or norms of European law, obliged to investigate of its own motion whether, in relation to a contract, the purchaser is (a) consumer within the meaning of Article 1(2)(a) of Directive 1999/44?
- (2) If the answer to the first question is in the affirmative, does the same hold true if the case file contains no (or insufficient or contradictory) information to enable the status of the purchaser to be determined?
- (3) If the answer to the first question is in the affirmative, does the same hold true in appeal proceedings, where the purchaser has not raised any complaint against the judgment of the court of first instance, to the extent that in that judgment that assessment (of its own motion) was not carried out, and the question of whether the purchaser may be deemed to be a consumer was expressly left open? [...]
- (7) Does the fact that Ms Faber has been assisted by a lawyer in both instances in these proceedings still play a role when answering the foregoing questions?”

### Reasoning of the CJEU:

The Court started from acknowledgment of the principle of **national procedural autonomy** as regards the rules concerning the assignment of a legal classification to the facts and acts upon which the parties rely in support of their claims. These rules shall be applied in accordance with the principles of equivalence and effectiveness (paragraph 37).

Both principles induced the CJEU to identify the judge’s duty to ascertain the consumer status of the claim in proceedings in which the claimant has not specifically invoked her/his status.

In light of the **principle of equivalence**:

“In the same way that, within the context of the detailed procedural rules of its domestic legal order, the national court is called upon, for the purpose of identifying the applicable rule of national law, to classify the matters of law and of fact which the parties have submitted to it, if necessary by requesting the parties to provide any useful details, it is required, in accordance with the principle of equivalence, to carry out the same process for the purpose of determining whether a rule of EU law is applicable.

That may be the case in the main proceedings, in which the national court has, as it itself stated in the order for reference, an “indication”, in the present case, the production by Ms Faber of a document entitled “contract of sale to a private individual”, and in which, pursuant to Article 22 of the Rv, that court is able, as the Netherlands Government has pointed out, to order the parties to explain certain claims or to produce certain documents. It is for the national court to undertake the investigations for that purpose.” (*Faber*, paragraphs 39 and 40)

In light of the **principle of effectiveness**, the CJEU pointed out the risk that a consumer may fail to invoke her/his status as a consumer and to provide sufficient elements to clearly indicate this status and thereby miss the chance to gain effective protection, should the court be bound by the specific contents of the claim and alleged documents.

Detailed procedural rules which, as may be the case in the main proceedings, would prevent both the court at first instance and the appellate court, before which a guarantee or warranty claim based on a contract of sale has been brought, from classifying, on the basis of the matters of fact and of law which they have at their disposal or may have at their disposal simply by making a request for clarification, the contractual relationship in question as a sale to a consumer, if the consumer has not expressly claimed to have that status, would be tantamount to making the consumer subject to the obligation to carry out a full legal classification of his situation himself, failing which he would lose the rights which the EU legislature intended to confer on him by means of Directive 1999/44” (*Faber*, paragraph 44).

#### Conclusion of the CJEU:

The principle of effectiveness motivated the conclusion reached by the CJEU:

“the **principle of effectiveness** requires a national court before which a dispute relating to a contract which may be covered by that directive has been brought to determine whether the purchaser may be classified as a consumer, **even if** the purchaser has not expressly claimed to have that status, as soon as that court has at its disposal the matters of law and of fact that are necessary for that purpose or may have them at its disposal **simply by making a request for clarification**” (*Faber*, paragraph 46).

Therefore, in light of the principle of effectiveness, the national court shall:

- examine all factual elements emerging from the case at hand regardless of any specific declaration made by the consumer in her/his claim or act of defence;
- request clarification from the potential consumer in order to assess whether she/he has acted as a consumer so that consumer protection should be provided.

The CJEU did not distinguish between a first instance and an appeal judge. Moreover, it expressly excluded the fact that the consumer is assisted by a lawyer is a specificity that should not influence this conclusion (para. 37).

### Impact on the follow-up case

Following the CJEU's judgment, the Court of Appeal invited the parties to a session in which they could respond to the consequences of the CJEU's decision and reply to a number of specific questions of the Court of Appeal regarding the facts surrounding the conclusion of the sales contract. The case was discontinued.

### Elements of judicial dialogue:

In the Faber judgement, the CJEU provided the national courts with a specific rule to resolve the dispute; national judges have a narrow margin of discretion in applying that rule. The dialogue between the CJEU and the Dutch court of appeal aimed at providing national courts with clarification on the implications of EU law for the court's duty to assess *ex officio* whether a person had acted as a consumer when concluding a sales contract. Implementation in Dutch judicial practice is expected.

### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

#### **Italy**

The CJEU judgement has had a direct impact on Italian case law. The Court of Cassation, in its decision no. 17586/2018, stated that the judge has the duty to ascertain the consumer status of contractual parties. In this case, the first instance court (*Giudice di Pace*) classified the party as a consumer, and the appeal judge (*Tribunale di Roma*) failed to consider the question of the consumer status.

Moreover, in two decisions of 19 June 2019 by the Tribunal of Milan, the *Faber* case (C-497/13) was mentioned. Accordingly, the judges raised of their own motion the question concerning the status of the consumer.

The judge's power of legal qualification of facts is also relevant. For example, in its decision no. 9252/2017 the Italian Banking and Financial Ombudsman, with regard to ascertainment of the consumer status in a case concerning the application of consumer credit legal provisions, stated that the plaintiff, although not asserting his consumer status, did not use or mention a commercial denomination, nor did he possess an enterprise tax identification number. As a result, the Ombudsman classified the plaintiff as a consumer.

More generally, under Article 183(4), Italian Civil Procedure Code, in a hearing that addresses the case ("*udienza di trattazione*"), the judge requests clarification from the parties on the basis of the alleged facts. The *Faber* judgement (C-497/13) suggests that these clarifications are necessary when the judge suspects that one of the parties is a consumer.

#### **Poland**

The *Faber* judgement (C-497/13) did not have any direct impact on Polish case law. In particular, there are no direct references to this judgement made by domestic courts of any instance. It is, however, indisputable that a court in civil cases is obliged to apply substantial law on its own,

without any specific statements of the parties. Consequently, a court has to review whether a particular person is a consumer – and apply law in accordance with this finding. The scrutiny in question can be carried out only within the framework of the facts of the case that have been presented as evidence in the proceedings. In principle, all proof in this respect has to be collected by the parties themselves (under Article 232 sentence 1 of the Code of Civil Procedure) and only exceptionally can the court, by exercising its discretion, seek evidence *ex officio* (Article 232 sentence 2 of the Code of Civil Procedure).

## Slovenia

There are no direct references to the Faber case (C-497/13) made by Slovenian national courts. However, it is believed that the Faber case (C-497/13) had some indirect impacts on Slovenian case law. The Ljubljana Higher Court, in case no. I Cpg 664/2017 of 20 July 2017, *ex officio* ascertained that the second defendant should be considered the producer in view of the Consumer Protection Act and Directive 85/374/EEC, although the parties did not expressly claim such. Thus, similarly to the Faber case (C-497/13), the court *ex officio* applied consumer law. In general, in Slovenian civil procedure, the court is obliged to apply substantial law on its own (*ex officio*) within the framework of the facts that have been submitted as evidence by the parties in the proceedings. Hence, in principle, the evidence within a case is collected by the parties themselves; and only in exceptional circumstances can the court collect evidence on its own. This procedural conduct complies with Article 7 and Article 180 of the Slovenian Civil Procedure Act.

## 1.2. Declaration of contract terms' unfairness.

### Relevant CJEU cases in this cluster

- Judgement of the Court of 27 June 2000, *Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades, José Luis Copano Badillo, Mohammed Berroane and Emilio Viñas Feliú*, Joined cases C-240/98 to C-244/98, (“**Oceano**”)
- Judgement of the Court (Fifth Chamber) of 21 November 2002. *Cofidis SA v Jean-Louis Fredout*, Case C-473/00 (“**Cofidis**”)
- Judgment of the Court (First Chamber) of 26 October 2006. *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, Case C-168/05 (“**Mostaza Claro**”)
- Judgement of the Court (Fourth Chamber) of 4 June 2009, *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi*, Case C-243/08 (“**Pannon**”)
- Judgement of the Court (First Chamber) of 6 October 2009, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, Case C-40/08 (“**Asturcom**”)
- Judgement of the Court (Grand Chamber) of 9 November 2010, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, Case C-137/08 (“**Pénzügyi**”)
- Judgement of the Court (First Chamber) of 21 February 2013. *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, Case C-472/11 (“**Banif**”)

- Judgement of the Court (First Chamber) of 30 May 2013, *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jabani BV*, Case C-488/11 (“**Asbeek**”)
- Judgement of the Court (First Chamber) of 18 February 2016, *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others*, Case C-49/14 (“**Finanmadrid**”)
- Judgement of the Court (Third Chamber) of 21 April 2016, *Ernst Georg Radlinger and Helena Radlingerová v Finway a.s.*, Case C-377/14 (“**Radlinger**”)
- Judgement of the Court (First Chamber) of 28 July 2016, *Milena Tomášová v Slovenská republika - Ministerstvo spravodlivosti SR and Pohotovosť s.r.o.*, Case C-168/15 (“**Tomášová**”)
- Judgement of the Court (First Chamber) of 26 January 2017, *Banco Primus SA v Jesús Gutiérrez García*, Case C-421/14, (“**Banco Primus**”)
- Judgement of the Court (Fifth Chamber) of 7 December 2017, *Banco Santander SA v Cristobalina Sánchez López*, Case C-598/15;
- Judgement of the Court (Fifth Chamber) of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen VZW v Susan Romy Jozef Kuipers*, Case C-147/16, (“**Karel de Grote**”);
- Judgement of the Court (Second Chamber) of 20 September 2018, *OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt. V. Teréz Ilyés, Emil Kiss*, Case C-51/17, (“**OTP**”);
- Judgement of the Court (Second Chamber) of 13 September 2018, *Profi Credit Polska S.A. w Bielsku Białej v. Mariusz Wawrzosek*, Case C-176/17, (“**Profi Credit**”).
- Judgement of the Court (Eighth Chamber) of 20 September 2018, *EOS KSI Slovensko s.r.o. v J. D. and M. D.*, Case C-448/17, (“**EOS KSI**”)
- Order of the Court (Seventh Chamber) of 28 November 2018. *Powszechna Kasa Oszczędności (PKO) Bank Polski S.A. w Warszawie v Jacek Michalski*. Case C-632/17 (“**Bank Polski**”).
- Judgement of the Court (First Chamber) of 3 April 2019, *Aqua Med sp. z o.o. v Irena Skóra*, Case C-266/18 (“**Aqua Med**”)
- Judgment of the Court (First Chamber) of 4 September 2019, *Alessandro Salvoni v. Anna Maria Fieremonte*, Case C-347/18 (“**Salvoni**”)
- Order of the Court (Ninth Chamber) of 6 November 2019. *MF v BNP Paribas Personal Finance SA Paris Sucursala București and Secapital Sàrl*, Case C-75/19 (“**BNP Paribas**”)
- Judgement of the Court (First Chamber) of 7 November 2019, *Profi Credit Polska S.A. w Bielsku Białej v Bogumiła Włostowska and Others*, Joined cases C-419/18 and C-483/18 (“**Profi Credit II**”)
- Judgement of the Court (Third Chamber) of 11 March 2020, *Györgyné Lintner v. UniCredit Bank Hungary Zrt.*, Case C-511/17 (“**Lintner**”)
- Judgement of the Court (Sixth Chamber) of 4 June 2020, *Kancelaria Medius SA v. RN*, Case C-495/19 (“**Kancelaria Medius**”)

### Main questions addressed

- Question 1 Given the right to an effective consumer protection, the principle of effectiveness, and article 47, CFREU, shall a court declare a consumer contract term unfair of its own motion, even though the consumer has not alleged the term's unfairness in this respect?
- a. Given the principle of effective consumer protection, shall a court also conduct an *ex officio* investigation in order to ascertain whether a contract term is unfair?
  - b. Shall an appeal court declare a consumer contract term unfair even though the consumer has not raised an objection in this regard either in first instance or in appeal?
  - c. Shall a court seized of the execution of a payment order issued by another court or an arbitration tribunal declare a consumer contract term unfair, even though the consumer has not filed a claim in this respect within the proceedings aimed at the adoption of the payment order and the latter has become final?
    - a. payment order by a court
    - b. by an arbitration court
    - c. by a non-judicial body
    - d. mortgage enforcement procedure
  - d. Does the duty to examine the unfairness of contractual terms regard only the clauses that are supposedly enforced before the court or, given the principle of effectiveness and Article 47 CFREU, shall the court examine *ex* own motion (all the) other contract terms, including those on which the court has already ruled in previous decisions that have become final?
- Question 2 If and when such a duty exists, given the right to a fair trial (Article 47, CFREU), shall a judge enable the parties to present their views on a contractual term's unfairness and even oppose the declaration of a term as non-binding?
- Question 3 Is the judge liable for not declare of his/her own motion? the unfairness of the contractual clause in consumer contracts? What is the scope of the duty of the court to declare a consumer contract term unfair of its own motion? Is there a difference between the duties of first instance judges and those of courts of appeal?

### Relevant legal sources

*Article 47, CFREU*, Right to an effective remedy and to a fair trial

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.



Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Article 6(1), Unfair Terms Directive

“1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.”

Article 7(1), Unfair Terms Directive

“1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.”

### **1.2.1. Question 1 – *Ex officio* power to declare the unfairness of a consumer contract term**

1. Given the right to effective consumer protection, the principle of effectiveness, and Article 47, CFREU, shall a court declare a consumer contract term unfair even though the consumer has not filed a claim in this respect?

#### *The case(s)*

Several preliminary ruling procedures before the CJEU have addressed the issue in the above box.

In most of them, a single business brought an action against a consumer for failure to return a loan either as a stand-alone loan or as a financing linked with a sale contract.

In this type of dispute, the issue concerning the unfairness of terms included in the financing contract may emerge as a defence for the consumer. In fact, the consumer fails to use such a defence. The issue is whether the judge (1) can, or (2) should, raise the issue and ascertain the unfairness of contract terms, whose validity is relevant to adjudicating the case.

In the cases examined here, the issue concerned:

- clauses on jurisdiction (*Pannon*, C-243/08; *Pénzügyi*, C-137/08; *Aqua Med*, C-266/18): the question was therefore whether the court was competent to adjudicate the case if the contracts assigned such competence to the court based upon the place of business of the professional, when this place is far away from, and poorly connected to, the place of residence of the consumer;

- arbitration clauses (*Asturcom*, C-40/08; *Tomášová*, C-168/15): in the case examined, the issue about unfairness of terms emerged when the arbitration award, which required the consumer to pay the due sum, was executed through an enforcement procedure and, by means of opposition, the controversy was brought before a court;
- early termination clauses enabling the creditor to request immediate and full payment in the case of non-payment of one or more instalments (*Banif*, C-472/11; *Radlinger*, C-377/14; *Finanmadrid*, C-49/14; *Banco Primus*, C-421/14): here the contested term more directly influenced the ground for the professional's claim and the enforcement procedure thereof;
- penalty clauses or clauses on default interest (*Radlinger*, C-377/14; *Finanmadrid*, C-49/14; *Banco Primus*, C-421/14; *De Grote*): here the term's unfairness impaired the amount of credit and therefore again the ground for the professional's claim and enforcement procedure thereof.

Preliminary question referred to the CJEU:

The general aspects of the issue concerning the *ex officio* power of the court to raise the question of a contractual term's unfairness will now be addressed, principally in regard to the *Pannon* case (C-243/08). Within this general framework, the following subsections will address the more specific issues listed from 1.a to 1.c with regard to the other mentioned cases adjudicated by the CJEU.

As far as the issue of *ex officio* powers of the judge is concerned, the Hungarian court, before which the statement of opposition to the payment order was presented, raised the following preliminary questions:

1. Can Article 6(1) of Directive [93/13] – pursuant to which Member States are to provide that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer – be construed as meaning that the non-binding nature vis-à-vis the consumer of an unfair term introduced by the seller or supplier does not have effect ipso jure but only when the consumer successfully contests the unfair term by lodging the relevant application?
2. Does the consumer protection provided by Directive [93/13] **require** the national court of its own motion – irrespective of the type of proceedings in question and of whether or not they are contentious – to determine that the contract before it contains unfair terms, even when no application has been lodged, thereby carrying out, of its own motion, a review of the terms introduced by the seller or supplier in the context of exercising control over its own jurisdiction?

Therefore, the referring court first raised the issue of the need for an explicit claim by the consumer regarding the non-binding nature of the unfair term. Second, it asked whether the Directive *requires* the court to review *ex officio* the relevant contract terms from the perspective of fairness.

By referring to the contentious or non-contentious nature of judicial proceedings, the national judge also invited the CJEU to specify the scope of the *ex officio* power with regard to the existence

of proceedings that are not contentious in nature, as sometimes happens under national procedural law in regard to the issue of orders of payment without the necessary involvement of the debtor.

Reasoning of the CJEU:

Without explicitly referring to Article 47 CFREU, the CJEU addressed the issue by focusing on the effectiveness of consumer protection.

First, it acknowledged that “the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms” (Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25)”.

Then, by again referring to the *Océano* case, it concluded that:

“23. The Court also held, in paragraph 26 of that judgment, that the aim of Article 6 of the Directive would not be achieved if the consumer were himself obliged to raise the unfairness of contractual terms, and that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion”.

Therefore, the *ex officio* power of the court to evaluate the unfairness of contractual terms was conceived as a necessary step towards effective consumer protection. Moreover, it emphasised that the provision on unfair terms as non-binding is a mandatory one intended “to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them”.

In the *Pannon* case (C-243/08), subsequent to *Océano* (Joined Cases C-240/98 to C-244/98), the CJEU stated that for the consumer it is not necessary to have successfully contested the unfair term (in answer to the first preliminary question); rather, the judge is **obliged** to evaluate a contractual term’s unfairness to ensure effective consumer protection (in answer to the second preliminary question):

“32. [...] the role thus attributed to the national court by Community law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction”.

The obligation of the judge is only coupled with the **consumer’s right to oppose** the declaration of a term as non-binding to the extent that this declaration does not meet the concrete interest of the consumer. This may be the case when a jurisdiction clause is concerned and the consumer prefers that the proceedings continue before the court determined by the unfair term, rather than the action being transferred to a different court with a further delay.

### Conclusion of the CJEU:

These were the conclusions of the Court in the *Pannon* case (C-243/08):

1. Article 6(1) of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand.
2. The national court is required to examine, of its own motion, the unfairness of a contractual term when it has available the legal and factual elements necessary for that task. Where it considers a term to be unfair, it must not apply it, except if the consumer opposes that non-application. This duty is also incumbent upon the national court when it is ascertaining its own territorial jurisdiction.

The CJEU did not address the issue of the contentious nature of proceedings, but it confirmed that the *ex officio* power to ascertain a term's unfairness shall regard territorial jurisdiction. One may wonder whether this extends to contentious proceedings where the consumer is not a party to the proceedings. We shall return to this point in sub-section 1.*b* below.

### Elements of judicial dialogue:

As far as the *Pannon* case (C-243/08) is concerned, judicial dialogue has developed both horizontally within the CJEU itself, as shown by the references to the *Oceano* case, and vertically within the application by national courts, including jurisdictions other than those of the referring court. The case law of the CJEU subsequent to *Pannon* (C-243/08) confirms that the national judges' duty to ascertain on their own motion the unfairness of clauses in consumer contract is necessary to ensure effective protection (e.g. *Asbeek*, C-488/11; *Karel de Grote*, C-147/16; *OTP*, C-51/17). The principle of equivalence also plays a significant role in the CJEU's reasoning. For example, in *Asturcom* C-40/08 and *Finanmadrid* (C-49/14) cases, the CJEU stated that although the principle of procedural autonomy applies with regard to the rules implementing the principle of *res judicata* (*Asturcom*), and national enforcement mechanisms (*Finanmadrid*, C-49/14), it must not be less favourable than those governing similar domestic actions (principle of equivalence). Nor may such mechanisms be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness). Furthermore, in the *Profi Credit II* case (C-419/18 and C-483/18), the CJEU has recently reaffirmed the duty of national courts to examine on their own motion the unfairness of clauses in consumer contracts, also recalling that the obligation on a Member State – and its authorities, including courts – to take all the measures necessary to achieve the result prescribed by a Directive is a binding obligation imposed by the third paragraph of Article 288 TFEU and by the Directive itself. More specifically, in the *Profi Credit II* case (C-419/18 and C-483/18), the CJEU stated that when a national court has serious doubts as to the merits of an application based on a promissory note intended to secure the debt arising under a consumer credit agreement, and that note was initially left blank when issued by the maker and subsequently completed by the payee, that court must examine of its own motion whether the provisions agreed between the parties are unfair. Moreover, with regard to judicial dialogue techniques, in the *Profi Credit II* case (C-419/18 and C-483/18), the CJEU, recalling its previous case law

(*Pannon*, C-243/08; *Banco Español*, C-618/10, *Finanmadrid*, C-49/14) made reference to both the conform interpretation and disapplication instruments. In this regard, the CJEU stated that national courts are bound to interpret domestic law in light of the wording and the purpose of the relevant Directive in order to achieve the result sought by that Directive. Then, if they cannot interpret and apply national legislation in accordance with the requirements of Directive 93/13, they are obliged to examine of their own motion whether the provisions agreed between the parties are unfair and, when necessary, to disapply any national legislation or case-law which precludes such an examination. Moreover, generally speaking, the CJEU judgements on the *ex officio* duties of judges in relation to the application of Directive 1993/13 are preliminary rulings in which the Court provides the national courts with a ready-made solution to the dispute, stating that national courts have a duty to examine certain consumer law violations on their own motion.

National courts are only obliged to carry out an *ex officio* assessment of unfairness regarding those contractual terms whose unfairness can be determined by existing elements of law and fact available to the court (*Profi Credit II*, C-419/18 and C-483/18). However, in order to implement the duty of *ex officio* examination, national courts should not be confined exclusively to the elements of law and fact provided by the parties. This means that national courts can, of their own motion, can take investigative measures to complete the case file. National courts should only do this if the existing elements of law and fact ‘give rise to serious doubts as to the unfair nature of certain clauses which were not invoked by the consumer but which are related to the subject matter of the dispute’. The question arises as to how this relates to the requirement for a national court to take into account all the other terms of the contract, more specifically the ‘cumulative effect of all the terms of that contract’, when assessing the unfairness of the contractual term on which the claim is based (*Banif Plus Bank*, C-472/11, Article 4(1) of the Directive). Does the national court have a duty to *ex officio* assess the unfairness of those other terms? The answer is ‘no’. In the *Lintner* decision (C-511/17) the CJEU stressed the importance of protecting the *ne ultra petita* principle: Directive 1993/13 does not oblige national courts to conduct any unfairness assessment beyond the subject matter of the dispute. The terms that are relevant to the assessment of the term are in themselves not connected to the subject matter of the dispute in the main proceedings.

#### *Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

The CJEU’s judgment has had an impact on national case law beyond the scope of the specific context determined by the preliminary reference by the Hungarian court.

With no claim to completeness, there follow a number of references in regard to the jurisdictions considered. This disclaimer applies to all equivalent sections below.

#### **Finland**

The Supreme Court of Finland (*Korkein oikeus*), in the judgement S2014/652, 15 September 2015, relied on CJEU case law when addressing the duty of a court to assess on its own motion the unfairness of terms in consumer contracts. In this case, the Supreme Court stated that in Finland the competence of a court to examine the case of its own motion in civil cases is very limited and

there are no explicit exceptions to this rule in national legislation. The Court, however, noted that this competence is affected by the consumer protection legislation of the EU, in particular Council Directive 93/13/EEC on unfair terms in consumer contracts, and the established case law of the CJEU.

The Supreme Court went on to explain the CJEU's case law as regards Article 6 of the Directive. It referred *i.a.* to the imbalance between the consumer and the supplier, and the demands of the principle of effectiveness in the context of consumer law. The Supreme Court quoted the key statements of the CJEU, recalling several cases such as *Océano* C-240/98–C-244/98, *Pannon GSM*, C-243/08, *Asturcom* C-40/08.

In its summary of the case law, the Supreme Court stated that a national court is obliged to ascertain of its own motion whether the contractual term which is the subject of the dispute before it falls within the scope of the Directive. If it does, the court must examine the unfairness of the term *ex officio* when it has available the legal and factual elements necessary for that task. If necessary, the court must request further clarification. The obligation to examine is not dependent on whether the defendant has pleaded his/her position as a consumer or the unfairness of the term. The Supreme Court also referred to *Faber* C-497/13 and stated that the court must fulfill the obligation notwithstanding rules of domestic law to the contrary.

The Supreme Court ruled that, due to the obligations imposed by EU law, the general national procedural rules must be interpreted in a manner that takes the rights of the consumer into account. This means *i.a.* that the relevant provisions of the Finnish Code of Judicial Procedure on claims that are manifestly without a basis **shall be interpreted so that** they also cover such claims that are based on terms that are contrary to Directive 93/13/EEC. Since the obligation to examine the unfairness of the terms in cases falling within the scope of the Directive is not dependent on the initiative of the consumer, this also constitutes an exception to the general procedural rule in civil cases according to which a court shall not pass judgement on anything more than what has been claimed by a party (Chapter 24 Section 3 of the Code of Judicial Procedure).

The Supreme Court explained the general characteristics of the principle of equivalence, national procedural autonomy and effectiveness in light of CJEU case law (*van Schijndel and van Veen* C-430/93 and C-431/93, *J. van der Weerd* C-222/05-C-225/05). It, however, stated that those principles are to a certain extent different/modified when the case falls within the scope of the Unfair Terms Directive.

With regard to legislation, the Consumer Protection Act (Chapter 4 Section 2) has been amended so that it will no longer be possible for a court to revise an unfair term of a contract. It can only exclude the application of that term if the consumer has not had an opportunity to influence the contents of the agreement (in force: 1 September 2019).

The Code of Judicial Procedure (Chapter 5 Section 3) has been supplemented by a new provision which requires that the plaintiff in his/her complaint to inform the court about the exact terms of the consumer credit agreement (*i.a.* ALR) (in force: 1 September 2019).

## France

In the *Cour de Cassation* case, 3 November 2016 (ECLI:FR:CCASS:2016:C101227), the French *Cour de Cassation*, recalling *Pannon*, (C-243/08) annulled a judgement by the Court of Appeal on the grounds that the latter has failed to *ex officio* declare a term non-binding. It thus enabled the return of an advance payment for an elderly residential service within a term fixed by law. Indeed, the Court of Appeals rejected the unfair clause claim, disregarding its duty to identify *ex officio* the legal grounds for such a declaration since it had all the factual and legal elements to do so.

Civ. 2e, 14 oct. 2021, FS-B+R, no. 19-11.758 is a judgement referred to the Report of the *Cour de Cassation* in which the Second Civil Chamber insisted on the obligation of a judge to examine, even *ex officio*, a clause which s/he suspects of being unfair in view of its wording, in accordance with Article L. 212-1 of the Consumer Code and the interpretation given by the Court of Justice of the European Union. The contractual term in question pertained to the conversion of savings into a life annuity. The phrase “in accordance with the prevailing tariff” suggested a certain amount of power in favour of the professional to manipulate the conversion into a life annuity as s/he saw fit. Clarity and comprehensibility (Article 5 of Directive 93/13) were lacking here: the expression ‘current tariff’ was at least cryptic for the insuree. Article 3 of Directive 93/13 was applicable. It should be noted that the unfair nature of the clause might also have been deduced from what happened in concrete terms: by substituting the unisex table for the TGH05 table (the male table which is more favourable to the insuree), the insurer applied the aforementioned life annuity conversion clause to its own benefit. The *Cour de Cassation* found that by failing to assess the unfairness of the term of its own motion, the Court of Appeal had breached the law. See also Civ. 2e, 8 jul. 2021, no. 19-25.552 - ECLI:FR:CCAS:2021:C200705.

## Italy

The Italian Supreme Court (*Corte di Cassazione*), Joint Chambers, has referred to the principles applied in *Pannon* (C-243/08) in a few cases.

In Judgement no. 14828/2012, though not referring to a consumer dispute and expressly addressing only the general rules on nullity of contract, the Court acknowledged that the principles expressed in *Pannon* (C-243/08) confirmed the interpretation whereby ascertainment of nullity is an obligation and not a mere power of the judge, as the black letter rule states in Article 1421, Italian Civil Code. The same Italian judgement referred to *Asturcom* (C-40/08, see below) to support this view. On this basis, the Court concluded that such a duty exists also when the claimant seeks contract termination for breach, since contract termination (as well as contract execution) presupposes contract validity, which shall be *ex* own motion ascertained by the court.

The implications of the *Pannon* case (C-243/08) in Italian case law have been developed further by the twin judgements of the Joint Chambers rendered in 2014 (n. 26242/2014 and 26243/2012). Here, the Court acknowledged that the duty of an *ex officio* declaration of nullity shall extend to both general contract law and consumer contract law. The only peculiarity in this case concerns the consumer’s right to oppose the declaration of nullity, once this has been ascertained and the judge has invited the parties to present their views on the question of nullity. Moreover, when exercising this *ex officio* power, the court shall act in the interest of the consumer

and not of the counterparty, thus enacting the undeniable guarantee of effective protection of fundamental values establishing the social order.

The Court identified the rationale of the *ex officio* power not only in the need to ensure an effective consumer protection, but also in the need for deterrence of abuses in prejudice of a weak contracting party. These twin judgements have become a milestone of Italian case law – as confirmed by subsequent judgements (Court of Cassation, joint chambers, 4 November 2019, n. 28314) in the area of nullity (in both general contract law and consumer law) – leading to an evident expansion of the judicial duties of *ex officio* ascertainment of nullity at any stage of the civil process.

### **The Netherlands**

The Supreme Court has affirmed in the *Heesakkers/Voets* case (judgement of 13 September 2013, ECLI:NL:HR:2013:691) that the national court must examine of its own motion whether a contract term falls within the scope of Directive 93/13/EEC and, if so, whether it is unfair insofar as the court has the necessary (factual and legal) information available. This requires an examination of law which is equivalent to national rules of public policy (“*openbare orde*”).

To obtain the necessary information, the court may use the powers conferred on it by Articles 21 and 22 of the Dutch Code of Civil Procedure (**DCCP**) and take the measures of inquiry that are necessary to ensure the full effectiveness (“*volle werking*”) of Directive 93/13/EEC. The duty of *ex officio* examination also applies in the event of default on the part of the consumer, on the basis of Article 139 DCCP and the writ of summons.

In addition, it was decided that the national court is obliged to annul (“*vernietigen*”) unfair contractual terms on the basis of Article 6:233 of the Dutch Civil Code (**DCC**). This interpretation of Article 6:233 DCC deviates from the meaning that is usually attributed to ‘voidability’ (“*vernietigbaarheid*”) in Dutch contract law. In contrast to nullity, which has an *erga omnes* effect and is affirmed by courts of their own motion, Article 6:233 DCC normally requires a party to invoke the voidability of a clause in order for the clause to lose its effect. The Supreme Court’s interpretation of Article 6:233 in compliance with the requirements of Directive 93/13/EEC now translates EU law’s requirements into a duty for Dutch courts to assess *ex officio* whether a clause in a B2C contract is unfair, and to annul it on the basis of Article 6:233 DCC if this is the case. In B2B contracts, Article 6:233 is still understood as necessitating a party’s request.

The Court of Appeal Arnhem-Leeuwarden (*Gerechtshof Arnhem-Leeuwarden*) in its decision no. 200.139.113/01, 19 September 2017 followed the Supreme Court’s case law and applied the principle of effectiveness. Moreover, in that judgement the Court applied the CJEU’s reasoning in *Banco Primus* (C-421/14), stating that in order for the effect of article 7 of the Directive 93/13 to be deterrent, it must be interpreted as meaning that, if a term is unfair within the meaning of article 3(1) of the Directive, the fact that it has not been enforced cannot prevent the national court from attaching all appropriate consequences to that unfair nature.

Furthermore, the Supreme Court (*Hoge Raad*) in the judgement no. 19/01115, 12 July 2019, considered that the relationship between the narrow judicial review afforded to courts when enforcing arbitral awards and the duty for a national judge to apply consumer protection rules *ex*



*officio* has not been defined in law. The Court cited the CJEU's decision in *Pohotovost* in determining that Directive 93/13 imposes an obligation on the national judge to ascertain an unfair term within the meaning of the Directive *ex officio*, if s/he is given this power under national law. The Court considered that, under national law, the judge has limited grounds for setting aside an arbitral award. These grounds include an invalid arbitration agreement and if the manner of the arbitral proceedings is contrary to public policy (Article 1065(1) Rv). In its evaluation, the Court noted that, due to the weight and public interest of Directive 93/13, it must be seen as equivalent to national rules of public order. Thus, according to the principle of effectiveness, the national judge must apply the same test to an arbitral award which s/he suspects is an unfair term within the meaning of Directive 93/13 as the test that s/he would apply to a term which circumvents public order. The Court noted that, if the judge does not have the competence to apply this test, the principle of effectiveness will be undermined. The Court concluded that, if the judge finds that the arbitration clause should not bind the consumer, the arbitral award can be set aside as being invalid. The Court found, in accordance with the principle of effectiveness, that if national law allows the judge to test an arbitral award because it breaches public policy, s/he must also be able to test the award if s/he suspects that it is an unfair term within the meaning of Directive 93/13. Accordingly, the Court concluded that if the judge has the relevant facts with which to ascertain that the arbitration clause is unfair under Directive 93/13, s/he must investigate this *ex officio*.

With respect to the *ex officio* examination of unfair contract terms in the context of Directive 93/13/EEC, a report has been drafted by a special working group of the National Consultation Committee on Civil Law and Subdistrict Matters of the District Courts (*Landelijke overleg vakinhoud civiel en kanton van de rechtbanken*, hereinafter: LOVCK) containing guidelines on the *ex officio* application of European consumer law (first report of February 2010 (*Ambtshalve toepassing van Europees consumentenrecht*) and second report of November 2014 (*Ambtshalve toetsing II*); both reports have been published online). See recommendations for Dutch judiciary on *ex officio* control of unfair terms: <https://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-civiel-recht/Pages/rapport-Ambtshalve-toetsing-van-Europees-consumentenrecht.aspx> (incl. explanation of CJEU and Dutch case law, references to literature).

The LOVCK-report is aimed at determining a common position of the District Courts and Courts of Appeal. It contains recommendations to all judges dealing with consumer law cases, which are almost always followed and applied (see the 2014 report, p. 3). According to the 2014 report, which refers to a survey among national courts, there appear to be local differences only in (the estimation of) the number of cases requiring an *ex officio* examination.

In the 2010 report, the principle of effectiveness is emphasised as entailing that consumers who are not aware of their rights must be protected by the court (p. 6); see also the 2014 report (p. 23). Both reports extensively discuss the CJEU's case law in the field of consumer protection, including judgments applying the principle of effectiveness. Neither proportionality nor dissuasiveness are mentioned (explicitly).

## Poland

In Poland the general consequence of the unfairness of a contract clause – i.e. its lack of bindingness upon a consumer – has been shaped as a sanction effective *ex lege*. A consumer is not required to make any separate claim to trigger this sanction, and the court is obliged to apply it *ex officio*. The general model of this sanction resembles the concept of nullity of a clause in general contract law (with several peculiarities due to the provisions of the 93/13/EC Directive). This pertains also to its *ex officio* effect, which is considered to follow the general pattern of nullity.

This interpretation has been acknowledged in numerous cases. The first milestone in this process was set by the resolution of a panel of seven judges of the Supreme Court of 31 March 2004 (III CZP 110/03). Making reference to the CJUE *Océano* (C-240/98) case, the Supreme Court declared that the national court was obliged to examine of its own motion the unfairness of a territorial jurisdiction provision in contracts concluded with consumers, even though the Polish civil procedure states that this matter may be evaluated by a court only at the request of the party. In its judgement of 19 April 2007 (I CSK 27/07), the Supreme Court went a step further and affirmed that a national court must *ex officio* conduct an examination of the unfairness not only of a jurisdiction clause, but of any contract term. With regard to the *Océano* case, the Court explicitly addressed the issue presented in the literature that this interpretation would violate Polish civil procedure (specifically Article 321 § 1 of the Code of Civil Procedure forbidding the court to adjudicate on a matter not covered by a request, or to adjudge the request), referring to it as a ‘misunderstanding’. This principle has since been applied broadly in national case law. In the judgement of 14 July 2017, the Supreme Court once again reached the same conclusion, making reference to the latest CJEU judgements: *Elisa Maria Mostaza Claro c. Centro Movil Milenium SL* (C-168/05), *Pannon* (C-243/08), *Maria Bucura c. SC Bancpost SA* (C-348/14) and *ERSTE Bank Hungary Zrt. C. Attila Sugár* (C-32/14).

## Portugal

The regime on abusive clauses in contracts is set out in Decree-Law 446/85 as amended. In Portugal, abusive clauses are null and they produce no effects. The judge has the power to declare *ex officio* the unfairness of a consumer contract term, according to Article 286 of Portuguese Civil Code, Article 24 of Decree-Law 446/85. It is not controversial.

With its decision of 25 February, 2016, the Appeal Court of Guimarães – with regard to the clauses of an insurance contract – referred to the CJEU case law indicating a court’s duty to examine of its own motion the possible unfairness of a clause. Secondly, the Court examined the notions of ‘good faith’ and ‘significant imbalance’ concerning the concept of unfairness as laid out in Article 3(1) of Directive 93/13. Thus, the Court highlighted that: i) in order to ascertain whether a term causes a ‘significant imbalance’, the court must consider what rules of national law would apply in the absence of an agreement by the parties in the relevant situation; ii) in order to ascertain whether such imbalance is contrary to the good faith requirement, the national court must assess whether the company, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.

## Romania

In its judgement of 25 February 2015, the High Court of Cassation and Justice declared that a territorial competence clause that forced the consumer to file a case in a Tribunal more than 500 km away from his domicile was abusive, and that avoidance of the clause could be asserted *ex officio*. The High Court decided the case by making explicit reference to the CJEU *Pénzügyi* (C-240/98) and *Oceano* (C-244/98) cases, as well as to Article 6 of the ECHR. The same conclusions were reached in a similar case with the judgement of the High Court of 20 May 2014, where the High Court interpreted and applied national law, making reference to the CJEU *Océano* (C-240/98) case, as well as to *Salvat Editores SA c. José M. Sánchez Alcón Prades* (C-241/98), *José Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) and *Emilio Viñas Feliú* (C-244/98).

## Slovenia

According to Article 23 of the Slovenian Consumer Protection Act, the general consequence of a contractual term which is unfair to a consumer is *ex officio* declaration of its nullity (see also Article 86 et seq. of the Obligations Code). In decision no. II Ips 201/2017 of May 7, 2018 the Supreme Court of the Republic of Slovenia, referring to the *Andrićinc* case (C-186/16) and the *Kásler* case (C-26/13), concluded that an unfair contractual term constitutes prohibited contractual content, for which the Slovenian Consumer Protection Act as *lex specialis* explicitly provides the legal sanction of *ex officio* declaration of nullity. The purpose of the explicit provision on the nullity sanction is, according to the Court, that consumers do not suffer any negative consequences due to unfair contractual terms and are not bound by them. The Court also explained the importance of differentiation between a contractual term that is not defined in plain intelligible language, and an unfair contractual term. Only the latter can be declared null. Even though the Slovenian national courts have not to date directly referred to the *Pannon* case (C-243/08), Slovenian case law obviously refers to principles applied in it.

### 1.2.2. Question 1.a – *Ex officio* power to declare the unfairness of a consumer contract term and duty to make investigations

1.a. Under the principle of effective consumer protection, shall a court also make *ex officio* investigations in order to ascertain whether a contractual term is unfair?

#### The case

The issue was addressed in *Pénzügyi* (C-137/08). This is again a Hungarian case dealing with consumer credit linked with the purchase of a car. The consumer stopped fulfilling his obligations under the credit agreement and the bank sought an order for payment, which should be rendered by the court without the involvement of the debtor, in application of national procedural law. The accessed court is the one identified in a contract term with regard to the place of business of the professional party. This term was not reviewed by the court (which did not raise any question concerning jurisdiction), either before issuing the order for payment or once the

consumer had ‘appealed’ against the order for payment. It was only at this point that the court addressed the issue of jurisdiction concerning the fairness of the mentioned clause.

#### Preliminary question referred to the CJEU

The original question referred to the CJEU in respect of *ex officio* power was very similar to the one presented in the *Pannon* case (C-243/08):

Does the consumer protection guaranteed by [the Directive] require that – irrespective of the type of proceedings and whether they are *inter partes* or not – in the context of the review of their own competences, the national courts must assess, of their own motion, the unfair nature of a contractual term before them even if not specifically requested to do so?

When the CJEU judgement in the *Pannon* case (C-243/08) was issued, the *Pénzügyi* case (C-137/08) was still pending. Therefore, the referring court considered the above question as already answered in the former judgement, while adding the following question that had not been answered by the CJEU in the *Pannon* case (C-243/08):

If the national court itself observes, where the parties to the dispute have made no application to that effect, that a contractual term is potentially unfair, may it undertake, of its own motion, an examination with a view to establishing the factual and legal elements necessary for that examination where the national procedural rules permit such only if the parties so request?

#### Reasoning of the CJEU:

The CJEU totally concurred with the reasoning presented in the *Pannon* case (C-243/08). The need to ensure effective consumer protection remained the main argument. The European judge also recalled, further to previous jurisprudence, that “the Court has also stated that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (*Océano Grupo Editorial and Salvat Editores*, paragraph 27, *Mostaza Claro*, paragraph 26, and *Asturcom Telecomunicaciones*, C-40/08, paragraph 31)”.

#### Conclusion of the CJEU:

On this basis, the CJEU expanded the duty to ascertain a term’s unfairness having regard to the judge’s obligation to conduct an investigation in order to evaluate a term’s unfairness. These are the conclusions of the Court in the *Pénzügyi* case (C-137/08):

1. The national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether that term is unfair.

One could ask whether the same conclusion could apply to other types of clauses calling for a more onerous investigation, e.g. about the imbalance created by complex mechanisms of

liquidation of default interest in loan agreements, such as those discussed in *Radlinger* (C-377/14) and in *Banco Primus* (C-421/14).

#### Elements of judicial dialogue:

On the basis of available information, the CJEU mainly interacts horizontally when dealing with judgements in other preliminary reference proceedings, and it does so vertically when dealing with the referring court in the preliminary reference proceeding. With regard to judicial dialogue within the CJEU, to be recalled is the *Profi Credit II* case (C-419/18 and C-483/18), in which the Court considered that the duty to make investigations is necessary for ensuring the effective review of whether the terms of the contract concerned are unfair, and then the observance of the rights conferred by Directive 1993/13. On these bases, the CJEU stated that, where a national court is hearing an application based on a promissory note which was initially left blank when issued and subsequently completed and was intended to secure a debt arising under a consumer credit agreement, and when that court has serious doubts as to the merits of that application, Articles 6(1) and 7(1) of Directive 93/13 require that the court be able to demand the production of the documents on which that application is based, including the promissory note agreement, where under national law such an agreement constitutes a precondition for the issuance of such a promissory note. The CJEU added that its ruling did not contravene the principle according to which the subject matter of an action is to be defined by the parties. The national court's requirement that the applicant produce the content of the document or documents on which his/her application is based simply forms part of the evidential framework of the proceedings, since the purpose of such a request is merely to verify the basis of the action.

Relevant in another field is the *Online Games* case (C-685/15), in which the CJEU, relying also on Article 47 CFR, stated that a national procedural system may provide that, in administrative offence proceedings, the court called upon to rule on the compliance with EU law of legislation restricting the exercise of a fundamental freedom of the European Union is required to examine of its own motion the facts of the case before it in the context of examining whether administrative offences arise, **provided that such a system does not have the consequence that that court is required to substitute itself for the competent authorities of the Member State concerned**, whose task is to provide the evidence necessary to enable that court to determine whether that restriction is justified.

However, as more broadly understood, the issue is subject to a wider debate in national jurisprudence, which is suited to creating greater space for judicial dialogue beyond the boundaries of preliminary reference procedures.

#### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

### **Poland**

As explained above, the general duty of a Polish court to conduct an *ex officio* examination of contract clauses is considered an element intrinsic to the consequences of the unfairness of a clause. As follows from this general assumption, domestic courts are obliged to use the entire

material of the case to carry out this examination (all the facts and evidence available). They can also collect new evidence on their own motion (under Article 232 sentence 2 of the Code of Civil Procedure). In this respect, however, they are significantly constrained because, under Polish case law, a court can only exceptionally intervene in the collection of evidence, so as not to destabilise the equality of arms between the parties. There are no significant cases of this issue being addressed from the perspective of consumer protection and, in particular, of unfair contract terms.

## **Portugal**

According to the Portuguese Civil Procedure Code, the judge has neither the duty nor the power to conduct investigations (and by ‘investigations’, autonomous and new evidence-collecting may be understood). Nevertheless, if it results from the documentation or from other evidence collected for the process that the clause is abusive, the judge must declare it null and void.

## **The Netherlands**

The Supreme Court (*Hoge Raad*) in the judgement no. 19/01115, 12 July 2019, relying on the CJEU’s decision in *Pénzügyi* (C-137/08), stated that if the relevant facts are not available to the judge, s/he may order measures of his/her own motion if national law permits it. The Court considered that, despite the limited inquiry allowed in Article 1063(1) Rv, Article 22 Rv allows the judge to ask the appellant to explain the relevant facts and circumstances and submit the relevant documents. This applies even if the respondent has not shown up for the proceedings and s/he is tried *in absentia*.

### **1.2.3. Question 1.b – *Ex officio* power to declare the unfairness of a consumer contract term in appeal**

1.b. Shall an appeal court declare a consumer contract term unfair even though the consumer has not filed a claim in this respect in first instance or in the appeal brief?

#### *The case(s)*

This issue has been addressed in the *Asbeek* case (C-488/11). This case concerned a tenancy contract concluded in the Netherlands between a real-estate company and two consumers. The contract was based on standard terms drawn up by a real-estate association and included a penalty clause applicable in case of default. When the consumers failed to pay the rent, the real-estate company brought before a court a claim for payment. The first-instance court upheld the claim. Once the case was brought to appeal, the consumers sued for a reduction of the penalty due to a discrepancy between the penalty and the detriment suffered by the landlord. The Court wondered whether in such circumstances an appeal court should *ex officio* examine the term’s unfairness and what measure it should apply (annulment or penalty moderation). The latter issue is addressed in other sections of this Casebook (see Chapter 5).

### Preliminary question referred to the CJEU

This is the question referred to the CJEU in *Asbeek* (C-488/11) in respect of the *ex officio* power of an appeal court:

Does the fact that Article 6 of the Directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy mean that, in a dispute between individuals, the national transposition measures with regard to unfair contractual terms are a matter of public policy, so that the national court is **competent and obliged, both in first-instance proceedings and in appeal proceedings, of its own motion** (and thus also outside the ambit of the grounds of complaint), to assess a contractual term against the national transposition measures and to rule that term to be void if it reaches the conclusion that the term is unfair?

The question was therefore brought to the attention of the CJEU from the perspective of the *principle of equivalence*. Indeed, on the one hand Dutch law requires a national court adjudicating appeals to keep in general to the complaints submitted by the parties and to base its decision on those complaints; on the other hand, it provides that the court hearing the appeal must apply of its own motion the relevant provisions of public policy, even if these have not been invoked by the parties.

### Reasoning of the CJEU:

The CJEU started from the principles already applied in *Banco Español de Crédito* and *Banif* (C-472/11), according to which the role attributed to the national court by European Union law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term. It also consists of the obligation to examine that issue of its own motion, where it has available the legal and factual elements necessary for that task (paragraph 41). The Court added that the implementation of these obligations in appeal proceedings is a matter of national procedural autonomy. However, this autonomy shall be exercised within the limits imposed by the principles of effectiveness and equivalence.

Moreover, the Court observed that Article 6, Unfair Terms Directive, is a mandatory provision and, due to the public interest underlying consumer protection provided by this Directive, “article 6 thereof must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy (see Case C 40/08 *Asturcom Telecomunicaciones* [2009] ECR I 9579, paragraph 52, and order in Case C 76/10 *Pobotovost’* [2010] ECR I 11557, paragraph 50).” (paragraph 44).

### Conclusion of the CJEU:

These are the conclusions of the CJEU in the *Asbeek* case (C-488/11) in regard to the issue addressed:

where the national court has the power, under internal procedural rules, to annul of its own motion a term which is contrary to public policy or to a mandatory statutory provision the scope of which warrants such a sanction, which, according to the

information provided in the order for reference, is true in the Netherlands judicial system with regard to a court ruling in appeal proceedings, it must also annul of its own motion a contractual term which it has found to be unfair in light of the criteria laid down by the Directive. (paragraph 51)

Being based on the principle of equivalence applied to Dutch law, the conclusion suggests that, whenever a national law requires an appeal court to apply *ex officio* mandatory provisions and/or public order rules, this obligation shall extend to the application of the Unfair Terms Directive, with especial regard to the ascertainment of terms' unfairness, and the non-binding nature of unfair terms.

#### Elements of judicial dialogue:

The CJEU built on previous judgements concerning the *ex officio* power of the court to ascertain the unfairness of contractual terms and to set aside unfair ones (part. *Banco Español de Crédito, Banif*, C-472/11). When referring to these judgements, it also confirmed that the right of both parties to be heard should be respected, and that a consumer may oppose the declaration of nullity on being informed about the possibility of having the terms set aside.

#### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

##### **Italy**

Although it lacks a reference to EU principles and case law, the Italian Supreme Court (*Corte di Cassazione*) has long upheld the principle that contract nullity may be acknowledged also in appeal proceedings and without a claim or a defence by the interested party, whenever the claim refers to a right based on the contract affected by nullity (Cass., Joint Chambers, 4 November 2004, n. 21095, confirmed, e.g., by Cass., Joint Chambers, 4 November 2012, no. 14248). The same principle applies with regard to partial nullity claims, with the consequence that the party can formulate a claim concerning partial nullity for the first time in the appeal proceeding, since such claim – being detectable *ex officio* – does not fall under procedural preclusion (Court of Cassation, Decision no. 2910 of 15 February 2016).

With decision no. 923/2017 the Italian Court of Cassation laid out the principle that protection nullity in consumer contracts may be determined by the judge even during the appeal proceeding as long as an inner *res indicata* concerning the nullity claim has not been developed. In other words, if the nullity – in the first instance proceeding – was the object of a specific claim or an objection and the judge's decision in its regard was not challenged before the Court of Appeal, then an inner *res indicata* is formed, so that the judge is prevented from ruling the nullity *ex officio*. Nevertheless, the judge must carefully examine whether or not there is an inner *res indicata* because, for instance, in this decision the Court of Cassation recalled that in the first-instance proceeding the Tribunal rejected the plaintiff's claims on the grounds that the transaction challenged had not been, in fact, concluded at all. Therefore, the first instance judge did not address the question concerning the nullity, but instead based the decision solely on the alleged non-occurrence of the transaction. As a consequence, no inner *res indicata* was developed, and the



Court of Appeal, according to the Court of Cassation, could *ex officio* rule the nullity of the contract.

In the above-examined judgement no. 26242/2014, the Supreme Court upheld the same principle (see section 7.1). It did so through analysis that posited CJEU case law as a driver for expansion of the court's *ex officio* powers in the case of contract nullity (see section 3.13.2).

## The Netherlands

As seen above, the Supreme Court has affirmed in the *Heesakkers/Voets* case (judgement of 13 September 2013, ECLI:NL:HR:2013:691) that the national court must examine of its own motion whether a contractual term falls within the scope of Directive 93/13/EEC and, if so, whether it is unfair insofar as the court has the necessary (factual and legal) information available. This requires an examination of law which is equivalent to national rules of public policy (“*openbare orde*”). Such an obligation also applies to the Court of Appeal, even if this would extend beyond the (strictly delimited) ambit of the dispute in appellate proceedings.

In the Netherlands, the principle that a civil court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it by the parties (Articles 24 and 25 of the Dutch Code of Civil Procedure, **DCCP**). In short, Articles 24 and 149 DCCP prohibit the court from supplementing facts and rights not stated by the parties. The court can supplement legal grounds of its own motion (Article 25 DCCP), but not if they are ‘at the disposal of the parties’ (“*ter vrije beschikking van partijen*”). Those grounds must be invoked by the parties themselves. Another limitation is that if the defendant fails to appear when the necessary formalities to inform him/her of the proceedings have been completed, the court will only assess whether the claim is manifestly wrongful or unfounded in order to pass judgement in default of appearance (Article 139 DCCP).

In appellate proceedings, the ambit of the dispute is even more strictly limited: in principle, the Court of Appeal may only decide on the basis of the objections (“*grieven*”) lodged against the judgement in first instance. Until recently, it was still a matter of dispute in the Netherlands whether the obligation of *ex officio* control of unfair contract terms extended to the Court of Appeal, if this would extend beyond the ambit of the dispute. The Supreme Court has ruled that overriding the (strict) procedural rules is only possible when an appeal has been filed against the granting or dismissal of the claim which is based on the contractual term at issue (Supreme Court judgement of 26 February 2016, ECLI:NL:HR:2016:340). Only then is the Court of Appeal competent to decide upon it. The ambit of the dispute is limited to the decisions (“*beslissingen*”) in the judgment that have been challenged. The decisions that have not been challenged have obtained *res judicata* (encompassing both “*kracht van gewijsde*”, i.e. formal *res judicata*: they are final and irrevocable, and “*gezag van gewijsde*”, i.e. substantive *res judicata*: they are binding between the parties).

## Poland

Due to the general model of the appeal proceedings in Polish law, the court of second instance is entitled to fully reassess a case in terms of substantial law and verify any infringements *ex officio*. Only procedural law issues can be examined in an appeal, on the condition that they have been

pointed out by the appellant (see resolution of the Supreme Court of 31 January 2008, III CZP 49/07). In its judgement of 19 April 2007 (I CSK 27/07), the Supreme Court explained in detail how this procedure influences the application of the court's *ex officio* power to declare the unfairness of a consumer contract term in appeal. According to Article 187 § 1 of the Code of Civil Procedure, the claimant has to state his/her claim (demand/remedy) and present sufficient facts that justify it. These elements are the boundaries of the case that cannot be exceeded by the court. However, the court is obliged to identify the nature of the case, which means that it must find a substantial law that should be applied in the case. This concerns proceedings before both the first and second instance court. The second instance court considers the case *cum beneficio novorum*, which means 'from the beginning', and has a duty to correct legal errors made by the lower instance court.

As a result, the court of second instance is able to conduct a new examination of a consumer contract and declare the unfairness of any of its clauses *ex officio*. This pertains to both the 'negative' and 'positive' effects of the review. Hence, the court of second instance can both find that the clause is fair (although it has been declared abusive by a court of first instance) and review it for abusiveness (when the court of the first instance found it fair or did not conduct any examination at all). It can also supplement the evidence (e.g. collect new documents, gain expert witness opinions), if doing so is necessary to ascertain the abusiveness of a clause. The court of second instance is expected to make its own judgement *in merito* (i.e. also to adjudicate on the unfairness of a clause); only in exceptional circumstances is it entitled to refer the case back to be decided again in the first instance.

In the cassatory proceedings before the Supreme Court, the scope of *ex officio* power to review clauses is much more constrained. The procedure in question is designed only to verify the interpretation and application of law by the court of second instance. Therefore, the Supreme Court is restrained by the factual findings made in the first and second instances and cannot collect evidence on its own (Article 398<sup>13</sup> § 2 of the Code of Civil Procedure). While reviewing a case, it is also limited by the statements made in the cassatory claim – i.e. it is not entitled to review the case entirely on its own. From the perspective of abusive clauses, the Supreme Court can, therefore, reassess fairness only if this issue has been pointed out in the cassatory claim and as long as it does not require supplementary factual findings or evidence (Article 398<sup>13</sup> § 1 of the Code of Civil Procedure). In the majority of cases, the Supreme Court – when finding the judgement faulty – refers the case back to the court of second or first instance. As a result, it relatively rarely makes its own, final declaration of the abusiveness of a clause.

## **Slovenia**

In Slovenia, there are no references to EU principles or case-law regarding *ex officio* power to declare the unfairness of a consumer contract term on appeal. According to general rules in Slovenian appeal proceedings, the court of second instance *ex officio* reassesses the case in terms of the correctness of application of the substantive law and *ex officio* nats severe violations of civil procedure provisions referred to in clauses 1, 2, 6, 7, 8, 11, 12 and 14 of the second paragraph of Article 339 of the Slovenian Civil Procedure Act. Thus, the court of second instance has the power to conduct a new examination of a consumer contract and also the power to declare the

unfairness of any clause *ex officio* within the framework of the facts that have been submitted by the parties (see article 350 of the Slovenian Civil Procedure Act). On the other hand, in the revision proceeding the Supreme Court of Republic of Slovenia is not entitled to review the case *ex officio*. Consequently, it does not have the power to *ex officio* declare the unfairness of any clause. The Supreme Court has the power to reassess the fairness of a contract's terms only if that issue has been pointed out in the revision claim by the parties (see article 371 of the Slovenian Civil Procedure Act).

#### 1.2.4. Question 1.c – *Ex officio* powers of the judge when giving judgement in default

1.c Shall a judge, when giving judgement in default, assess on his/her own motion whether a contractual term falls within the scope of Directive 93/13 as well as the unfairness of that term?

##### The case

The decision examined here (*Karel de Grote* case, C-147/16) concerned a proceeding initiated by an educational institute against a student for the payment of registration fees and the costs of a study trip. In particular, the student had agreed, by written contract, to an interest-free repayment plan of her debts which also contained a clause regarding default interests amounting to 10% per annum. The defendant (i.e. the student) did not appear before the Tribunal and was not represented. The referring Court stated that “given that (...) [the student] did not appear, it is required under Article 806 of the Judicial Code (i.e. of Belgium), to uphold (...) [the] claim, unless the legal procedure or claim is contrary to public policy”.

##### Preliminary questions referred to the CJEU:

The referring Court formulated three different questions regarding, in essence, two major issues: i) the *ex officio* assessment of Directive 93/13 on applicability and unfairness of contractual terms when giving the judgement in default; and ii) the qualification of an educational institution as a ‘seller or supplier’ within the scope of Directive 93/13.

- (1) Does a national court, when a claim is lodged with it against a consumer in relation to the performance of a contract, under national procedural rules, the power only to examine of its own motion whether the claim is contrary to national rules of public policy, or does it have the power to examine in the same manner, of its own motion, even if the consumer does not appear at the hearing, whether the contract in question falls within the scope of [Directive 93/13] as implemented in Belgian law?

##### Reasoning of the CJEU:

With regard to the first question, the Court pointed out that the system of protection introduced by Directive 93/13 follows the principle that the consumer is in a weaker position vis-à-vis the seller/supplier “as regards both his bargaining power and his level of knowledge”. The assessment carried out by the judge on the applicability of the Directive as well as the unfairness of contract clauses constitutes a positive action aimed at establishing a correct balance between the consumer and

the seller/supplier if that balance was firstly disrupted by exploiting the weaker position of the consumer. On such grounds, the established case law of the CJEU empowers national judges to assess the aforementioned issues on their own motion.

With specific regard to in-default proceedings, the Court recalled that it is the national legal system of each member state that is responsible for determining procedural rules to safeguard the rights that individuals derive from EU Law. Nevertheless, those rules must comply with both the principle of equivalence and the principle of effectiveness. Therefore, effective protection of the consumers must be ensured even when the judgement is given in default. Moreover, “*the Court of Justice has held that, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 thereof must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy*”. As a consequence, where national rules empower the judge to carry out an *ex officio* assessment when giving in-default judgements, only when a claim’s contrariness to public policy’s rules is at stake shall such classification “[*extend*] to all the provisions of the directive which are essential for the purpose of attaining the objective pursued by Article 6 thereof”.

#### Conclusions of the Court

Following extensive reference to its already-established case law, the CJEU ruled that, even when giving judgement in default, a national court can assess on its own motion the unfairness of contractual terms:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning **that a national court giving judgement in default and which has the power, under national procedural rules, to examine of its own motion whether the term upon which the claim is based is contrary to national public policy laws is required to examine of its own motion whether the contract containing that term falls within the scope of that Directive and, if so, whether that term is unfair.**

#### Elements of judicial dialogue

The CJEU drew heavily on its previous case law in the first place to highlight that the asymmetrical contractual relationship between the consumer and the seller/supplier induces the consumer to agree to previously drawn-up terms (*Pénzügyi* C-137/08; *Banif*, C-472/11, *Banco Santander*, C-598/15). The same case law, and in particular the *Pénzügyi* (C-137/08) and *Banif*, C-472/11 decisions, are also referred to in order to specify the scope and purpose of the *ex officio* assessment in terms of contractual balancing and effective judicial protection of the consumer. When highlighting how national procedural rules should comply with the principles of equivalence and effectiveness, the Court referred to the *Asbeek* decision (C-488/11).

In the *Kancelaria Medius* decision (C-495/19) the CJEU suggested that Polish courts could apply the principle of harmonious interpretation when interpreting Polish procedural rules on default judgements: that is, they could broadly interpret the exceptions of ‘reasonable doubts’ and ‘circumventing the law’ to accommodate *ex officio* assessment of unfairness. Indeed, Polish courts

may not contest the validity of the presented documents in default proceedings of their own motion, unless there are ‘reasonable doubts’ or a risk of ‘circumventing the law’.

### 1.2.5. Question 1.d – *Ex officio* powers of the judge in execution proceedings

1.d. Shall a court seized of the enforcement of a mortgage procedure or of the execution of a payment order issued by another court or an arbitration tribunal declare a consumer contract term unfair even though the consumer has not filed a claim in this respect during the proceedings aimed at the adoption of the payment order and the latter has become final?

- i. payment order by a court
- ii. by a non-judicial body
- iii. by an arbitration court
- iv. mortgage enforcement procedure

#### The case(s)

A number of cases (e.g. *Asturcom*, C-40/08; *Pannon*, C-243/08; *Pénzügyi* C-137/08, *Finanmadrid* C-49/14, *Banco Primus*, C-421/14, *Banco Santander*, C-598/15, *Profi Credit*, C-176/17) have been brought before the CJEU in order to address the issue in the box above.

Indeed, it quite frequently happens that the issue of a term’s unfairness arises when the professional, as creditor, intends to execute his/her right *vis à vis* the consumer by seizing the goods of the consumer as debtor (normally for price payment or return of a loan).

Most judicial systems provide mechanisms with which to obtain orders of payment as ‘executory titles’ by means of fast procedures, and these procedures are often conducted without the participation of the debtor. The latter normally has the right to file an opposition against the payment order so as to prevent the foreclosure of goods. Lacking this opposition (or once a court has rejected this opposition), the title will normally become final (*res judicata*).

National procedures differ considerably. However, in most cases the ‘fast procedure’ does not allow for a review of a contract term’s fairness; or, if it do so, such a review may be omitted, particularly when the consumer has not taken part in the procedure.

Therefore, the issue concerning a contract term’s unfairness may arise later, particularly during the consumer’s opposition to the payment order or during the consumer’s opposition to the executory procedure, when the order has become final. Issues regarding a term’s unfairness may also arise within a mortgage enforcement procedure or during proceedings brought by the successful bidder in an auction of immovable property in order to acquire possession of the immovable property and evict the debtor. The courts dealing with these oppositions are normally the courts referring preliminary questions to the CJEU, as described below.

### Preliminary questions referred to the CJEU:

On the premises described above, the referring courts questioned whether they should *ex officio* review contract terms constituting the ground for the professional right to seize consumers' goods, even if the payment order has been issued by a judge or another authority within a procedure allowing for opposition by the consumer.

The exact terms of preliminary questions differ according to the type of procedure used to issue the payment order. We distinguish the following cases:

#### a. Payment order issued by a court

This is the case of *Pannon* (C-243/08) and *Pénzügyi* (C-137/08), where the order sought was made in proceedings which did not require the court to hold a hearing or to hear the other party, and in which the court did not raise any questions concerning its jurisdiction or concerning the contractual term conferring jurisdiction in the loan contract. The consumer appealed against the order for payment before the referring court without, however, stating any grounds for that appeal (see paragraph 17-18, *Pénzügyi*, C-137/08).

In *Pénzügyi* (C-137/08) the referring court asked the following question:

Does the consumer protection guaranteed by [the Directive] require that – irrespective of the type of proceedings and whether they are *inter partes* or not – in the context of the review of their own competences, the national courts are to assess, of their own motion, the unfair nature of a contractual term before them even if not specifically requested to do so?

In the *Profi credit I* case (C-176/17), the referring court raised the question of whether Directives 93/13 and 2008/48 preclude the assertion of a claim, established by means of a duly completed promissory note, by a seller or supplier (the creditor) against a consumer (the debtor) in the course of a specific order for payment, under which the national court may examine the effectiveness of the claim arising from the promissory note solely from the point of view of compliance with the formal requirements applicable to the promissory note, without examining the relationship underlying it.

Another relevant case is the *Bank Polski* (C-632/17) one, where the referring court raised the question of whether the provisions of Directive [93/13], and in particular Article 6(1) and Article 7(1) thereof, and the provisions of Directive [2008/48], and in particular Article 10 and Article 22(1) thereof, should be interpreted as precluding the pursuit of a claim by a bank (the creditor) against a consumer (the debtor) on the basis of a banking ledger excerpt signed by persons authorised to make statements regarding the bank's property rights and obligations and bearing the bank's stamp, and on the basis of proof that a request for payment had been submitted to the debtor in writing, in the context of an order-for-payment procedure.

#### b. Payment order issued by a non-judicial body

This concerns *Finanmadrid* (C-49/14), *Banco Primus* (C-421/14), and *EOS KSI* (C-448/17). We will refer here to the second of these cases.

As explained in the judgment,

[t]he referring court states that Spanish procedural law provides for intervention by the court in enforcement proceedings only when it is apparent from the documents annexed to the application that the amount claimed is not correct, in which case the *Secretario judicial* must inform the court thereof, or when the debtor contests the order for payment proceedings. It adds that, since the decision of the *Secretario judicial* is an enforceable procedural instrument with the force of *res judicata*, the court cannot examine of its own motion, in enforcement proceedings, any possible unfair terms in the contract which gave rise to the order for payment proceedings (paragraph 43).

Therefore, the referring court raised the following issues:

- (1) Must Directive [93/13] be interpreted as precluding national legislation such as that currently governing the Spanish order for payment procedure (Articles 815 and 816 [of the] LEC), which does not mandatorily provide for either the examination of unfair terms or the intervention of the court, except when the *Secretario judicial* considers it expedient or the debtors lodge an objection, because that legislation hinders or prevents examination by the courts of their own motion of contracts which may contain unfair terms?
- (2) Must Directive [93/13] be interpreted as precluding national legislation, such as the Spanish law that does not permit a court to consider, of its own motion and [*in*] *limine litis*, during subsequent enforcement proceedings [relating to] an enforceable instrument (a reasoned decision issued by the *Secretario judicial* bringing the order for payment procedure to a close), whether the contract giving rise to the reasoned decision whose enforcement is sought contained unfair terms, because under national law the matter is *res judicata* (Articles 551 and 552 in conjunction with Article 816(2) of the LEC)?
- (3) Must the [Charter] be interpreted as precluding national legislation, such as that relating to the order for payment procedure and the procedure for the enforcement of judicial instruments, that does not provide for review by the court in every case during the declaratory stages of proceedings and does not permit the court at the enforcement stage to reconsider the reasoned decisions previously taken by the *Secretario judicial*?

The *EOS KSI* case (C-448/17) should be also considered. In this case, the referring court raised the following question:

“Is it not incompatible with EU law, and the requirement that all the circumstances of the case be assessed, in accordance with Article 4(1) of Directive 93/13, for legislation, such as the summary proceedings for the issue of an order for payment (Article 172(1) et seq. of

the Slovak Code of Civil Procedure), to permit: (1) the seller or supplier to be given the right to a pecuniary benefit with the effects of a judgment, (2) in the context of summary proceedings, (3) before an administrative officer of the court, (4) solely on the basis of the trader's claims, and (5) without evidence being taken and in circumstances in which (6) the consumer is not represented by a legal professional, (7) and his defence may not be effectively mounted, without his consent, by a consumer protection association, which has standing and is authorised to act under Article 7(1) of Directive 93/13 as transposed by Article 53a(1) and (2) of the Civil Code?"

c. Payment order issued by an arbitration court

This is the case of *Asturcom* (C-40/08), where the consumer had not initiated proceedings for the annulment of an arbitration award and hence the award had become final.

This is the question referred to the CJEU:

In order that the protection given to consumers by [Directive 93/13] be guaranteed, is it necessary for the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, to determine of its own motion whether the arbitration agreement is void and, accordingly, to annul the award if it finds that the arbitration agreement contains an unfair arbitration clause that is to the detriment of the consumer?

d. Mortgage enforcement procedure and proceeding initiated by the successful bidder in an auction

In the *Banco Santander* case (C-598/15), a bank, after a sale auction pertaining to a mortgaged immovable property, on the basis of an entry in the land register pursuant to the instrument of sale drawn up by a notary after the auction, asked for an order of possession of the dwelling and the eviction of the debtor.

These are the relevant questions referred to the CJEU:

- (1) Is it contrary to [Article 3(1) and (2) to Article 6(1) and Article 7(1) of Directive 93/13] and the objectives of that directive for national legislation which establishes a procedure like that of Article 250(1)(7) [of the Code of Civil Procedure], requiring the national court to give a ruling that orders the dwelling subject to enforcement to be handed over to the person who acquired it in extrajudicial enforcement proceedings, in which, under the current regime contained in Article 129 of the Law on Mortgages ... and Articles 234 to 236-o of the [Mortgage Regulation] ..., there could be no review *ex officio* of unfair terms and the debtor could not raise an effective objection on those grounds, either in the extrajudicial enforcement procedure or in separate legal proceedings?
- (3) Are the abovementioned provisions of Directive [93/13], the objective it pursues and the obligation it imposes on national courts to examine of their own motion the existence of unfair terms in consumer contracts without the consumer having to request it to be interpreted as allowing the national court, in proceedings such as that established in Article 250(1)(7) [of the Code of Civil Procedure] or in the "extrajudicial sale"



procedure governed by Article 129 [of the Law on mortgages], to disapply national law when the latter does not permit that judicial review of the court's own motion, in view of the clarity of the provisions of Directive [93/13] and of the [Court's settled case-law] concerning the obligation of national courts to review of their own motion the existence of unfair terms in cases relating to consumer contracts?

Reasoning of the CJEU:

a. Payment order issued by a court

In *Pénzügyi* (C-137/08), the decision was anticipated by the conclusion of the *Pannon* case (C-243/08), whose results were considered conclusive for the preliminary question formerly presented by the referring court in *Pénzügyi* (C-137/08). The reasoning and conclusions of the CJEU are presented above and are mainly based on the **principle of effectiveness**.

In the *Profî Credit* case (C-176/17), the Court excluded the applicability of Directive 2008/48. With regard to Directive 93/13, the reasoning of the CJEU was mainly based on the principle of the effective protection of consumer rights, and on the right to an effective remedy, relying also on Article 47 CFR.

In the *Bank Polski* case (C-632/17), **the right to an effective remedy and Article 47 CFR** are mentioned. The CJEU affirmed that the right to an effective remedy must apply both as regards the designation of courts having jurisdiction to hear and determine actions based on EU law and as regards the detailed procedural rules relating to such actions. In order to establish whether a procedure infringes a right to an effective remedy, the referring court must determine whether the detailed rules of the opposition procedure which national law lays down give rise to a significant risk that the consumers concerned will not lodge the objection required.

b. Payment order issued by a non-judicial authority

The **principle of effectiveness** was the main driver of the Court's reasoning in *Finanmadrid* (C-49/14) as well:

‘In the present case, it must be noted that the progress and particular features of the Spanish order for payment proceedings are such that, in the absence of facts requiring the intervention of the court, referred to in paragraph 24 of the present judgment, those proceedings are closed without it being possible for there to be a check as to whether there are unfair terms in a contract concluded between a supplier or seller and a consumer. If, accordingly, the court hearing the enforcement of the order for payment does not have the power to assess of its own motion whether such terms are present, the consumer could be faced with an enforcement order without having the benefit, at any time during the proceedings, of a guarantee that such an assessment will be made.

In that context, it must be stated that such a procedural arrangement is liable to undermine the effectiveness of the protection intended by Directive 93/13. Such effective protection of the rights under that directive can be guaranteed only provided that the national procedural system allows the court, during the order for payment

proceedings or the enforcement proceedings concerning an order for payment, to check of its own motion whether terms of the contract concerned are unfair (paragraphs 45-46).”

To be noted is that, before *Banco Español de Crédito* (Case C-618/10, see below for further reference), *ex officio* control of unfair contract terms was not possible in the ‘*procedimiento monitorio*’, which is an order-for-payment procedure. The *secretario judicial* was only required to monitor the compliance of the creditor’s claim with formal requirements and could refer the matter to the court only when it was clear from the documents annexed to the application that the amount claimed was not accurate. Once the formal check had been passed, and in the absence of the debtor’s objection, the payment order was issued and subsequently became final (*res judicata*). The referring court in *Finanmadrid* (C-49/14) had been asked to grant leave for the execution of an order for payment, which had been issued by a *secretario judicial* without the involvement of a court. The majority of Spanish courts interpreted the applicable procedural rules in such a way that judicial control of unfair terms was no longer possible and the request for execution could not be denied. This rule, as stated by the Court, appeared to ‘run counter’ to the principle of effectiveness (paragraphs 53-54), also because:

“there is a significant risk that the consumers concerned will not lodge the objection required, be it because of the particularly short period provided for that purpose, or because they might be dissuaded from defending themselves in view of the costs which legal proceedings would entail in relation to the amount of the disputed debt, or because they are unaware of or do not appreciate the extent of their rights, or indeed because of the limited content of the application for the order for payment submitted by the sellers or suppliers, and thus the incomplete nature of the information available to them (see, to that effect, judgment in *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 54).”

Thus, to some extent, the principle of effectiveness limits the force of *res judicata*. At the enforcement stage, the court should still be able to review the unfairness of the terms of the contract on which the claim was based if such a review had not taken place during the order-for-payment procedure itself.

On the one hand, the CJEU acknowledged that legal principles lying at the basis of national legal systems should be taken into consideration: among them, protection of the rights of the defence; legal certainty; and the proper conduct of the proceedings (as principles linked with *res judicata* in accordance with national legal traditions). On the other hand, however, the rules implementing the principle of *res judicata* may not infringe upon the EU principles of equivalence (which is not the case in the present case) and effectiveness.

*Finanmadrid* (C-49/14) concerned a systemic problem with the judicial protection of consumers. However, Spanish law had already been changed prior to the CJEU’s judgement. Ley 42/2015, meant to implement *Banco Español de Crédito* (Case C-618/10, see below for further reference), introduced a new paragraph 4 for Article 815 LEC (*Ley de Enjuiciamiento Civil*) that explicitly provided for *ex officio* control in the order-for-payment procedure. The court had the power to deny the order if the claim was based on unfair terms (e.g. accelerated payment clauses).

In *EOS KSI* (C-448/17), the principle of effectiveness was used to assess the compatibility with Directive 1993/13 of a national provision which regulated the procedure for the issue of an order-for-payment providing only an assessment on unfair clauses by an administrative authority. The CJEU affirmed, citing the *Finanmadrid* case (C-49/14), that when examination of its own motion by the court of the potentially unfair nature of terms in the contract concerned is provided for only at the enforcement stage of the order for payment, a national law must be regarded as undermining the effectiveness of the protection intended by Directive 93/13 if it does not provide for such an assessment when the order is granted or, in the case that such an assessment is provided for only when an objection is lodged against the order granted, if there is a significant risk that the consumer concerned will not lodge the objection required, either because of the particularly short period provided for that purpose, or because the consumer might be dissuaded from defending him/herself by the costs which legal proceedings would entail in relation to the amount of the disputed debt, or because the national legislation does not state the obligation that all the information necessary for the consumer to determine the extent of his/her rights must be communicated to him/her.

*c. Payment order issued by an arbitral tribunal*

In *Asturcom* (C-40/08), the relation between effective consumer protection and *res judicata* concerned the nature of arbitral awards become final due to the lack of opposition by a consumer to whom the payment order provided by the award was directed.

As (later) in *Finanmadrid* (C-49/14), the CJEU upheld the principles that are at the basis of the rules of *res judicata* in national legal systems as rules intended to “ensure stability of the law and legal relations, as well as the sound administration of justice” (paragraph 36). These rules do not need to be disapplied even if EU law has been disregarded or infringed upon in the decision at issue. The **principles of equivalence and effectiveness** should be respected, however.

In *Asturcom* (C-40/08), the analysis was carried out with regard to both principles. More specifically, the principle of effectiveness was found to be compliant with current Spanish legislation. This was particularly due to the rules on time limits, since these are not likely to make it virtually impossible or excessively difficult to exercise rights conferred by EU law (paragraph 41).

Indeed,

“the need to comply with the principle of effectiveness cannot be stretched so far as to mean that, in circumstances such as those in the main proceedings, a national court is required not only to compensate for a procedural omission on the part of a consumer who is unaware of his rights, as in the case which gave rise to the judgment in *Mostaza Claro*, but also to make up fully for the total inertia on the part of the consumer concerned who, like the defendant in the main proceedings, neither participated in the arbitration proceedings nor brought an action for annulment of the arbitration award, which therefore became final” (paragraph 47).

From the perspective of the **principle of equivalence**, the CJEU provided guidance as regards the possibility of extending to consumer cases national rules concerning the power of the court

to assess *ex officio* whether an arbitration clause is against public policy. Indeed, the provisions of the Unfair Terms Directive were considered by the CJEU to be mandatory and as equivalent to national rules of public policy. Therefore,

“inasmuch as the national court or tribunal seized of an action for enforcement of a final arbitration award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of that directive, where it has available to it the legal and factual elements necessary for that task” (paragraph 53).

#### *d. Mortgage enforcement procedure and proceeding initiated by the successful bidder of an auction*

In the *Banco Santander* case (C-598/15), the CJEU dealt with the issue of “*whether Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation (...) under which, at the end of the procedure laid down for such purposes, the national court is required to grant vacant possession of immovable property to its transferee, even though neither the extrajudicial mortgage enforcement procedure agreed by the initial owner, nor the procedure governing the claim brought before that national court by that transferee, allow the initial owner of that property, as a consumer, to rely on an unfair term in the mortgage loan agreement which has been enforced extra-judicially and, where relevant, whether the national court is required to disapply that national legislation*”.

The Court highlighted that in mortgage enforcement procedures a “*failing effective review of the potential unfairness of contractual terms in the instrument on the basis of which the property is seized*” does not guarantee observance of the rights conferred under Directive 93/13. This statement seems to imply that, in light of the principle of effective judicial protection, even in mortgage enforcement procedures, an *ex officio* assessment of whether the terms of a mortgage loan are unfair is compliant with EU Law. Nevertheless, this legal assumption is justifiable so long as the main proceeding concerns such an agreement. In fact, the Court distinguished the mortgage enforcement procedure from the subsequent procedure activated by the successful bidder in an auction in order to evict the mortgagee. As far as this second hypothesis is concerned, the Court pointed out that: (i) “*the case in the main proceedings does not concern the procedure for compulsory enforcement of the mortgage guarantee under the loan agreement (...) but the protection of real rights derived from title lawfully acquired (...) following a sale by auction*”: therefore, to allow the debtor to challenge the already-enforced mortgage loan agreement against the third party who acquired the mortgaged property could affect “*legal certainty in pre-existing proprietary relationships*”; (ii) “*the instrument on which the action brought before the referring court is based is, in the present case, the instrument of ownership as entered in the land register and not the mortgage loan agreement, the security for which has been enforced extra-judicially*”. In other words, the proceeding aimed at evicting the mortgagee no longer concerns the mortgage loan agreement, since the title upon which the plaintiff acts is the instrument of ownership drawn up by the notary following the auction and as such entered in the land register.

#### *Conclusion of the CJEU:*

In all three cases (*a.* payment order issued by a court; *b.* payment order issued by a non-judicial body; *c.* payment order issued by an arbitral tribunal), the CJEU upheld the power of the court

to review *ex officio* unfair contract terms whenever a payment order has been issued within procedures that have not allowed for an earlier assessment during previous stages, thus hindering the effective protection of consumer rights.

*a. Payment order issued by a court*

In cases in which the consumer has filed an opposition against a payment order issued by a court (*Pannon*, C-243/08; *Pénzjegy*, C-137/08), the space for opposition does not transfer to the consumer the entire burden concerning the ascertainment of unfair terms. Indeed, in these circumstances the principle of effectiveness urges ‘positive action’ by the court in order to address the imbalance between consumer and professional, and positive action *requires* the exercise of *ex officio* powers.

Recently, in the *Profi Credit I* case (C-176/17), the CJEU stated that, in accordance with Article 7(1) of Directive EU/93/13, national legislations on consumer contracts should not permit issue of an order for payment founded on a valid promissory note that secures a claim arising from a consumer credit agreement, when the court dealing with an application for an order for payment does not have the power to examine whether the terms of that agreement are unfair, if the detailed rules for exercising the right to lodge an objection against such an order do not enable observance of the rights which the consumer derives from that directive to be ensured.

Furthermore, in the *Bank Polski* case (C-632/17) the CJEU stated that national legislation cannot provide rules which permits the issue of an order for payment, based on a bank ledger excerpt, as evidence of the existence of a debt arising from a consumer credit agreement, where the court dealing with an application for an order for payment does not have the power to examine whether the terms of that agreement are unfair and to ensure that, in that examination, the information referred to in Article 10 is made available, if the detailed rules for exercising the right to lodge an objection against such an order do not enable observance of the rights which the consumer derives from that directive.

*b. Payment order issued by a non-judicial authority*

Nor in cases in which the order has been issued by non-judicial authorities (such as the Spanish *Secretario General*) in fast procedures conducted in the absence of the consumer as debtor (*Finanmadrid*, C-49/14) does the lack of opposition consume the space for consumer protection. Here, the principle of effectiveness causes a conflict between effective consumer protection and the national rules of *res judicata*, according to which the lack of opposition makes the decision of the non-judicial authority final. These rules are upheld by the CJEU (in light of the principle of national procedural authority) only to the extent that they comply with the principles of (i) effectiveness (and then, e.g., the non-judicial authority may itself assess a contract’s unfairness and the consumer has an effective possibility to file an opposition in terms of both time and information), and (ii) equivalence (in light of national provisions enabling limitations to the rules of *res judicata* in equivalent circumstances for the protection of equivalent rights based on national law). This approach may extend the power of judges in charge of execution of the payment order, even though it was issued by the non-judicial authority through a decision that has become final.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts precludes national legislation, such as that at issue in the main proceedings, which does not permit the court ruling on the enforcement of an order for payment to assess of its own motion whether a term in a contract concluded between a seller or supplier and a consumer is unfair, when the authority hearing the application for an order for payment does not have the power to make such an assessment.

Furthermore, according to the *EOS KSI* (C-448/17) case, the principle of effectiveness requires a judge to control the unfairness of the clauses in proceedings concerning orders for payments, given the insufficiency of control made by an administrative officer of a court who is not a magistrate when there is no provision for such an assessment by the court of its own motion at the stage of enforcement of that order.

*c. Payment order issued by an arbitral tribunal*

The same applies for cases in which the order is issued by an arbitral tribunal whose power is based on unfair arbitration clauses that have evaded proper review before that arbitral tribunal or a court possibly addressed to the annulment of the arbitral award (*Asturcom*, C-40/08). Without finding any flaw in the procedure from the perspective of effectiveness, on the basis of the principle of equivalence the CJEU concluded thus:

“Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court or tribunal hearing an action for enforcement of an arbitration award which has become final and was made in the absence of the consumer is required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature. If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause.”

*d. Mortgage enforcement procedure and proceeding initiated by the successful bidder in an auction*

As far as a mortgage enforcement procedure is concerned, an effective judicial protection of consumers' rights appears to imply that the authority managing such a procedure can review and assess the terms of a mortgage loan agreement. On the other hand, the same procedure cannot be conducted with regard to eviction proceedings initiated by the successful bidder in an auction who acts upon a legally compliant instrument of sale obtained following that auction.

The concept of the effectiveness of the judicial remedy has also been addressed by the CJEU as far as its boundaries are concerned. In other words, the CJEU refers to the principle of effectiveness also in order to justify a specific legal framework that may allegedly violate Article 47 of the Charter. In particular, in the *Sziber* case (C-483/16), the Court directly referred to *Banco Primus* (C-421/14, § 47) when assessing the boundaries and limits of the consumer's judicial protection. It ruled that when a national provision lays out procedural requirements for the consumer to fulfil in order to exercise his/her rights, it does not necessarily constitute a violation

of Article 47, in particular when such provisions, although they impose additional duties on the consumer, satisfy a general interest in the good and proper functioning of the judicial system.

Elements of judicial dialogue:

The CJEU built on previous judgements concerning *ex officio* power of the court to ascertain the terms of contracts and set aside unfair ones. In *Pénzügyi* (C-137/08), the link with the *Pannon* case (C-243/08) was explicitly addressed since the first two questions presented above were considered (by the referring court during the procedure) as answered by the *Pannon* judgement. Moreover, in all the three judgements examined here, the cases of *Océano*, *Asturcom* (C-40/08), *Mostaza Claro*, *Pannon*, *Banco Español de Crédito* were taken into account. As regards subsequent judgements, the CJEU in *BNP Paribas*, (C-75/19), relying also on the principle of effectiveness, declared that not compatible with Directive 1993/13 is a rule of national law under which a consumer who has concluded a loan contract with a credit institution and against whom the latter has initiated enforcement proceedings is not allowed, after 15 days have elapsed from the notification of the first acts of that procedure, to invoke the existence of unfair terms to oppose the said procedure, even if that consumer has initiated, under national law, a legal action not subject to any time limit to establish the existence of unfair terms, but the solution of which is without effect on the one resulting from the procedure in forced execution, which may be imposed on the consumer before the end of the action to establish the existence of unfair terms.

Against this backdrop, the CJEU adopted a different approach in *Salvoni* (C-347/18), which dealt with a consumer law case related to the application of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. In that judgement the referring court (Tribunal of Milan) extensively relied on the CJEU's case law related to the application of Article 47 CFR and the principle of effectiveness set forth in Directive 1993/13 on unfair contractual terms, in order to interpret Regulation 1215/2012. In this specific case, a lawyer obtained a payment order against a client resident in Germany from the Tribunal of Milan. Then, for the purposes of enforcement of that judgement in Germany, the lawyer submitted to the Milan court an application requesting a certificate on the basis of Article 53 of Regulation No 1215/2012. The referring judge classified Ms F as a consumer and stated that it was apparent that Mr S directed his activity in Germany. Then, the referring court concluded that the judgement ordering payment was in breach of the rules on jurisdiction set out in Chapter II, Section 4 of Regulation No 1215/2012 relating to jurisdiction in respect of consumer contracts. In that context, the referring court had doubts as to the powers conferred on the court called upon to issue the certificate provided for in Article 53 of Regulation No 1215/2012 when a judgement, which had acquired the force of *res judicata* under national procedural law, was adopted in breach of the provisions relating to the rules on jurisdiction laid down by that regulation. The referring court took the view that Articles 42 and 53 of Regulation No 1215/2012 could be interpreted as meaning that the court called upon to issue that certificate lacked any discretionary power and that it must automatically transpose the content of the judgement at issue in the form set out in Annex I to that regulation in order to certify that the judgement was enforceable in the Member State of origin, and then the judge doubted the compatibility of this rule with Article 47 CFREU.

In the decision with which the Tribunal of Milan referred the preliminary question to the CJEU, the national court relied extensively on the CJEU case law on *ex officio* duties in the application of Directive 1993/13, and specifically on the *Banco Español de Crédito* (C-618/10), *Finanmadrid EFC* (C-49/14), considering that:

- the weaker position of the consumer vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge, may be corrected only by positive action by the court which is under an obligation to examine of its own motion whether a contractual term is unfair, provided that it has available to it the legal and factual elements necessary for that task.
- the judge has to reconcile the objective of the swift circulation of judgments as pursued by Regulation No 1215/2012 and the effective protection of consumers by means of the possibility, when the certificate provided for in Article 53 of that regulation is issued, of informing the consumer of its own motion that there has been a breach of the rules on jurisdiction laid down in Chapter II, Section 4 of that Regulation.

The CJEU concluded that **Article 53 of Regulation (EU) No 1215/2012, read in conjunction with Article 47 CFR, must be interpreted as precluding the court of origin which has been requested to issue the certificate provided for in Article 53 of that regulation in respect of a judgement which has acquired the force of *res judicata* from being able to ascertain of its own motion whether there has been a breach of the rules set out** in Chapter II, Section 4 of that regulation, so that it may inform the consumer of any breach that has been established and enable him/her to assess, in full knowledge of the facts, the possibility of availing him/herself of the remedy provided for in Article 45 of that Regulation.

The CJEU's reasoning was based on formal arguments stating that Article 42(1)(b) of Regulation 1215/2012 concerning the certificates issued for the purposes of enforcement in a Member State of a judgement given in another Member State, does not provide that the national court issuing this certificate can examine the aspects of the dispute which fall outside the scope of Article 53 of Regulation 1215/2012, such as questions of substance and jurisdiction which have already been dealt with in the judgement for which enforcement is sought. Moreover, the CJEU stated that the delivery of the certificate is almost automatic.

Furthermore, **in order to distinguish that case from its case law on *ex officio* duties of national courts with regard to the application of Directive 1993/13**, the CJEU used the following arguments:

- Protection of the weaker party is provided through the specific rules applicable to contracts concluded between a consumer and a professional set out in Chapter II, Section 4 of Regulation 1215/2012;
- The person against whom enforcement is sought should be able to apply for refusal of the recognition or enforcement of a judgment if s/he considers one of the grounds for refusal of recognition to be present, including any breach of the rules on special jurisdiction.
- There is not an infringement of the right to an effective remedy granted by Article 47 CFREU, because Article 45 of Regulation No 1215/2012 enables the defendant to cite,



in order to seek refusal of recognition of a judgement, on a potential breach of the rules on jurisdiction provided for in Chapter II, Section 4 of that Regulation in respect of consumer contracts

In another case (*Bondora AS*, C-453/18), the CJEU also concluded that Article 7(2)(d) and (e) of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure and Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, as interpreted by the Court and read in light of Article 38 of the Charter of Fundamental Rights of the European Union, must be interpreted as allowing a ‘court’, within the meaning of that Regulation, seized in the context of a European order for payment procedure, to request from the creditor additional information relating to the terms of the agreement relied on in support of the claim at issue, in order to carry out an *ex officio* review of the possible unfairness of those terms and, consequently, that the aforementioned Articles preclude national legislation which declares the additional documents provided for that purpose to be inadmissible.

More recently, the question of whether and to what extent *ex officio* powers in consumer protection limits the principle of *res judicata* has again been addressed by the CJEU (*Banco di Desio e della Brianza and Others*, Case C-831/19). Here, the Court held that Article 6(1) and Article 7(1) of Directive 93/13/EEC on unfair terms in consumer contracts must be interpreted as precluding national legislation which provides that, where an order for payment issued by a court on application by a creditor has not been the subject of an objection lodged by the debtor, the court hearing the enforcement proceedings may not, on the ground that the force of *res judicata* of that order applies by implication to the validity of those terms, thus excluding any examination of their validity, subsequently review the potential unfairness of the contractual terms on which that order is based. The ruling is bound to have a major impact on the doctrine of implied *res judicata*, commonly applicable at national level also in the domain of consumer protection. As a consequence, it is also bound to change the role of judges in charge of the enforcement of orders of payment; a change that is even more challenging in the framework of pending reforms aimed at reducing the length of proceedings for more effective access to justice under both national and EU law.

[Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU](#)

### **The Netherlands**

Article 47 of the EUCFR embodies the fundamental right to an effective remedy before a court of law for the violation of rights within the scope of EU law. Two Dutch Courts of Appeal have referred to the right of access to justice – laid down in Article 17 of the Constitution and the European treaties, in particular Article 47 of the EUCFR – in cases concerning arbitration clauses in general terms and conditions, which were declared to be unfair because they withheld from consumers the protection of the State courts assigned to them by law. Article 47 was used to interpret the open norm of ‘unfairness’ (Article 6:233 DCC).

In *Van Marrum/Wolff*, the Leeuwarden Court of Appeal considered that arbitration may have certain disadvantages compared to proceedings before a State court (judgement of 5 July 2011,

ECLI:NL:GHLEE:2011:BR2500): there are no equivalent safeguards for the independence of the arbiter or the application of the law, and the consumer can be deterred (cf. the principle of dissuasiveness) by the higher costs involved or the distance between his/her place of residence and the seat of the arbitral tribunal. According to the Court of Appeal, when the intended purpose of Directive 93/13/EEC is taken into account (cf. the principle of effectiveness), the arbitration clause at issue was unreasonably burdensome (“*onredelijk bezwarend*”), which means that it could be annulled. In this respect, the Court of Appeal referred to *Océano Grupo Editorial* (Joined Cases C-240/98 to C-244/98), *Pannon* (C-243/08) and *Pénzügyi* (C-137/08). Article 47 EUCFR was used here as an argument to place arbitral clauses on the ‘black list’ of unreasonably burdensome contract terms (cf. Article 6:236 DCC). This means that the court must always examine of its own motion whether a standard contract containing an arbitration clause is unfair, and annul it if it is.

Other courts had reached the opposite conclusion; they considered that, although an arbitration clause may deprive the consumer of access to a State court, Article 17 of the Constitution and Article 6 ECHR do not offer protection that extends further than that provided by the Directive. Before the Supreme Court, the Advocate-General had tentatively concluded that arbitration clauses are not as such unacceptable, but in consumer contracts they should in principle be considered as unnecessarily burdensome or unfair. However, the Supreme Court ruled that the Court of Appeal should have taken the special circumstances of the case into account instead of using a general argumentation applicable to all arbitration clauses in general terms and conditions.

The discussion has since been settled by the Dutch legislator in favour of consumer protection. Indeed, as of 1 January 2015, arbitration clauses are on the ‘black list’ of unreasonably burdensome contract terms (Article 6:236n DCC). This means that the court must always examine of its own motion whether a standard contract containing an arbitration clause is unfair, and annul it if it is. In the Explanatory Memorandum (Kamerstukken II, 2012/2013, 33 611, nr. 3) the Dutch legislator explicitly referred to the CJEU’s judgments in *Pannon* (C-243/08) and *Asturcom* (C-40/08), and to the above-mentioned Supreme Court judgment in *Van Marrum/Wolff*.

The Court considered in a preliminary ruling on 12 July 2019 19/01115 (ECLI:NL:HR:2019:1731) that the relationship between the narrow judicial review afforded to courts when enforcing arbitral awards and the duty of a national judge to apply consumer protection rules *ex officio* has not been defined in law. The Court cited the CJEU’s decision in *Pohotovost* in determining that Directive 93/13 imposes an obligation on the national judge to ascertain an unfair term within the meaning of the Directive *ex officio*, if s/he is given this power under national law. The Court considers that, under national law, the judge has limited grounds for setting aside an arbitral award. These grounds include an invalid arbitration agreement and if the manner of the arbitral proceedings is contrary to public policy (Article 1065(1) Rv). The Court concluded that, if the judge decides that the arbitration clause should not bind the consumer, the arbitral award can be set aside as being invalid. The Court ruled, in accordance with the principle of equivalence, that if national law allows the judge to test an arbitral award because it breaches public policy, s/he must also be able to test the award if he suspects that it is an unfair term

within the meaning of Directive 93/13 in order to guarantee the effective legal protection of the consumer.

## **Poland**

Under Polish law, final orders of payment cannot be subsequently challenged as such. In the enforcement proceedings it is, however, possible to issue the so-called ‘oppository claim’ to ascertain whether the enforcement title (e.g. a court’s judgement) should be deprived of enforceability (Article 840 of the Code of Civil Procedure). This claim should be made in separate proceedings, and it may also be based, in principle, on the defectiveness of a contract that has been the basis for adjudicating the previous claim.

## **Estonia**

### *b. Payment order issued by a non-judicial body*

In Estonia, the execution of enforcement instruments (e.g. judicial decisions, notarized agreements concerning financial claims according to which a debtor has consented to be subject to immediate compulsory enforcement after the claim falls due) is organised by bailiffs, who have independent legal status and disciplinary liability.

According to Article 221(1) of the Code of Enforcement Procedure (*Täitemenetluse seadustik*) (henceforth the CEP), a debtor may file an action before a court against a claimant for declaration of compulsory enforcement to be inadmissible. A claim can be filed until the end of the enforcement proceedings.

If the enforcement instrument is not a judicial decision (in particular, notarised agreements which prescribe the obligation of the owner of an immovable property to be subject to immediate compulsory enforcement for the satisfaction of a claim secured by the mortgage), a debtor can submit, in the action for declaration of compulsory enforcement to be inadmissible, all objections to the existence and validity of the claim arising from the enforcement instrument (Article 221(1<sup>1</sup>) of the CEP). In those procedures, a court can assess the potential unfairness of the contract terms (in consumer cases, *ex officio*). This sub-paragraph entered into force on 5 April 2011, and its purpose is to provide a judicial review for monetary claims and to combat excessive penalties. It is necessary because a bailiff cannot assess the claim on its substance, only formal requirements.

In the case of a judicial decision, the objections are admissible only if the grounds on which they are based were created after the entry into force of the court decision (Article 221(2) of the CEP). Therefore, the courts are prohibited from examining of their own motion the unfairness of contractual terms when a judicial decision, as an enforcement instrument, already exists. The Estonian Supreme Court explained in its judgement of 21 June 2017 (case 3-2-1-64-17, paragraph 10) that in the case of a judicial decision, a debtor cannot dispute the circumstances which have been established by a final court judgement. In an action for the enforcement of a penalty clause, it is possible to request the reduction of a contractual penalty or penalty for late payment, but only if these sums have not been established or calculated in a final judgement.

c. Payment order issued by an arbitration court

A consumer, as a weaker party, is protected by the specific provisions of the Code of Civil Procedure (CCP) which state the criteria for an agreement to be valid. More generally, the Estonian courts have the duty to *ex officio* examine the unfairness of a standard term when the other party in a contract is a consumer. To ensure better protection of consumers' rights, Article 718 of the CCP was supplemented by point (3) which entered into force on 1 July 2015.<sup>2</sup> Consequently, an arbitral agreement is null and void if its object is a dispute arising from a consumer credit contract.

A new article was introduced into the CCP on 1 April 2019 to regulate agreements in arbitration proceedings with consumers.<sup>3</sup> It was based, according to the provision's explanatory report, on Austrian law, which imposes additional consumer protection requirements (Articles 577-618 of the Austrian Code of Civil Procedure).

Before the above-mentioned article entered into force, the Estonian Supreme Court, in its judgement of 11 February 2015 (case 3-2-1-150-14, paragraph 14), held that the court has the duty to *ex officio* examine the validity of an arbitration clause as a standard term in accordance with Article 35 of the Law of Obligations Act (*Võlaõigusseadus*).

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<sup>2</sup> The relevant provisions of the Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik*) read as follows:

**Article 718 - Validity of arbitral agreement**

“(1) The object of an arbitral agreement may be a proprietary claim. An arbitral agreement concerning a non-proprietary claim is valid only if the parties are able to reach a compromise concerning the object of the dispute.

(2) An arbitral agreement shall be null and void if its object is:

1) a dispute concerning the validity or cancellation of a residential lease contract, and vacating a dwelling located in Estonia;

2) a dispute concerning the termination of an employment contract;

3) a dispute arising from a consumer credit contract [entry into force 01.07.2015]

...”

<sup>3</sup> **Article 718<sup>1</sup> - Agreement in arbitration proceeding with consumer**

“(1) An agreement in an arbitration proceeding shall not be entered into before a claim falls due if one of the parties to the agreement is a consumer.

(2) Before entering into an agreement in an arbitration proceeding, a consumer is presented with information about differences between judicial and arbitration proceedings in a format which can be reproduced in writing. Among others, the following information shall be presented to the consumer:

1) the procedure for forming an arbitral tribunal, the principles of conducting arbitration proceedings and the applicable rules, including the presumption provided in subsection 732 (2) of this Code;

2) the procedure for contesting a decision of an arbitral tribunal as well as information that upon reviewing an appeal against a decision of an arbitral tribunal the court does not examine lawfulness of adjudication of the dispute on the merits;

3) the provisions contained in subsections 753 (1) and (1<sup>1</sup>) of this Code as well as information that a decision of an arbitral tribunal that has been declared enforceable has the same effect as a court decision in enforcement proceedings.

(3) If a consumer is a party to an arbitration proceeding, the residence or place of work of the consumer at least to the accuracy of the county is agreed on as the place of the arbitration proceeding.

(4) If a consumer is a party to an agreement in the arbitration proceeding, such agreement shall be set out in a document bearing the hand-written or digital signature of the consumer.

(5) If the requirements provided in subsections (1)–(4) of this section were violated upon entry into an agreement in the arbitration proceeding with a consumer, the agreement is void.

(6) If, at the time of entry into an agreement in the arbitration proceeding, the residence or place of work of the consumer was not in the place of the arbitration proceeding indicated in such agreement or if an agreement in the arbitration proceeding is not set out in a document bearing the hand-written or digital signature of the consumer, the agreement is valid if the consumer himself or herself relies thereon.”

### 1.2.6. Question 1.e – *Ex officio* power to ascertain unfairness as regards contract terms different from those already reviewed in decisions that have become final

1.e. Does the duty to examine the unfairness of contract terms regard only the clauses that are supposedly enforced before the court or, based on the principle of effectiveness and article 47, CFREU, shall the court examine *ex* own motion (all the) other contract terms, including those on which the court has already ruled in previous decisions that have become final?

#### The case(s)

The question in the box is addressed in *Banco Primus* (C-421/14), a case in Spain which involved a mortgage established on a consumer's home to secure a loan. The loan agreement included accelerated payment clauses and clauses concerning the calculation of default interests, which were considered possibly unfair by the referring court. In this case, the consumer – Mr. Gutiérrez García – had made a final attempt to stop the mortgage enforcement proceedings by filing an application for 'extraordinary opposition'. Strictly speaking, Mr. Gutiérrez was too late: the applicable statutory time limits had lapsed, both the normal period of 10 days and the one-month 'transitional' time limit of Law 1/2013 (deemed contrary to EU law in *BBVA*). The transitional provisions apply to all enforcement proceedings that have not yet been completed because possession of the property has not been taken, as in the case of Mr. Gutiérrez. In his 'extraordinary opposition', he alleged the unfairness of Clause 6 in the loan agreement relating to accelerated repayment, on which the initial repayment procedure was based. This previous procedure had already resulted in a court decision, which had become final, and which stated that the loan agreement was lawful. It should be noted that this was not the first objection lodged by Mr. Gutiérrez, but the suspension of his eviction had been terminated nevertheless. He filed his application for 'extraordinary opposition' two months later.

The referring court found that the loan agreement contained two potentially unfair clauses, but it was prevented from (re-)examining them by the Spanish rules on *res judicata*.

#### Preliminary question referred to the CJEU

For the purpose of the present analysis, the issue centres on whether a court shall assess the fairness of contract clauses in regard to a contract which has already been subject to judicial review within a procedure leading to a decision which has become final in accordance with the principles of *res judicata*. As a third preliminary question (the one relevant in the present analysis), the referring court asks:

Under Directive 93/13, and in particular Articles 6(1) and 7(1) thereof, and in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, is a national court required to assess, of its own motion, whether a term is unfair and to determine the appropriate consequences, even when an earlier decision of that court reached the opposite conclusion or declined to make such an assessment and that decision was final under national procedural law?

Once again, the rules of *res judicata* may conflict with the objective of effective consumer protection.

### Reasoning of the CJEU

The CJEU commenced with consideration of the weak position of the consumer *vis-à-vis* the professional, in terms of both bargaining power and knowledge. Secondly, it highlighted the nature of Article 6, Unfair Terms Directive, as a mandatory provision intended to replace the formal balance between the rights and obligations of the parties with an **effective balance**. These provisions are considered to have equal standing with national provisions of public policy. In accordance with existing judgements by the CJEU (*Asturcom*, C-40/08; *Sanchez Morcillo, Gutiérrez Naranjo*), these premises lead to the acknowledgment of the court's duty to *ex* own motion assess term unfairness.

On the other hand, the CJEU highlighted the role of the national rules on *res judicata* as intended “to ensure stability of the law and legal relations, as well as the sound administration of justice” (paragraph 46). This explains why, as already held in *Asturcom* (C-40/08), “EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, regardless of its nature, contained in Directive 93/13” (paragraph 47). Indeed, consumer protection is not an absolute right.

As a preliminary conclusion, national rules on *res judicata* may limit the scope of consumer protection. However, according to the reasoning of the CJEU, this may not hamper the effective consumer protection envisaged by article 7, Unfair Terms Directive. More particularly, this would occur in respect to Spanish procedural law, which prohibits national courts not only from re-examining the lawfulness, with regard to Directive 93/13, of contractual terms in matters on which a definitive decision has already been delivered, but also from assessing the potential unfairness of other terms of the same contract. Indeed,

“In the absence of such a review, consumer protection would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13” (see, to this effect, the judgement of 14 March 2013, *Aziz*, C 415/11, EU:C:2013:164, paragraph 60).

### Conclusion of the CJEU:

For the purpose of the present analysis, this was the conclusion of the CJEU in the *Banco Primus* case (C-421/14):

Directive 93/13 must be interpreted as not precluding a rule of national law, such as that resulting from Article 207 of the LEC, which prohibits national courts from examining of their own motion the unfairness of contractual terms when a ruling has already been given on the lawfulness of the terms of the contract, taken as a whole, with regard to that directive in a decision which has become *res judicata*.

By contrast, where there are one or more contractual terms, the potentially unfair nature of which has not been examined during an earlier judicial review of the contract in dispute which has been closed by a decision which has become *res judicata*, Directive 93/13 must be interpreted as meaning that a national court, before which a consumer has properly lodged an objection, **is required to assess the potential unfairness of those terms**, either at the request of the parties or of its own motion when it is in possession of the legal and factual elements necessary for that purpose.

Once again, the CJEU provided the referring court with interpretative instructions that included a specific duty to assess the unfairness of contract terms, even in circumstances in which national provisions equivalent to those described with regard to Spanish law would in principle be applicable.

#### Elements of judicial dialogue:

As seen above, the CJEU established a direct continuity with previous case law, from *Aziç* to *Sanchez Morcillo*, from *Asturcom* (C-40/08) to *Naranjo*. Building on these decisions, the conclusions reached in *Banco Primus* (C-421/14) induced the Court to move a step forward in the balance between *res judicata* and effective consumer protection.

#### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

##### **Italy**

The question may be addressed from the perspective of the broad analysis provided by the judgement of the Italian *Corte di Cassazione* (Joint Chambers) no. 26242/2014, cited above. The decision does not specifically deal with the issue of whether a judge should assess the validity of contract terms different from those already reviewed in proceedings concluded by decisions that have become final. However, the Court ruled that:

- (i) the judge *shall* assess the validity of the disputed contract on **grounds different from those alleged by the parties** without infringing the principle of correspondence between the decision and the claim in both dimensions of what has been asked (*petitum*, i.e. declaration of invalidity) and the reason behind the claim (*causa petendi*, i.e. the inability of the contract to produce effects, regardless the specific ground causing invalidity); indeed, as the Court specified, the decision concerning contract nullity or non-nullity (as the object of the decision due to become *res judicata*) will be final and ‘across the board’ regardless of the type and number of grounds for nullity alleged by the claimant (“*Il giudizio di nullità/non nullità del negozio (il thema decidendum e il correlato giudicato) sarà, così, definitivo e a tutto campo indipendentemente da quali e quanti titoli di nullità siano stati fatti valere dall’attore*” – see paragraph 6.13.6); the claim for nullity is a comprehensive claim in respect of the possibly several grounds for invalidity (“*La domanda di nullità sarebbe pertanto unica rispetto ai diversi, possibili vizi di radicale invalidità che affliggono il negozio*”, paragraph 6.13.4);

- as a consequence, once the decision becomes *res judicata*, the issue of the invalidity of that contract may not be brought before a court on different grounds; the opposite solution would hamper the functioning of the process and the stability of decisions (see paragraph 6.14);
- (ii) when the claimant invokes a **partial nullity** (i.e. with respect to a ‘separable’ clause), the judge has the power/duty to ascertain the nullity of the entire contract (and reject the claim for partial nullity); vice versa, when the claimant invokes a total nullity, the judge shall ascertain the partial nullity if she/he believes that it exists (and then reject the total nullity). However, due to the different scopes of partial v. total nullity, the judicial ascertainment – if it divergent from the claimant’s request – may not constitute *res judicata* (see paragraphs 6.16, 6.17).

In this part of the Court’s analysis, the judgement refers to partial nullity from the perspective of general contract law, without considering the specificity of the partial nullity of unfair consumer contract terms and the specific case of nullity of clauses different from those already subject to judicial review in decisions become *res judicata*.

However, starting from the above premises, one may wonder whether the judge might/should:

- *ex officio* assess the validity of clauses different from those contested by the consumer with the consequence that, in the absence of this judicial review at any stage of the process, *res judicata* is formed, thereby precluding future judicial review, or
- in light of the principle of effectiveness as applied by the CJEU in *Banco Primus* (C-421/14), the review of any single clause should be considered to be a ‘separate matter’ and, although subject to *ex officio* review by the court in previous proceedings, may therefore take place in subsequent procedures without violating the *res judicata* principles.

## Spain

In the Spanish judicial system, the *Banco Primus* judgement (C-421/14) has been applied in all the cases where, during an execution proceeding, the parties have requested that the judge assess the potentially unfair nature of one or more contractual terms and there is no previous decision in their regard.

Hence, judges have the duty to examine the potentially unfair nature of contractual terms when no previous assessment has been made of one specific several contractual terms, regardless of whether the parties request that assessment after procedural deadlines have elapsed.

Judges must also control by their own motion all the contractual terms that they have not previously examined. That assessment must be made in both first and appeal instance.

However, when a ruling has already been given on one or more contractual terms, it is not possible to review their potentially unfair nature, even though there is a new interpretation of the contractual term which concludes that it is abusive, because in this case the previous judgement has become *res iudicata*. Hence, when there is a previous decision on a contractual term that has become final, it is not possible to carry out a new assessment of that contractual term; but that decision does not prevent the assessment of another contractual term.



Furthermore, in a judgement of 28 February 2019, the Spanish Constitutional Court applied the *Banco Primus* (C-421/14) judgement to conclude that a first instance judge had violated the primacy of European Union Law because he had rejected the request for assessment of the potentially unfair nature of a contractual term in consideration that the party had requested that assessment after the procedural deadline, without taking account of the *Banco Primus* judgement (C-421/14), which establishes the duty to assess the potential unfair nature of a contractual term when there has not been previous control. Furthermore, the Constitutional Court ruled that it is not possible to maintain that a ruling on the admissibility of the execution proceeding implies a tacit assessment of all the contractual terms because the assessment of clause unfairness must be explicit.

## The Netherlands

The Court of First Instance of Amsterdam (Netherlands) set aside the *res judicata* of an *in absentia* judgement because the judge in question had failed to assess the unfairness of the contractual terms (ECLI:NL:RBAMS:2019:8803). The Court of First Instance of Rotterdam (Netherlands) decided the question of when to challenge the principle in a judgment – regarding the net neutrality law – by referring to the Charter: “*There should only be a breach of res judicata if national procedural law, which has led to a binding final decision on the interpretation and application of directly effective EU law, conflicts with the requirements of equivalence or effectiveness. In view of Article 47 of the Charter of Fundamental Rights of the European Union, this breach also applies if national procedural law conflicts with the principle of effective judicial protection, which is similar to the principle of effectiveness*” (ECLI:NL:RBROT:2019:414).

### 1.2.7. Question 2 – *Ex officio* powers and fair trial principles

If and when such a duty exists, based on the right to fair trial (Article 47, CFREU), shall a judge enable parties to present their views on terms’ unfairness and even oppose the declaration of a term’s non-bindingness?

The analysis is based on the *Banif* case (C-472/11).

#### The case

A Hungarian consumer concluded a credit agreement which comprised, among other things, a termination clause obliging the debtor to pay immediately the entire amount of outstanding capital plus interest if any type of breach of the agreement occurred. The consumer defaulted, and the bank filed a claim against him. The first-instance judge determined that the aforesaid term was unfair, informed the parties, and invited them to present their views on the matter. Whereas the professional contested the term’s unfairness, the consumer agreed to repay the outstanding instalments and only contested the duty to pay interest on the basis of the unfair clause. The first-instance court set the clause aside and obliged the debtor to pay a sum calculated regardless of that clause. The bank filed an appeal.

### Preliminary question referred to the CJEU:

The Hungarian Court of Appeals raised three preliminary questions, two which are relevant here:

1. Are the procedures of a national court consistent with Article 7(1) of [the Directive] if, when a contract term is held to be unfair, and the parties did not submit a claim to that effect, the court informs them that it holds sentence 4 of clause 29 of the standard contract terms of the loan agreement between the parties to the proceedings to be invalid? That invalidity arises from breach of the legislation, namely Paragraphs 1(1I) and 2(j) of Government Decree No 18/1999 ...
2. In the circumstances of the first question, is it permissible for the court to direct the parties to the proceedings to make a statement in relation to the contract term in question, so that the legal implications of any unfairness may be established and so that the aims expressed in Article 6(1) of [the Directive] may be achieved?

In other words, the issue is whether EU law (and more particularly Article 7) should be interpreted as not precluding a law, like the Hungarian one, providing for procedural safeguards, such as fair hearing rules, as specifically applicable to *ex officio* judicial powers. More precisely, the Hungarian procedural law provides that a court which has decided, of its own motion, that there are grounds for invalidity must inform the parties of that fact and must give them the opportunity to make a statement on the possible finding that the legal relationship concerned is void, failing which the court cannot make a declaration of invalidity (see paragraph 18).

### Reasoning of the CJEU:

Not only did the CJEU argue that the Hungarian legislation is consistent with the correct interpretation of EU law, but it also linked the procedural safeguards therein provided to Article 47, CFREU. Indeed, the Court stated:

“in implementing European Union law, the national court must also respect the requirements of **effective judicial protection** of the rights that individuals derive from European Union law, as guaranteed by **Article 47 of the Charter of Fundamental Rights** of the European Union. Among those requirements is the **principle of *audi alteram partem***, as part of the rights of defence and which is binding on that court, in particular when it decides a dispute on a ground that it has identified of its own motion (see, to that effect, Case C 89/08 P Commission v Ireland and Others [2009] ECR I 11245, paragraphs 50 and 54).

Thus, the Court has held that, as a general rule, the principle of *audi alteram partem* does not merely confer on each party to proceedings the right to be apprised of the documents produced and observations made to the court by the other party and to discuss them, but it also implies a right for the parties to be apprised of pleas in law raised by the court of its own motion, on which it intends to base its decision, and to discuss them. The Court pointed out that, in order to satisfy the requirements associated with the right to a **fair hearing**, it is important for the parties to be apprised of, and to be able to debate and be heard on, the matters of fact and of

law which will determine the outcome of the proceedings (see Commission v Ireland and Others, paragraphs 55 and 56).”

The CJEU considered this to be a general duty applicable to a court *vis-à-vis* all the parties to the proceedings, including the professional. Unlike the latter, however, as already acknowledged in *Pannon* (C-243/08), the consumer retains the **right to oppose the declaration of nullity** (or an equivalent remedy identified by national legislation to comply with Articles 6 and 7, Unfair Terms Directive). Indeed (see paragraph 35),

“[t]hat opportunity afforded to the consumer to set out his/her views on that point also fulfils the obligation on the national court, as was pointed out in paragraph 25 of the present judgement, to take into account, where appropriate, the intention expressed by the consumer when, **conscious of the non-binding nature of an unfair term**, that consumer states nevertheless that s/he is opposed to that term being disregarded, thus giving his/her **free and informed consent** to the term in question.”

To be stressed is that this right of the consumer concerns the declaration of a term’s non-bindingness and not the assessment of a term’s unfairness. A case could concern the hypothesis in which the consumer waives the protection linked with the invalidity of a clause defining the competent tribunal once the lawsuit has started and the consumer considers the transfer of the proceedings as personally more prejudicial than the effects of the clause, even though it is unfair.

#### Conclusion of the CJEU:

These were the conclusions of the CJEU in the *Banif* case (C-472/11):

“Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that the national court which has found of its own motion that a contractual term is unfair is not obliged, in order to be able to draw the consequences arising from that finding, to wait for the consumer, who has been informed of his/her rights, to submit a statement requesting that that term be declared invalid. However, the **principle of *audi alteram partem***, as a general rule, **requires** the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure.”

As in other judgements examined here, the CJEU identified specific procedural duties to be complied with in national procedures, although with general respect for the principle of national procedural authority (as specifically recalled in the above judgement as well: see paragraph 26). It did so by referring to the Charter and to general principles of EU law rooted in previous case law.

### Elements of judicial dialogue:

As in all the decisions by the CJEU examined, the Court largely took account of existing case law in this area, particularly as regards the grounds for *ex officio* powers to ascertain the unfairness of contract terms and the consumer's right to oppose non-bindingness (see references to *Pannon*, C-243/08 among many others).

### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

#### **Italy**

The principle of an adversarial process (“*principio del contraddittorio*”) and the right to a defence are principles deeply embedded in Italian civil procedural law (see Article 184, Italian Code of Civil Procedure). In the area of consumer case law, the principles applied in *Pannon*, C-243/08, (and then *Banif*, C-472/11) in respect to the consumer's right to oppose the decision of non-bindingness have been acknowledged by the above-examined decision no. 26242/2014 (*Corte di Cassazione*, Joint Chambers).

#### **Poland**

In accordance with the adversarial principle in civil proceedings, under Polish law each party enjoys the right to express its own opinion on any aspect of a case. This undoubtedly applies also to the review of clauses in consumer contracts.

Generally, Polish civil proceedings are based on the ‘*da mihi factum, dabo tibi ius*’ principle, which means that the claimant is obliged to provide the court with relevant facts supporting his/her claim, while the judge is required to identify the correct legal basis. The unfairness of a contract clause is a matter of substantive law; therefore it should be considered by the court *ex officio*, even though neither of the parties has submitted a claim on those grounds. In its judgement of 31 January 2008 (III CZP 49/07), a panel of seven judges of the Supreme Court stated that, in judicial consideration of a case, the court is entitled to base the case on legal grounds completely different from those pleaded by the claimant. However, subsequent judgements of the Supreme Court clarified that this activity of the court should respect fundamental rights, especially the right to be heard. In a resolution of 17 February 2016 (III CZP 108/15), the Supreme Court affirmed that, if a court intends to decide the case on grounds other than those raised by the parties, it is required, in accordance with the principle of fair proceedings, to duly inform the parties. A failure to provide such information should be considered as depriving the parties of the possibility to defend their rights, which makes the proceedings invalid. The constitutional right of court access covers the parties' right to present all important issues relating to the case. These fundamental principles embody the idea of procedural justice, which requires that the resolution of the court should not be surprising or unexpected for the parties. This standpoint corresponds with the reasoning of the CJUE made in *Banif* (C-472/11).

Explicit reference to this case was made in the judgement of the Supreme Court of 14 July 2017 (II CSK 803/16). In that decision, the court commented on the procedural duty of the judge to guarantee the rights of both parties to be apprised of pleas in law raised by the court *ex officio*, and to address them. Furthermore, the Supreme Court acknowledged the principles set forth in

*Pannon* (C-243/08) and *Banif* (C-472/11), which oblige the national court to take into account the consumer's free and informed consent to be bound by an unfair term.

## Slovenia

Under the Slovenian Civil Procedure Act, each party to a litigation must be granted the opportunity to be heard on the opposing party's claims and assertions (Article 5 of the Slovenian Civil Procedure Act). This rule applies also in consumer law when the parties present their views on a contractual term's unfairness or when the parties oppose the declaration of a term's non-bindingness. The violation of the right to be heard is at the same time a violation of Article 22 of the Slovenian Constitution (Equal Protection of Rights). However, to date, the "right to be heard issue" has not been explicitly addressed in Slovenian consumer case law.

### 1.3. Judge liability

#### 1.3.1. Question 3 – Judge liability

Is a court liable for not declaring of its own motion the unfairness of a clause in consumer contracts? Which is the scope of the duty of the court to declare a consumer contract term unfair of its own motion? Is there a difference between the duties of first instance courts and of courts of appeal?

## Relevant CJEU case

- Judgement of the Court (First Chamber) of 28 July 2016. *Milena Tomášová v Slovenská republika - Ministerstvo spravodlivosti SR and Pohotovost' s.r.o.*, Case C-168/15 ("**Tomášová**") - [link](#) to the database for the analysis of the lifecycle of the case

The analysis is based on the *Tomášová* case (C-168/15)

### Relevant legal sources

## EU level

### Article 3 of Directive 93/13/EEC

“(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

(2) A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

(3) The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.”

#### Article 6(1) of Directive 93/13/EEC

“Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.”

#### The case

Ms. Tomášová, a consumer in Slovakia, alleged that the district court of Prešov, in pending proceedings for the execution of an arbitral award according to which Ms. Tomášová was ordered to pay to the professional several sums in respect of a failure to repay the credits deriving from a consumer credit contract, had failed to examine *ex officio* the potential unfairness of contract terms in the consumer credit agreement between her and *Pobotovost' s.r.o.*, which included an arbitration clause.

On 9 July 2010 Ms. Tomášová claimed damages from the Slovakian Republic on the ground that the enforcement of the arbitral award against her was based on unfair terms and therefore that there was a breach of EU law. The Prešov District Court dismissed the consumer's application as unfounded, considering that she had failed to take advantage of all the remedies available to her, that the enforcement proceedings at issue had not yet been definitively concluded and that, consequently, the damage invoked had not yet occurred, so that that application had been made prematurely. Ms. Tomášová appealed against that judgement; the regional court annulled the first judgement and referred the case back to the Prešov District Court, which referred a preliminary ruling to the CJEU.

#### Preliminary questions referred to the CJEU

“(1) Is there a serious breach of EU law if, in an enforcement procedure carried out on the basis of an arbitration award, performance of an unfair term is enforced, contrary to the case-law of the Court of Justice of the European Union?

(2) May liability of a Member State for a breach of [European Union] law arise before a party to proceedings has used all legal remedies available in the legal order of the Member State in proceedings for enforcement of an award? In the light of the facts of the case, may that liability of a Member State arise in the present case before the actual conclusion of the proceedings for

enforcement of the award and before exhaustion of the applicant's possibility of requiring an account for unjust enrichment?

(3) If so, is the conduct of an authority as described by the applicant, in the light of the particular facts and in particular of the absolute inactivity of the applicant and the non-exhaustion of all legal remedies made available by the law of the Member State, a sufficiently clear and serious breach of [European Union] law?

(4) If there is a sufficiently serious breach of [European Union] law in the present case, does the sum claimed by the applicant represent damage for which the Member State is liable? Is it possible for the damage as so understood to be equated with the debt collected which constitutes unjust enrichment?

(5) Does accounting for unjust enrichment, as a legal remedy, have priority over reparation for damage?"

### Reasoning of the CJEU

The CJEU first **recalled the jurisprudence on Member State liability** for the violation of EU law by national judicial authorities (*Francovich and Others*, C-6/90 and C-9/90; *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93; *Leth*, C-420/11; *Köbler*, C-224/01; *Traghetti del Mediterraneo*, C-173/03, Fuß, C-429/09), **stating that**

- **the principle of Member State liability** for loss or damage caused to individuals as a result of breaches of EU law **is applicable when the breach stems from a decision of a court adjudicating at last instance**. In this respect, the Court affirmed that in light of the essential role played by the judiciary in the protection of the rights derived by individuals from rules of EU law and of the fact that a court ruling at last instance constitutes, by definition, the last instance before which those individuals can enforce the rights conferred on them by those rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by a breach of EU law attributable to a decision of a court of a Member State adjudicating at last instance.

- the conditions for incurring the non-contractual liability of the State to make reparation for loss and damage caused to individuals as a result of breaches of EU law are:

a) the rule of EU law infringed must be intended to confer rights on individuals;

b) the breach of EU law rule must be sufficiently serious. That liability can be incurred only in exceptional cases where the court has manifestly infringed the applicable law.

c) there must be a direct causal link between that breach and the loss or damage sustained by the individuals concerned.

Secondly, the CJEU **recalled that in the *Pannon* judgement (C-243/08), and in its subsequent case law** (*Banco Español de Crédito*, C-618/10; *Banif Plus Bank*, C-472/11; *ERSTE Bank Hungary*, C-32/14; *Asturcom*, C-40/08), **it had established that a national court has an obligation to examine the possible unfairness of a contractual term** falling within the scope

of Directive 1993/13 **of its own motion**, when it has available the legal and factual elements necessary for that task.

### Conclusion of the CJEU

Member State liability for damage caused to individuals as a result of a breach of EU law by a decision of a national court may be incurred only where that decision has been made by a court of that Member State adjudicating at last instance. If this is the case, **a decision by that national court adjudicating at last instance may constitute a breach of EU law sufficiently serious to give rise to that liability only when, by that decision, that court has manifestly infringed the applicable law or when that infringement has taken place despite the existence of well-established Court case-law on the matter.** Relying on these consumer protection judgements, the CJEU considered that only in 2009 had the CJEU acknowledged the duty of national courts to examine the unfairness of contractual terms *ex officio* when legal and factual elements necessary for that task are available (in *Pannon* decision, C-243/08). Therefore, the CJEU concluded that a national court which, prior to the judgement of 4 June 2009 in *Pannon GSM* (C-243/08), had failed to assess of its own motion whether a consumer contract term was unfair, although it had available the legal and factual elements necessary for that purpose, had manifestly disregarded the Court's case-law on the matter and, therefore, had committed a sufficiently serious breach of EU law.

Furthermore, the CJEU considered that the rules for the compensation of damage as a consequence of a violation of EU law are determined by national law, subject to the principles of equivalence and effectiveness.

### Elements of judicial dialogue

The *Tomášová* case (C-168/15) is a good example of dialogue within the CJEU where the Court has relied on its previous case law in regard to two different issues: the liability of the State for a breach of EU law; and the national courts' duty to examine the possible unfairness of a contractual term falling within the scope of Directive 1993/13 of its own motion, in order to construct a decision, and provide guidance for national judges. In its preliminary ruling, the CJEU provided the national courts with a ready-made solution to the dispute, and left it to the national judges only to decide whether the referring court is a last-instance one.

### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

#### **Portugal**

The liability of the State for judicial decisions is regulated by Law 67/2007, of December 31st. Judges are liable only in the case of *dolus* or serious negligence (according to Article 13 of Law 67/2007 and Article 5 of Law 21/85, of July 30th, as amended). There is no case law in Portugal concerning the liability of a judge for not having declared on his/her own motion the unfairness of a clause in a consumer contract.



## 1.4. Information, transparency and other violations

### Relevant CJEU cases

- Order of the Court (Eighth Chamber) of 16 November 2010 (reference for a preliminary ruling from the *Krajský súd v Prešove (Slovak Republic)*) — *Pohotovost' s.r.o. v Iveta Korčková*, Case C-76/10, (“**Pohotovost'**”)
- Judgement of the Court (First Chamber) of 3 October 2013, *Soledad Duarte Hueros v Autociba SA, Automóviles Citroën España SA*, Case C-32/12 (“**Duarte Hueros**”) - [link](#) to the database for analysis of the lifecycle of the case
- Judgement of the Court (Third Chamber) of 21 April 2016, *Ernst Georg Radlinger, Helena Radlingerová v FINWAY a.s.*, Case C-377/14, (“**Radlinger**”) - [link](#) to the database for analysis of the lifecycle of the case
- Judgement of the Court (Fifth Chamber) of 19 September 2018, *Bankia SA v Juan Carlos Mari Merino, Juan Pérez Gavilán, María Concepción Mari Merino*, Case C-109/17 (“**Bankia**”)
- Judgement of the Court (First Chamber) of 4 September 2019, *Avv. Alessandro Salvoni v Anna Maria Fiermonte*, Case C-347/18 (“**Salvoni**”)
- Judgement of the Court (First Chamber) of 7 November 2019, *Profi Credit Polska S.A. w Bielsku Białej v Bogumiła Włostowska and Others*, Joined cases C-419/18 and C-483/18 (“**Profi Credit II**”)
- Judgement of the Court (Grand Chamber) of 3 March 2020, *Marc Gómez del Moral Guasch v. Bankia SA*, Case C-125/18 (“**Gómez del Moral Guasch**”)
- Judgement of the Court (First Chamber) of 26 March 2020, *Mikrokasa SA, Gdynia, and Revenue Niestandardowy Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty, Warsaw v XO*, Case C-779/18, (“**Mikrokasa**”)
- Judgement of the Court (Sixth Chamber) of 26 March 2020, *JC Kreissparkasse Saarlouis*, Case C-66/19, (“**Kreissparkasse**”)
- Judgement of the Court (First Chamber) of 3 September 2020, *Profi Credit Polska SA v QJ (C-84/19)*, and *BW v DR (C-222/19)*, and *QL v CG (C-252/19)*, Joined Cases C-84/19, C-222/19 and C-252/19 (“**Profi Credit Polska III**”)
- *Judgement of the Court (First Chamber) of 10 June 2021, VB and Others v BNP Paribas Personal Finance SA and AV and Others v BNP Paribas Personal Finance SA and Procureur de la République*, Joined Cases C-776/19 to C-782/19 (“**BNP Paribas II**”)
- Judgement of the Court (Seventh Chamber) of 18 November 2021, *M.P., B.P. v. 'A.' prowadzący działalność za pośrednictwem 'A.' S.A.*, Case C-212/20 (“**A. S.A.**”)

### Main questions addressed

- Question 1      Based on the right to an effective consumer protection, on the principle of effectiveness, and on Article 47, CFREU, shall the judge *ex officio* ascertain violations of information duties and transparency imposed by EU law?

Question 2 Based on the right to an effective consumer protection, on the principle of effectiveness and on Article 47, CFREU, shall the judge *ex officio* grant an appropriate reduction in the price of goods where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity in those goods is minor?

### 1.4.1. Question 1 – *ex officio* powers, duties and information and transparency duties

Given the right to an effective consumer protection, the principle of effectiveness, and Article 47 CFREU, shall the judge *ex officio* ascertain violations of information duties and transparency and/or other consumer protection rules related to the conduct of the professional?

The analysis is based on the *Radlinger* case (C-377/14).

#### Relevant legal sources

#### **EU level**

##### Directive 93/13

Under Article 1(1), the purpose of Directive 93/13 is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

According to Article 3(1) of that Directive, a contractual term which has not been individually negotiated is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Article 3(3) of the Directive states that “the annex [thereto] contains an indicative and non-exhaustive list of the terms which may be regarded as unfair”. Point 1(e) of the annex to that Directive refers to terms which have the object or effect of “requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation”.

Under Article 4(1) of Directive 93/13: “Without prejudice to Article 7, the unfairness of a contractual term shall be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.”

Article 6(1) of that Directive

Article 7 of the Directive:

##### Directive 2008/48

As stated in Article 1 thereof, Directive 2008/48 harmonised certain aspects of the Member States' rules concerning agreements covering credit for consumers.

According to Article 2(2)(a) of that Directive, it does not apply, in particular, to “credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property”. Recital 10 to that Directive states that, although the scope of the Directive is expressly defined therein, Member States may nevertheless apply its provisions to matters outside the Directive’s scope.

According to recitals 6, 7, 9, 19 and 31 to Directive 2008/48, the aims of that Directive are, *inter alia*, to develop a more transparent and efficient consumer credit market within the internal market; to achieve full harmonisation while ensuring a high and equivalent level of protection for consumers throughout the European Union; to ensure that credit agreements contain all necessary information in a clear and concise manner, so as to enable consumers to make their decisions in full knowledge of the facts and to allow them to be aware of the rights and obligations under a credit agreement; and to ensure that consumers have information relating to the annual percentage rates of charge (‘APR’) throughout the European Union, allowing them to compare those rates.

Article 10 of Directive 2008/48, concerning the information to be included in credit agreements, requires, in the first subparagraph of paragraph 1, that credit agreements to be drawn up on paper or on another durable medium.

Article 10(2) lists the items of information that must be specified in a clear and concise manner in any credit agreement. That list includes, *inter alia*:

“... (d) the total amount of the credit and the conditions governing the drawdown; ... (f) the borrowing rate, the conditions governing the application of that rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedures for changing the borrowing rate and, if different borrowing rates apply in different circumstances, the above mentioned information in respect of all the applicable rates; (g) the [APR] and the total amount payable by the consumer, calculated at the time the credit agreement is concluded; all the assumptions used in order to calculate that rate shall be mentioned; (h) the amount, number and frequency of payments to be made by the consumer and, where appropriate, the order in which payments will be allocated to different outstanding balances charged at different borrowing rates for the purposes of reimbursement; ...”

Article 22 of Directive 2008/48, entitled ‘Harmonisation and imperative nature of this Directive’, states in paragraph 2:

“Member States shall ensure that consumers may not waive the rights conferred on them by the provisions of national law implementing or corresponding to this Directive.”

Article 23 of the directive, entitled ‘Penalties’, provides as follows:

“Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this directive and shall take all measures necessary to ensure that they are implemented. The sanctions must be effective, commensurate with the infringement, and must constitute a sufficient deterrent.”

## National legal sources

### Insolvency proceedings

On the date of the judgement, insolvency proceedings in Czech law were governed by Law No 182/2006 on bankruptcy and the modes of its resolution (the Law on Insolvency) (*zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení*, as amended by Law No 185/2013 ('the Law on Insolvency')). Under that law, a debtor is regarded as insolvent, in particular, for the purposes of that law, when s/he is unable to honour his/her financial commitments for more than 30 days after the final date for payment. A debtor who is not a trader may apply to the insolvency court for the status of bankruptcy to be resolved by way of discharge. The authorisation of the discharge is subject, firstly, to a finding by the court that, given that application, the debtor is not acting in bad faith and, secondly, to the reasonable presumption that the registered unsecured creditors will recover, in the discharge, at least 30% of the established debts. In the context of insolvency proceedings, under Article 410 of that law, the court may not, either of its own motion or at the request of the debtor, examine the validity, amount, or the ranking of claims, even when issues regulated by Directive 93/13 or 2008/48 arise, before adoption of its decision on the application for discharge. It is not until the insolvency court has approved the resolution of the bankruptcy by way of discharge that the debtor may lodge an incidental application to contest the registered debts. However, that application is limited to enforceable, unsecured claims. Furthermore, in that case, the debtor may assert, in order to justify his/her opposition to the existence or amount of that debt, only that the claim has lapsed or is time-barred.

### Consumer protection legislation

Articles 51a et seq. of Law No 40/1964 establishing the Civil Code (*Zákon č. 40/1964 Sb., občanský zákoník*), in the version in force until 31 December 2013 ('the Civil Code'), transposed Directive 93/13 into Czech law.

According to Article 56(1) of that code, consumer contracts must not contain terms which, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. By virtue of Article 55(2) of that code, terms of that sort in consumer contracts are to be void. Article 56(3) of that code contains an indicative list of unfair terms which is based on the annex to Directive 93/13 but which does not include the term, set out in point 1(e) of that annex, which has the object or effect of requiring any consumer who fails to fulfil his/her obligation to pay a disproportionately high sum in compensation.

Directive 2008/48 was transposed into Czech law by Law 145/2010 concerning consumer credit and amending certain laws in their original version (*Zákon č. 145/2010 Sb., o spotřebitelském úvěru a o změně některých zákonů*) ('the Law on Consumer Credit'). Article 6(1) of that Law, which concerns the creditor's obligation to provide information to the consumer, provides that: "Consumer credit agreements shall be in writing and include the information listed in Annex 3 to this Law, set out in a clear, concise and visible manner. Failure to comply with that obligation to provide information or to set out the agreement in writing shall not affect the validity of the contract. ..." By virtue of Article 8 of the Law on consumer credit, if the credit agreement does not include

the information set out in Article 6(1) of that law and if the consumer relies on that fact against the creditor, interest under that consumer credit is, from the outset, deemed to have been calculated at the discount rate applicable on the date of conclusion of that agreement, as published by the Czech National Bank; and any other arrangements as to payments in the credit agreement are invalid.

### *The case*

The case concerns a request for a preliminary ruling on the validity of national procedural rules that prevent a judge from examining the compliance of a consumer credit contract with the protections granted to consumers by Directive 2008/48 and Directive 93/13 in the context of insolvency proceedings.

In 2011, Mr and Mrs Radlinger concluded a consumer credit agreement. Claiming default in precontractual disclosure by the Radlingers, the lender accelerated the debt and asked for immediate payment of the outstanding debt. The claimants then defaulted and were declared bankrupt.

In the course of the insolvency proceedings, the Radlingers filed a request to resolve the bankruptcy by way of discharge and simultaneously challenged the validity of the credit agreement on grounds of violation of the principle of morality. These latter claims were dismissed on a procedural ground, because national rules prevent a judge, either of his/her own motion or upon request by the debtor, to examine the validity, amount, or the ranking of claims before adoption of a decision on the application for discharge.

Once the regional court had approved the claimants' joint discharge from bankruptcy based on a schedule of repayments, the Radlingers lodged an incidental application to contest the validity of the original contract and the amounts of the registered debts. At this stage, however, according to national insolvency rules, a debtor may only dispute unsecured debts and on the sole grounds that the debt is time-barred or has been repaid.

Given that the agreement at issue was a consumer credit agreement within the meaning of Directive 2008/48, and that it was a contract concluded between a consumer and a seller or supplier within the meaning of Directive 93/13, the Prague Regional Court filed a request for a preliminary ruling giving guidance as to whether such national procedural rules, which prevented it from considering whether the debtors benefited from the protection rules in the above-mentioned Directives, were consistent with EU law.

### *Preliminary questions referred to the CJEU*

In the first question referred to the CJEU, the national judge asked if national insolvency law was contrary to Directive 1993/13 and to Directive 2008/48 where it provides that the court must examine the authenticity, amount, or ranking of claims stemming from consumer relations only on the basis of an incidental application lodged by the administrator in bankruptcy, a creditor, or – in only some cases – the debtor (consumer). Furthermore, the referring court asked if national provisions which restrict the right of the debtor (consumer) to request review by the court of the registered claims of creditors (suppliers of goods or services) solely to cases in which the

resolution of the consumer's bankruptcy in the form of a discharge is approved, and in this context only in relation to creditors' unsecured claims, with the objections of the debtor being further limited, in the case of enforceable claims acknowledged by a decision of the competent authority, applied solely to the possibility of asserting that the claim has lapsed or is time-barred, as laid down in the provisions of Paragraph 192(3) and Paragraph 410(2) and (3) of the Law on insolvency.

In its second question, the national judge asked the CJEU whether domestic courts, in proceedings concerning the examination of claims under a consumer credit agreement, are required to have regard *ex officio*, even in the absence of an objection on the part of the consumer, to the credit supplier's failure to fulfil the information requirements under Article 10(2) of Directive 2008/48 and to infer the consequences provided for in national law in the form of the invalidity of the contractual arrangements.

### Reasoning of the CJEU

The question concerning the extent of the *ex officio* powers in consumer credit contracts was addressed by the Court with regard to Directive 1993/13 and to Directive 2008/48.

With regard to Directive 93/13, the CJEU recalled its case law (*Pannon*, C-243/08), applying the principle of effective judicial protection and stating that the **principle of procedural autonomy is limited by the principle of equivalence and by the principle of effectiveness**.

**With regard to Directive 2008/48, the CJEU** recalled its previous case law related to various Directives (Directive 93/13: *Pannon*, C-243/08; Directive 85/577/EEC *Martín Martín*, C-227/08; Directive 1999/44/EC *Duarte Hueros*, C-32/12), considering that on several occasions the Court had affirmed the obligation of national courts to examine of their own motion infringements of EU consumer protection legislation. The CJEU stated that the rationale of *ex officio* requirements is based on the idea that the consumer is in a weak position *vis-à-vis* the seller or supplier as regards both his/her bargaining power and his/her level of knowledge.

The Court then considered that information, before and at the time of a contract's conclusion, of the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer because it is on the basis of that information that the consumer decides whether s/he wishes to be bound by the conditions drafted in advance by the seller or supplier. **On this basis, the CJEU declared that effective consumer protection could be achieved only if the national court was required, of its own motion, to examine compliance with the requirements which ensue from EU law on consumer law.** Furthermore, the Court noted that the examination by national courts of compliance with the requirements ensuing from Directive 2008/48 is **dissuasive**, and therefore compliant with Article 23 of Directive 2008/48, according to which the penalties laid down in respect of infringement of the national provisions adopted under that directive must be dissuasive.

### Conclusion of the CJEU

“2. **Article 10(2) of 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

**must be interpreted as meaning that it requires a national court** hearing a dispute concerning claims based on a credit agreement within the meaning of that directive **to examine of its own motion whether the obligation to provide information laid down in that provision has been complied with** and to establish the consequences under national law of an infringement of that obligation, provided that the penalties satisfy the requirements of Article 23 of that directive”.

#### Impact on the follow-up case

- Regional court, Prague (decision 50 ICM 2614/2013 - 197)

In the subsequent judgement, the Regional Court of Prague ruled on the merits of the debtor’s claims. It asserted that certain clauses of the original credit agreement were unfair and reduced the debt in the insolvency proceeding to that recognized by the claimants. The creditor filed an appeal against the first instance judgement.

#### Elements of judicial dialogue

The *Radlinger* judgement (C-377/2014) is a preliminary ruling in which the CJEU provides the national courts with a ready-made solution to the dispute, stating that national courts have a duty to examine certain consumer law violations on their own motion.

The case is expressly based on the previous CJEU case law regarding judges’ *ex officio* powers and duties in the ascertainment of the unfairness of contractual terms according to Directive 1993/13 (see section 1.2), and related to the application of Directives 1999/44/EC (*Duarte Hueros*, C-32/12, see Question 2) Directive 85/577/EEC (*Martín Martín*, C-227/08) and 87/102 (*Rampion*, C-429/05).

The obligation to provide transparent information about contract terms and their content falls within the scope of the transparency requirement laid down in Article 5 of Directive 1993/13. Compliance with the requirement that a contractual term must be plain and intelligible is one of the factors to be taken into account in the assessment of whether that term is unfair. That Articles 3 and 5 of the Directive are closely intertwined has been stressed in a series of judgements (*Invitel*, C-472/10; *Kasler*, C-26/13; *Amazon*, C-191/15). Recent judgements elaborate on how to evaluate compliance with the principle of transparency (*Gómez del Moral Guasch*, C-125/18; *A. S.A.*, C-212/20). This evaluation should take place *ex officio*.

In *BNP Paribas II* (C-776/19 to C-782/19), the Court stated that the burden of proving that a contractual term is plain and intelligible, for the purposes of Article 4(2) of the UCTD, *should not* be borne by the consumer.

The principle of effectiveness is cited in all the items of case law that the CJEU recalled in the *Radlinger* case (C-377/2014). The judgements related to Directive 1993/13 are examined in § 1.2, and those concerning Directive 1999/44 are considered in the next question.

With regard to Directive 87/102, which was repealed by Directive 2008/48, in the *Rampion* case (C-429/05) the CJEU, relying on the principle of effective protection and on the *Oceano* judgement (joined cases C- 240-244/98), stated that national courts can apply of their own

motion the domestic provisions on remedies available for consumers implementing Article 11(2) of Directive 87/102 into national law.

With regard to Directive 85/577/EEC, now repealed by Directive 2011/83, according to the *Martín Martín* case (C-227/08) article 4 of Directive 85/577/EEC, regulating the information to be provided by the trader to the consumer with regard to the right of withdrawal, does not preclude a national court from declaring, of its own motion, that a contract falling within the scope of that directive is void on the ground that the consumer was not informed of his/her right of cancellation, even though the consumer at no stage pleaded that the contract was void before the competent national courts. In that case, the CJEU stated that the obligation to give notice of the right of cancellation laid down in Article 4 of the Directive plays a central role in the overall scheme of that Directive, as an essential guarantee for the **effective** exercise of that right, and therefore for the **effectiveness of consumer protection** sought by the Community legislature. Hence, public interest reasons justify that, in the event that the consumer has not been duly informed of his/her right of cancellation, the national court may determine, of its own motion, an infringement of the requirements laid down in Article 4 of the Directive.

With regard to the cases subsequent to *Radlinger* (C-2014/377), *Profi Credit II* (C-419/18 and C-483/18) and *Bankia* (C-109/17) are important.

In the *Profi Credit II* case (C-419/18 and C-483/18), recalling the *Radlinger* case (C-2014/377), the CJEU reaffirmed that Article 10(2) of Directive 2008/48, which identifies the information to be included in consumer credit agreements, requires a national court hearing a dispute concerning claims based on a credit agreement within the meaning of that Directive to examine of its own motion whether the obligation to provide information laid down in that provision has been complied with and to establish the consequences which ensue under national law from any infringement of that obligation, without waiting for the consumer to make an application to that effect and provided always that the principle of *audi alteram partem* has been complied with, and that the penalties satisfy the requirements of Article 23 of that Directive.

Furthermore, with regard to Directive 2005/29 on unfair commercial practices, the CJEU in *Bankia* (C-109/17) stated that not contrary to the effective protection provided by that Directive is a national provision which prohibits the national court hearing mortgage enforcement proceedings from reviewing, of its own motion or at the request of the parties, the validity of the enforceable instrument in light of the existence of unfair commercial practices and, in any event, prohibits the court having jurisdiction to rule on the substance regarding the existence of those practices from adopting any interim measures, such as staying the mortgage enforcement proceedings. In its reasoning, the CJEU distinguished this hypothesis from the one of unfair contractual terms, considering that:

- a contract cannot be declared invalid solely on the ground that it contains terms that are contrary to the general prohibition of unfair commercial practices laid down in Article 5(1) of Directive 2005/29;
- Directive 1993/13 clearly provides, in Art. 6(1) thereof, that unfair terms are not to be binding on the consumer, and that because that mandatory provision aims to replace the formal balance



which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them, the national court is required to assess, even of its own motion, whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier. In this regard, the CJEU recalled the importance of effective protection and cited the *Banco Español* (C-618/10) and the *Aziç* (C-415/11) judgements.

*Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

## **The Netherlands**

Two courts of first instance (Amsterdam and Leeuwarden) asked the Dutch Supreme Court whether they should conduct *ex officio* an investigation into the compliance with the information obligations of the trader laid down in the Consumer Rights Directive. The preliminary ruling, which was issued in November 2021 (ECLI:NL:HR:2021:1677), answered that question in the affirmative regarding both *in absentia* and *inter pares* proceedings, for two categories of information duties: those that are tied to a sanction in the Directive (Article 6, paragraph 6) and those that concern essential information (as listed in the annex of the Unfair Commercial Practices Directive). The claiming professional party must provide the court with all the information necessary to enable it to assess the breach of EU-law of its own motion.

### **1.4.2. Question 1b – *Ex officio* powers and remedies for the lack of conformity of goods in consumer sales**

Given the right to an effective consumer protection, the principle of effectiveness, and Article 47, CFREU, shall the judge *ex officio* grant an appropriate reduction in the price of goods when a consumer entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract, and such rescission cannot be granted because the lack of conformity in those goods is minor?

The analysis is based on the *Duarte Hueros* case (C-32/12).

*Relevant legal sources*

#### **EU level**

Recital 1 in the preamble to Directive 1999/44 states:

“... [Article 153(1) and (3) EC] provides that the Community should contribute to the achievement of a high level of consumer protection by the measures it adopts pursuant to Article [95 EC].”

Article 1(1) of Directive 1999/44 states:

“The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated

guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market.”

Article 2(1) of Directive 1999/44 states:

“The seller must deliver goods to the consumer which are in conformity with the contract of sale.”

Article 3 of Directive 1999/44, entitled ‘Rights of the Consumer’, reads as follows:

“1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.

2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6

3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate.

...

5. The consumer may require an appropriate reduction of the price or have the contract rescinded: — if the consumer is entitled to neither repair nor replacement, or  
— if the seller has not completed the remedy within a reasonable time, or  
— if the seller has not completed the remedy without significant inconvenience to the consumer.

6. The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.”

Article 8(2) of Directive 1999/44 states:

“Member States may adopt or maintain in force more stringent provisions, compatible with the [EC] Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.”

The first sub-paragraph of Article 11(1) of Directive 1999/44 states:

“Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive ...”

### **National legal sources**

The national legislation transposing Directive 1999/44 into the Spanish law in force at the time of the facts in the main proceedings was the Law on guarantees covering sales of consumer goods (*Ley 23/2003 de Garantías en la Venta de Bienes de Consumo*) of 10 July 2003 (BOE no 165 of 11 July 2003, p. 27160; ‘Law 23/2003’).

According to the first paragraph of Article 4 of Law 23/2003:

“The seller shall be liable to the consumer for any lack of conformity which exists at the time when the goods were delivered. Under the conditions set down by the present Law, the consumer has the right to have the goods repaired, to have them replaced, to have a reduction made in the price or to have the contract rescinded.”

Article 5.1 of Law 23/2003 provides:

“If the goods are not in conformity with the contract, the consumer may choose to require that the goods be repaired or replaced, unless one of those possibilities proves to be impossible or disproportionate. From the moment at which the consumer notifies the seller of his choice, both parties are bound by that choice. That decision by the consumer is subject to the provisions in the following article in the event that repair or replacement does not allow the goods to be brought into conformity with the contract.”

Article 7 of Law 23/2003 is worded as follows:

“The consumer shall choose whether there is to be a reduction made in the price or whether the contract is to be rescinded in the event that he cannot require repair or replacement or where repair or replacement has not been carried out within a reasonable amount of time or without causing major inconvenience to the consumer. Rescission shall not be available where the lack of conformity is minor.”

Article 216 of the Code of Civil Procedure (Ley de Enjuiciamiento Civil) provides:

“Civil courts before which cases are brought shall dispose of them on the basis of the facts, evidence and claims put forward by the parties, save where otherwise provided by law in specific cases.”

Article 218.1 of the Code of Civil Procedure provides:

“Legal decisions must be clear and precise and must be commensurate with the requests and other claims of the parties, made in a timely manner in the course of the proceedings. Those decisions must contain the requisite declarations, find in favour of or against the defendant and settle all points in dispute which form the subject-matter of the litigation.

The court, without departing from the cause of action by accepting elements of fact or points of law other than those which the parties intended to raise, must give its decision in accordance with the rules applicable to the case, even though they may not have been correctly cited or pleaded by the parties to the procedure.”

Article 400 of the Code of Civil Procedure states:

“1. Where the claims advanced in the application can be based on different facts, different grounds or different legal arguments, they must be advanced in the application when they are known or can be advanced at the time at which the application is lodged. It is not permissible to defer claims to later proceedings.

2. In accordance with the provisions of the preceding paragraph, for the purposes of *lis alibi pendens* and *res judicata*, the facts and the legal grounds advanced in a dispute shall be considered as being the same as those put forward in earlier proceedings if they could have been advanced in those earlier proceedings.”

Article 412.1 of the Code of Civil Procedure provides:

“Once the subject-matter of the proceedings has been established in the application, in the defence, and, as the case may be, in the counterclaim, the parties may not vary it at a later date.”

The case

In July 2004, Ms Duarte Hueros purchased a car. She returned the vehicle due to a defect and after a number of unsuccessful attempts to repair it, she requested that the vehicle be replaced.

Following the seller’s refusal to replace it, Ms Duarte Hueros brought an action before the Juzgado de Primera Instancia no. 2 of Badajoz, seeking rescission of the contract of sale and an order that the seller and the manufacturer of the vehicle be held jointly and severally liable to repay the purchase price of the vehicle. The Juzgado de Primera Instancia no. 2 of Badajoz found, however, that, because the lack of conformity giving rise to the dispute before it was minor, rescission of the contract of sale could not be granted under Article 3(6) of Directive 1999/44.

Against that background, even though Ms Duarte Hueros was entitled to a reduction in the sale price on the basis of Article 3(5) of Directive 1999/44, the referring court nevertheless found that that remedy could not be provided because of the internal rules of procedure, in particular Article 218.1 of the Code of Civil Procedure, reflecting the principle that judicial decisions must be commensurate with the requests made by the parties, as no request had been made to that effect, either as a principal claim or by way of an alternative claim, by the consumer. Moreover, since Ms Duarte Hueros had the possibility to claim such a reduction in the price, even if by way of an alternative claim, in the main proceedings, no such application would be admissible in later proceedings because, under Spanish law, the principle of *res judicata* extends to all claims which may have already been made in earlier proceedings.

In those circumstances, since it had doubts as to whether Spanish law is compatible with the principles ensuing from Directive 1999/44, the Juzgado de Primera Instancia no. 2 of Badajoz decided to stay the proceedings and to refer the following question to the CJEU for a preliminary ruling.

Preliminary questions referred to the CJEU

“If a consumer, after failing to have the product brought into conformity – because, despite repeated requests, repair has not been carried out – seeks in legal proceedings only rescission of the contract, and such rescission is not available because the lack of conformity is minor, may the court of its own motion grant the consumer an appropriate price reduction?”

Reasoning of the CJEU

When addressing the question, the Court started by pointing out that the purpose of Directive 1999/44 is to ensure a high level of consumer protection, and that Article 3(2) of Directive

1999/44 provides a specific list of rights to which the consumer is entitled in the case of defects in a product for which the seller is liable.

**The Court stressed that Article 3 of Directive 1999/44, read in conjunction with Article 11(1) thereof, requires Member States to adopt such measures as are necessary to enable consumers to exercise their rights effectively.** According to the Court's case law, the principle of effectiveness is not complied with when national procedural provisions make the application of European Union law impossible or excessively difficult (see also the reasoning of the cases analysed in § 1.2). **The principle of effectiveness** is the core of the reasoning of the Court; in light of that principle, the CJEU examined the procedural rules in proceedings in which a consumer claims the remedies consequent to the lack of conformity of goods. In particular, the CJEU recalled that, under Articles 216 and 218 of the Code of Civil Procedure, the national court is bound by the form of order sought by the applicant in his/her application that initiated the proceedings, and that, on the other hand, the applicant cannot vary the subject-matter of that application in the course of the proceedings by virtue of Article 412.1 of that Code. Furthermore, under Article 400 of that Code, the applicant is not entitled to bring a fresh action in order to advance certain claims that s/he could have advanced, at the very least by way of alternative claims, in previous proceedings. Such an action would, in fact, be inadmissible on the basis of the principle of *res judicata*.

The CJEU then affirmed that, under the Spanish procedural system, a consumer who brings proceedings seeking only rescission of the contract for the sale of goods is definitively deprived of the possibility to benefit from the right to seek an appropriate reduction in the price of those goods pursuant to Article 3(5) of Directive 1999/44 in the event that the court dealing with the dispute were to find that, in fact, the lack of conformity of those goods is minor, except where that application contains an alternative claim seeking that such a price reduction be granted.

On these bases the Court established that the Spanish national procedural rules under consideration undermined the effectiveness of the system of liability by making it excessively difficult for consumers to exercise their rights. In order to comply with the principle of effectiveness, the referring court is required to interpret its national legislation in conformity with the goals of Directive 1999/44.

#### Conclusion of the CJEU

**Directive 1999/44/EC** on certain aspects of the sale of consumer goods and associated guarantees must be interpreted **as precluding legislation of a Member State**, such as that at issue in the main proceedings, **which does not allow the national court hearing the dispute to grant of its own motion an appropriate reduction in the price of goods which are the subject of a contract of sale in the case where a consumer** who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity in those goods is minor, even though that consumer is not entitled to refine his/her initial application or to bring a fresh action to that end.

### Impact on the follow-up case

The case was eventually resolved through an agreement between the parties. Consequently, there was no implementation decision by the referring court.

### Elements of judicial dialogue

The *Duarte Hueros* judgement (C-32/12) gives national courts a precise and detailed rule on the *ex officio* powers which judges should apply.

The CJEU recalled its case law on *ex officio* powers related to the application of Directive 1993/13 (see § 1.2), and to remedies consequent on the lack of conformity of a good (*Weber and Putz* case, C-65/09 and C-87/09, analysed in chapter 5 of this casebook).

## 1.5. The guidelines for judges that emerge from the analysis

The CJEU expanded the role of the *ex officio* powers of civil judges in consumer litigation. In the view of the CJEU, *ex officio* powers contribute to the effectiveness of consumers' rights (*Oceano* case, C- 240-244/98; *Profi Credit*, C-176/17, *et al.*).

Generally speaking, in judgements on the *ex officio* duties/powers of judges in the field of consumer law, the CJEU provides the national courts with a ready-made solution to be applied, leaving them with a narrow margin for interpretation. The CJEU's case-law on *ex officio* powers plays a key role in the interpretation of EU law in several respects. It provides the following clear guidance for national courts and limits the principle of procedural autonomy of Member States:

### Consumer status

The principle of effectiveness requires a national court to ascertain *ex officio* the consumer status of a party, even though the consumer has not him/herself made his/her status clear when filing the claim or in his/her defence, as soon as that court has the elements of law and of fact necessary for that purpose at its disposal, or may have them at its disposal simply by making a request for clarification (*Faber* case, C-497/13).

### Declaration of unfair contractual terms

According to CJEU case law (*Pannon* case, C-243/08), a national court **must declare** the term of a consumer contract unfair of its own motion, even if the consumer has not claimed the unfairness of the term. This obligation of the judge is coupled with the **consumer's right to oppose the declaration** of a term as non-binding to the extent that this declaration does not meet the concrete interest of the consumer (*Pannon* case, C-243/08; *Banif plus*, C-472/11; *Asbeek*, C-488/11). Moreover, the **principle of *audi alteram partem***, as a general rule, requires the national court which has found that a contractual term is unfair by its own motion to inform the parties of such and to invite each of them to set out its views on the matter (*Banif* case, C-472/11).

### The duty of the judge to investigate

In light of the principle of effectiveness, the CJEU also expands the duty to ascertain the unfairness of a term with regard to the **judge's obligation to investigate** in order to evaluate a contractual term's unfairness (*Pénzügyi* case C-137/08, concerning a jurisdiction clause). In this regard, it should be pointed out that the CJEU has not yet addressed the question of whether the reasoning of the *Pénzügyi* case (C-137/08) could apply to all types of clauses, including those that require complex investigation, or whether it could extend to phases of judicial proceedings in which the parties may be precluded from providing evidence that supports their claims or defences.

### Judge's liability

In *Tomášová* (C-168/15), relying on its previous case law on the liability of the State for a breach of EU law and on the national courts' duty to examine the possible unfairness of a contractual term, the CJEU stated that the lack of exercise of *ex officio* duties by a last instance court in relation to the unfairness of consumer contracts' terms is to be considered a serious breach of EU law only after the judgement of 4 June 2009 in *Pannon GSM* (C-243/08). Furthermore, the CJEU considered that the rules for the compensation of damage as a consequence of a violation of EU law are determined by national law, subject to the principles of equivalence and effectiveness.

### Information and transparency violations

The CJEU declared that effective consumer protection could be achieved only if the national court were required, of its own motion, to examine compliance with information duties in consumer credit contracts set forth in Directive 2008/48. If there is a violation, national courts should establish the consequences under national law of an infringement of that duties, provided that the penalties satisfy the requirements of Article 23 of that Directive (*Radlinger*, C-377/14).

### Remedies for the lack of conformity of goods in consumer sales

According to the CJEU's case law (*Duarte Hueros*, C-32/12), in light of the principle of effectiveness, national courts must have the power to grant of their own motion an appropriate reduction in the price of goods which are the subject of a contract of sale if a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity is minor.

Against this backdrop, the CJEU does not always extensively interpret consumer protection rules, relying on the principle of effectiveness and on Article 47 CFR. For example, in a recent case, *Salvoni* (C-347/18), the CJEU adopted formal arguments to answer the preliminary question concerning *ex officio* powers and the application of Regulation 1215/2012 on jurisdiction, recognition, and enforcement of judgements in civil and commercial matters. Here, the referring court developed a reasoning based on effectiveness and on Article 47 CFR, and it asked whether *ex officio* powers should complement consumer protection within the cross-border procedure defined in the EU Regulation. On reading the *Salvoni* case, one may argue that, when EU law explicitly defines procedural rules for consumer protection, the principle of effectiveness and Article 47 are less used to expand judicial powers, although the type of unbalances and the consumer's difficulty in becoming aware of his/her rights are very similar to those addressed by

the CJEU in respect to national procedural rules intended to give effect to EU substantive law. Now pending before the CJEU is a case (*Investcapital*, C-524/19) concerning *ex officio* duties related to unfair contractual terms and the Regulation 1896/2006 creating a European order for payment procedure in which the Court may or may not confirm the reasoning adopted in the *Salvoni* case.



## 2. Effective consumer protection against violations of competition law

### 2.1. Introduction

This section assesses how Articles 101 and 102 of the TFEU may function as legal bases for consumers to seek damages from economic operators that have infringed EU competition law.

The section will also examine how the principle of effectiveness and the right to an effective judicial remedy (Article 47 CFREU) may affect the legal regime of private antitrust enforcement actions.

Over the past two decades, the notion of effectiveness has been at the centre of a legal discourse conducted by the CJEU in order to establish coherent and solid standards of protection for consumers. The domain of antitrust law is no exception. This field is, however, strongly affected by a sometimes complex dialectic between the public function of antitrust and the demand for private enforcement, as also emerges from the recent Directive no. 1/2019.

Periodically, the CJEU and the national courts have referred to the principle of effectiveness – with its twofold meaning of effectiveness of EU Law and effectiveness of protection standards and remedies – to expand the substantial and procedural scope of private antitrust enforcement. This section addresses some of the fields affected by such expansion in light of the relevant CJEU decisions and of national decisions drawing on the reasoning laid out at the Union level.

The ongoing evolution of EU case law, however, provides for new applications of the principle of effectiveness which will presumably generate further waves of national decisions in the near future. The most recent application of effectiveness in a private antitrust enforcement case occurred in the *Vantaan* decision<sup>4</sup>, where the CJEU held that, in a case where all the shares in the companies which participated in a cartel prohibited by Article 101 TFEU were acquired by other companies which had dissolved the former companies and continued their commercial activities, the acquiring companies could be held liable for the damage caused by the cartel in question. This was for the purpose of ensuring the effective application of Article 101.

In order to provide a clear account of the current scope of application of the principle of effectiveness, this section will distinguish among different topics touched upon by the relevant case law, both European and national.

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<sup>4</sup> Judgement of the Court (Second Chamber) of 14 March 2019 in Case C-724/17

## 2.2. Entitlement to compensation for third parties suffering damage causally related to an invalid agreement. Assessment and proof of the causal relation

### Relevant CJEU cases

- Judgment of the Court (Third Chamber), 13 July 2006 - *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA* (“**Manfredi**”) - [link](#) to the database for the analysis of the lifecycle of the case
- Judgement of the Court (Fifth Chamber), 5 June 2014 – *Kone AG and Others v ÖBB-Infrastruktur AG*, C-557/12 (“**Kone**”) - [link](#) to the database for the analysis of the lifecycle of the case

### Main questions addressed

- Question 1 Is Article 101 (and 102) of the TFEU to be interpreted as entitling any individual to rely on the invalidity of an agreement or practice prohibited under that article and, when there is a causal relationship between that agreement or practice and the harm suffered, to claim damages for that harm? On what grounds is a judge to ascertain such a causal relationship: in light of the principle of effectiveness and of the right to an effective judicial remedy? (**Manfredi**, Question no. 2)
- Question 2 Does the principle of effectiveness require the judge to allow claims for losses caused by entities not belonging to cartels or engaged in other kinds of illegitimate practices but which, as a consequence of a cartel/illegitimate conduct, raise prices more than they would have done without the cartel/conduct (umbrella pricing)? (“**Kone**”)

### Relevant legal sources

#### EU level

#### Article 101 of the Treaty on the Functioning of the European Union

#### National legal sources

##### - “**Manfredi**” (Italy):

Article 2 and Article 33 of Law No 287 of 10 October 1990 on the rules for the protection of competition and market (*Legge 10 ottobre 1990 No 287, Norme per la tutela della concorrenza e del mercato*, GURI No. 240 of 13 October 1990, p. 3) (‘Law No. 287/90’)

##### - “**Kone**” (Austria):

Article 1295 and Article 1311 of the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch* – “the ABGB”)

### 2.2.1. Question 1 – Entitlement to compensation on the basis of Articles 101 and 102 and assessment of the causal relation between infringement and harm sustained

Is Article 101 (and 102) of the TFEU to be interpreted as entitling any individual to rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between that agreement or practice and the harm suffered, to claim damages for that harm? On what grounds is a judge to ascertain such causal relationship, in light of the principle of effectiveness and of the right to an effective judicial remedy?

#### *The case*

In 2000, the Italian competition authority ('Autorità Garante per la Concorrenza e il Mercato' or AGCM) declared that the insurers Lloyd Adriatico Assicurazioni SpA, Fondiaria-Sai SpA and Assitalia SpA had implemented an unlawful agreement for the purpose of exchanging information on the insurance sector. The agreement facilitated an increase in premiums for compulsory civil liability insurance – related to accidents caused by motor vehicles, vessels and mopeds – that was not justified by the prevailing market conditions.

Vincenzo Manfredi and others brought actions before the Peace Justice of Bitonto, Italy, to obtain restitution of the increase in the premiums paid as a result of the agreement that had been declared unlawful by the AGCM. The local court asked the CJEU to provide guidance regarding the interpretation of certain principles of EU competition law, and thus enable it to determine whether the applicability of national competition law excluded that of Article 101 of the TFEU, whether it had jurisdiction over the case, and whether it could award damages under EU competition law.

#### *Preliminary questions referred to the CJEU*

(2) Is Article 81 EC to be interpreted as meaning that it entitles third parties who have a relevant legal interest to rely on the invalidity of an agreement or practice prohibited by that Community provision and claim damages for the harm suffered when there is a causal relationship between the agreement or concerted practice and the harm?

With this question, the national court was asking, essentially, whether Article 101 of the TFEU is to be interpreted as entitling any individual to rely on the invalidity of an agreement or practice prohibited under that article and, when there is a causal relationship between the agreement or practice and the harm suffered, to claim damages for the harm.

The preliminary question does not mention the principle of effectiveness but implicitly gives the CJEU a justifiable reason to apply it. Indeed, the question concerns the concrete application of the rights conferred by Article 101 of the TFEU (in the previous version of the Treaty Article 81) when a causal link is determined between the unlawful practice and the harm sustained. In other words, the national judge, in asking how the notion of causality can affect the judicial protection of consumers under Article 101 of the TFEU, is also asking for the relevant criteria to be followed according to EU Law as interpreted by the Court of Justice.

### Reasoning of the CJEU

The CJEU pointed out that, according to case-law, the principle of invalidity can be relied upon by every individual, and courts are bound by it once the conditions for the application of Article 101(1) TFEU have been met and so long as the agreement concerned does not justify granting exemption under Article 101(3).

Since the invalidity referred to in Article 101(2) TFEU is absolute (the court explicitly refers the absolute nullity to previous Article 81, now Article 101), an agreement which is null and void by virtue of this provision has no effect between the contracting parties and cannot be invoked against third parties (Case 22/71 *Béguelin* [1971] EUR 949, paragraph 29). Moreover, it can have a bearing on all the effects, either past or future, of the agreement or decision concerned (see Case 48/72 *Brasserie de Haecht* [1973] EUR 77, paragraph 26, and Case 453/99 *Courage and Crehan*, paragraph 22).

Furthermore, Article 101(1) produces direct effects in relations between individuals, and it creates rights for the individuals concerned which the national courts must safeguard. Therefore, any individual can claim damages for a breach of Article 101 before a national court (see *Courage and Crehan*, paragraph 24) and thus assert the invalidity of an agreement or practice prohibited under that article.

From this perspective, the effect of Article 101 directly concerns its applicability in the relations between individuals, and the principle of effectiveness is still not in play, since it regards, in particular, application of the notion of ‘causal link’ in light of the compensation claim.

Next, with regard to the possibility of seeking compensation for loss caused by a contract or conduct liable to restrict or distort competition, to be noted is that the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in Article 101(1) EU would be jeopardized if it were not open to any individual to claim damages for loss due to a contract or conduct liable to restrict or distort competition (*Courage and Crehan*, paragraph 26).

The concept of effectiveness laid down in the case can be viewed from a threefold perspective, which is not directly addressed by the Court but may nevertheless be assessed on the basis of systemic analysis of the EU Law applied here: i) in the first place, there is the practical effect of EU Law; ii) in the second place, but in direct relationship with the first consideration, there is the effectiveness of EU Law in its relationship with Member States’ legal systems, as noted below; iii) in the third place, although not mentioned by the Court, there is the concept of effectiveness of protection, which reinforces the general idea of practical effect and full effectiveness of EU Law.

It follows that any individual can claim compensation for the harm suffered when there is a causal relationship between the harm and an agreement or practice prohibited under Article 101 TFEU.

As far as application of the concept of ‘causal relationship’ is concerned, the Court pointed out that it is for each national legal system to lay down the procedural rules regarding the exercise of the rights conferred by EU Law, provided that the principles of equivalence and effectiveness

are respected. In other words, in light of the principle of effectiveness, the national provisions for application of the notion of causal relationship in the proceedings must not render the exercise of the aforementioned rights impossible or excessively difficult.

### Conclusion of the CJEU

“Article 81 EC is to be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm. In the absence of Community rules governing the matter, it is up to the domestic legal system of each Member State to prescribe detailed rules governing the exercise of that right, including rules on application of the concept of ‘causal relationship’, provided that the principles of equivalence and effectiveness are observed”.

In *Manfredi*, the CJEU clearly established that Article 101 TFEU represents the legal basis for compensation following infringements of competition law. It is to be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm.

At the same time, the CJEU confirmed that in the absence of EU rules governing the matter, it is up to the domestic legal system of each Member State to prescribe detailed rules governing the exercise of that right, including rules on application of the concept of ‘causal relationship’, provided that the principles of equivalence and effectiveness are observed. As already noted, the principle of effectiveness requires that the national provisions do not make it impossible or excessively difficult to exercise the rights conferred by Article 101. From this perspective, the concrete and procedural dimension of the concept of causal relationship concerns its ascertainment: this explains how the findings of the CJEU regarding this question constitute the main reference for national case law when assessing the rules governing ascertainment of the causal relationships and, in particular, the use of legal presumptions.

In other words, while a legal basis for the right to an effective remedy exists in EU law, the question of how that remedy should be provided is subject to national procedural law on the basis of the EU principle of national procedural autonomy. Neither the EU legislator nor the EU Courts have developed any EU provision or concept concerning the procedural details (e.g. causality) for the actual implementation of the right to effective damages claims. If consumers who are indirect purchasers of products from a cartel are unable to prove, for example, causality between the harm they suffered and the infringement, the principle of effectiveness may be jeopardized. While EU law establishes a legal basis for damages claims on the principle of effectiveness, it is national law that prescribes evidence concerning causality which consumers may find too difficult to provide. In that case, a national judge should, in light of the principle of effectiveness, be able to guarantee that consumers’ legal protections are still effective.

Illustrated below are various national approaches which point to pragmatic ways to determine this causal relationship, and which suggest that the principle of effectiveness leads to a certain presumption of causality in national procedural law. Thus, while the Court made no specific

reference to the Charter or the principle of effective judicial protection, it did emphasize that the effectiveness of EU law would be jeopardized if an individual were prevented from claiming damages and receiving compensation. In other words, individuals must have a right to an effective remedy through damages claims.

#### *Impact on the follow-up case*

The CJEU's decision in *Manfredi* led to a national decision by the Magistrates' Court of Bitonto, which had referred the five questions to the European Court. For the first time in a national context, this decision of 21 May 2007 applied the concept of effectiveness on a large scale to account for its judgement.

In this decision, the Magistrates' Court did not explicitly refer to the issue of causality between the infringement and the harm, but observed that the ascertainment of an infringement contained in an administrative decision may serve as a basis for a rebuttable presumption. It remains unclear whether the Court intended to apply the presumption to the occurrence of the infringement alone or to the causal link as well.

#### *Elements of judicial dialogue*

The decision defined the principle of effectiveness as the main criterion with which to interpret the notion of causation within the context of Member States' procedural autonomy.

In laying out the principle, the CJEU intervened in a debate initiated by the Commission. The Ashurst study<sup>5</sup> (2004) had already ascertained that Member States' legal systems adopted different approaches to causation, related to the choice of 'causation in fact' and the interaction between causation in fact and the scope of liability rules (i.e. causation in law). In 2005 the Commission recognized in its Staff Working Paper (attached to the Green Paper on actions for damages) the core function of causation in establishing liability for competition law violations. It stated that the requirement of causation is a necessary element of any claim for damages. It also stressed that the principle of effectiveness can have an impact on the notions of causation as existing in national civil law and eventually lead to their clarification.

The core issue was, however, to define some sort of standard for the assessment of causality. No concrete proposals were issued on the matter. The Staff Working Paper noted that the fact that the burden of proof of causation and damage rests on the claimant in all Member States is a serious obstacle to private actions and thus to the right to an effective remedy. The Staff Working Paper acknowledged that the evidential burden on the potential litigant is not only particularly heavy, but also that the information required to bring a case successfully is also unevenly distributed. Because proof is often required of the defendant's market position and trading practices, there is a marked asymmetry between the – potential – claimant and the defendant accused of engaging in anti-competitive behaviour. However, there are indications both in

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<sup>5</sup> Ashurst, Study on the conditions of claims for damages in cases of infringement of EC competition rules, Comparative Report, 31 August 2004

national law and under Community law that in a case of information asymmetry, the claimant's burden of proving the competition law infringement can be alleviated.<sup>6</sup>

Alleviation of the claimant's evidentiary burden was also addressed by the CJEU in C-204/00 (*Aalborg Portland*), where the Court stated that "although according to those principles the legal burden of proof is borne either by the Commission or the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged".<sup>7</sup>

Causation was not directly addressed in the White Paper of 2008,<sup>8</sup> and the recent Directive 2014/104/EU does not explicitly deal with it either. The Directive does not formulate harmonized rules on causation, but merely includes rules concerning causation by advancing causal presumptions favouring certain categories of defendants. An initial attempt to formulate EU rules on causation emerged in the preliminary ruling **Kone AG** and others, which will be discussed in the following sub-section.

#### *Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

EU Member States have so far implemented causation principles in actions for damages over infringement of competition law with strict causation requirements. Within their respective legal frameworks, legislators and courts have often adopted pragmatic approaches in determining the amount of damages to be awarded: for instance, by establishing presumptions or using *ex officio* discovery powers.

For detailed assessment of the evolution of legislation and judicial dialogue concerning causation we refer to § 2.1.2.

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<sup>6</sup> For example, in German competition law, Section 20(5) *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) alleviates the claimant's evidentiary burden in abuse actions brought by SMEs. When the claimant is able to establish a *prima facie* case, the defendant is required to clarify those issues relating to its field of business which cannot be clarified by the claimant, but which can readily be clarified, and may reasonably be expected to be clarified, by the defendant. Similarly, under Austrian civil procedural rules, it is sufficient for the claimant to furnish some basic evidence relating to an issue within the defendant's sphere of control. The latter then bears the burden of rebutting this evidence. Oberster Gerichtshof (OGH) of 16 December 2002, 16 Ok 11/02 on the application of this rule in a predatory pricing case.

<sup>7</sup> Joined cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00 and C-219/00 *Aalborg Portland and others v Commission* [2004] ECR I-123, para 79

<sup>8</sup> Although it did acknowledge its relevance. See p. 89 of the White Paper (2008). The White Paper discussed the option of lowering the standard of proof, i.e. letting less evidence and a lesser degree of likelihood suffice to obtain a damages award, in order to facilitate antitrust actions for damages. However, the difficulties described by claimants in accessing evidence are of such magnitude that a reduced standard of proof would have to be inappropriately low to avoid them: without better access to information and evidence held by infringers, all that claimants can often show is a plausible suspicion that an antitrust infringement has caused them harm. Reducing the standard of proof to such a low level would entail an unacceptably high risk of incorrect judgments and procedural abuses by the claimant. The option of generally shifting the overall burden of proof does not constitute such an effective general remedy to the consequences of the structural information asymmetry in competition cases as measures to improve access to evidence do.

## 2.2.2. Question 2 – Indirect purchasers and umbrella pricing

Does the principle of effectiveness require the judge to allow claims for losses caused by entities not party of cartels or other illegitimate practices but who, as a consequence of a cartel/conduct raise prices more than they would have done without the cartel/conduct (umbrella pricing)?

### The case

Since the 1980s *Kone* and others had implemented in Member States a large-scale agreement purporting to divide up the elevator and escalator market. The object of the cartel was to ensure for the preferred undertaking a higher price than that which would have been achievable under normal competitive conditions. It distorted the market and, in particular, the price development that would otherwise have occurred under such conditions. The result of the conduct of the members of the cartel at issue was that market prices changed little, even in the final years before 2004, and their market shares remained essentially the same. Relying on the ‘umbrella effect’, the claimant sued the appellants for compensation for loss assessed at EUR 1 839 239.74, as a result of buying from third undertakings not party to the cartel at issue elevators and escalators at a higher price than it would have paid but for the existence of that cartel, on the ground that those third undertakings benefited from the existence of the cartel in adapting their prices to the higher level. The court of first instance rejected the claim, but the appellate court upheld it. The appellants brought the proceedings before the Supreme Court, which considered the issue from two different perspectives: on the one hand, Article 101 TFEU and the case-law of the Court of Justice, in particular the judgements in Case C-453/99 *Courage and Crehan* EU:C:2001:465; Joined Cases C-295/04 to C-298/04 *Manfredi and Others* EU:C:2006:461; and Case C-360/09 *Pfleiderer* EU:C:2011:389; on the other hand, the national legislation, which precludes compensation in situations of ‘umbrella pricing’ since it states that no causal link is traceable between the infringement and the harm sustained.

### Preliminary questions referred to the CJEU

“Is Article 101 TFEU (Article 81 EC, Article 85 of the EC Treaty) to be interpreted as meaning that any person may claim from members of a cartel damages also for the loss which he has been caused by a person not party to the cartel who, benefiting from the protection of the increased market prices, raises his own prices for his products more than he would have done without the cartel (umbrella pricing), so that the principle of effectiveness laid down by the Court (...) requires the grant of a claim under national law?”

With this question, the national court was asking, in essence, whether or not the application of the effectiveness principle implies the grant of a claim in a situation of ‘umbrella pricing’ due to the alteration of competition dynamics caused by a violation of EU competition law. From the perspective of causality, the core issue is then to determine the causal link between the infringement and the harm sustained by a purchaser who is, however, in a contractual relationship not with the infringer(s) but with a third party.

### Reasoning of the CJEU

The CJEU assessed the question by trying to strike a balance between the procedural autonomy of the Member States and the principle of effectiveness of EU law. The *Courage* and *Manfredi* case



law ascertained that the effectiveness of the Treaty would be impaired if anyone suffering damages on account of an antitrust infringement would be prevented from seeking compensation. The Court pointed out, once again, that the notion of causality is left to Member States' legal systems to define, as long as it complies with the principles of equivalence and effectiveness. Afterwards, the CJEU considers that the free determination of commodity prices by an undertaking not part of an illicit agreement could nonetheless be based on general market prices whose value has been altered by such agreement. Therefore, the phenomenon of 'umbrella pricing' is to be regarded as a possible outcome of a concerted illicit practice. Although the notion of causality is subjected to Member States' procedural autonomy, national legal orders may not exclude *a priori* such phenomena from judicial protection. The consumer harmed by a practice of 'umbrella pricing' must be able to seek compensation, even if s/he has not engaged in contractual relations with an undertaking part of the illicit agreement, where it is ascertained that, in light of the specific circumstances and the features of the relevant market, the agreement was able to exert influence over the determination of an 'umbrella price' by a third operator. It is for the national judge to assess whether or not such influence was exerted.

#### Conclusion of the CJEU

The CJEU concludes that Article 101 precluded the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions.

In other words, the CJEU ruled that consumers harmed by 'umbrella pricing' must be protected provided that the national judge ascertains the occurrence of an influence exerted by the antitrust infringement over the determination of the price set by operators not part of the infringement.

#### Impact on the follow-up case

The Austrian Supreme Court (*Oberster Gerichtshof*) with the decision of 29 October 2014, 7 Ob 121/14s (ECLI:AT:OGH0002:2014:0070OB00121.14S.1029.000) widely addressed established Austrian case law in light of the criteria set by the CJEU, eventually rejecting the defendants' thesis that umbrella pricing would be excluded from the scope of private antitrust enforcement.

The Court, in diachronic dialogue? with both the CJEU and the previous Austrian case law, pointed out that, in the view of Austrian courts, a person claiming compensation for damages based on non-contractual liability had to establish an adequate causal link and a link of unlawfulness – that is, the infringement of a protective provision for the purposes of Article 1311 of the ABGB.

The person responsible for damage was required to provide compensation for all consequences that s/he could foresee *in abstracto*, including accidental ones, but not for atypical consequences. When an undertaking not party to a cartel takes advantage of the effect of umbrella pricing, Austrian courts ruled there was no adequate causal link between the cartel and the loss potentially

suffered by a buyer, since it consists of an indirect loss: a side effect of an independent decision that a person not party to a cartel has taken on the basis of his/her own business considerations.

With regard to the question of unlawfulness, the previous case law stated that the act of causing pecuniary loss entailed an obligation to provide compensation only if the unlawfulness of the loss stemmed from a breach of contractual obligations, a breach of absolute rights, or a breach of protective provisions. The decisive factor was therefore whether the provision infringed by the person responsible for the loss had as its object the protection of the injured person's interests. That was not the case in the practice of umbrella pricing.

The conflict between national case law and the principles laid out by the CJEU was evident. The Austrian Supreme Court, therefore, in judicial dialogue with both the CJEU and the national courts, sought to reaffirm in the national context the wider scope of judicial protection upheld at the EU level.

#### Elements of judicial dialogue

In the *Manfredi* decision, the issue of causation was not directly addressed. It fell upon the national courts' shoulders to set standards and criteria compliant with the principle of effectiveness, through interpretative means.

In *Kone*, the CJEU was for the first time urged to resolve an apparent conflict between EU principles and an established case law at national level regarding the reconstruction of the causal link between the antitrust infringement and the harm sustained by the consumer. The final decision reaffirmed the necessary inclusion of umbrella pricing cases within the scope of Article 101 TFEU on the basis of its full effectiveness. The national judge has to verify the concrete connection between the unlawful conduct (i.e. the cartel) and the alteration of prices applied by non-participants, as well as the fact that such effect could not be ignored by cartel members.

While the follow-up judgement applied the same reasoning as that of the CJEU, the real issue was still that of developing uniform standards to assess causation.

Indeed, the Advocate General, in the *Kone* proceeding, had supported the establishment of a clearer EU standard of causation for private antitrust enforcement actions, based on the reasonableness of the causal connection between infringement and price alteration and the exclusion of concurrent logical causes for such alteration. The thesis of the AG was not embraced by the Court, but it mirrored certain developments of national case law after *Manfredi*.

#### Directive no. 104/2014

Directive no. 104/2014 does not directly address the issue of umbrella pricing. It instead draws on the principle of effectiveness to set up a general regime concerning the so-called 'passing-on defence'. Indeed, Article 14 of the Directive rules that indirect purchasers enjoy a presumption concerning the passing of the overcharge on to them provided that they prove: i) the infringement of competition law<sup>9</sup>; ii) the existence of the overcharge as an effect of the infringement; iii) the purchase of goods/services concerned by the infringement. With this

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<sup>9</sup> However, with regard this point, consumers may rely on NCAs pursuant to Art. 9 of the Directive

intervention, the Directive provides a minimum standard to courts endeavouring to offer indirect purchasers adequate instruments with which to prove the harm sustained as a consequence of an infringement.

With regard to umbrella pricing, the interpretative setting is still the one laid out in *Kone*. However, national judges may also rely on Article 15 of the Directive, which requires national courts seized of actions for damages to take into account, *inter alia*, i) actions for damages that are related to the same infringement of competition law but are brought by claimants from other levels in the supply chain, and iii) relevant information in the public domain resulting from the public enforcement of competition law. As a consequence, the national judge, when assessing, pursuant to the *Kone* reasoning, the connection between infringement and third party's pricing, may rely on conclusions reached by NCAs pertaining, for instance, to the general effects of the infringement on the relevant market in terms of price alterations, as well as on other actions brought by third parties (i.e. competitors) harmed by the infringement.

#### *Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

In this section we assess the impact of the CJEU decisions analysed on national case law by distinguishing some of the relevant topics that courts, in several MSs, dealt with, thereby deriving practical solutions to ensure judicial protection of consumers in light of the principles of effectiveness and/or effective protection.

Several of the decisions mentioned did not arise from disputes directly involving consumers, but rather from business-to-business (BtB) relations. They laid out, however, procedural solutions pertaining to the general legal regime of private enforcement as a response to the demand of legal protection for weaker parties in commercial transactions falling within the scope of antitrust law.

#### **a) use of presumptions and discovery powers. Evidence value of the decisions taken by the national competition authority (henceforth NCA)**

### **Italy**

Since the Manfredi case and the follow-up decision by the Magistrates' Court of Bitonto, in the past ten years the Italian courts have developed a fairly consistent and harmonized pattern of reasoning concerning the burden of proof in follow-on antitrust infringement-related cases. On the basis of the principle of effectiveness and of the right to an effective judicial remedy, often not explicitly referred to but implicitly taken into account, the Italian Court of Cassation ruled that national judges could make use of legal presumptions in order to prove the causal link between the infringement and the harm sustained. In doing so, the Court also defined the limits to the legal relationship among the NCA decision, its ascertainment, and the follow-on civil proceeding initiated by the consumer.

#### Italian Court of Cassation, decision no. 27527 of 10 December 2013

The decision explicitly referred to the Manfredi case in stating that ascertainment of causality (i.e. between the antitrust infringement and the harm suffered by the consumer) must be made

according to the principle of effectiveness. In particular, the Court stated that, once an NCA decision has ascertained the existence of an infringement, the judge may then rely on the decision to ascertain the causal link as well, doing so by means of a (rebuttable) presumption. Thus the burden of proof no longer rests on the consumer's shoulders, but the link is presumed, and the defendant (i.e. the undertaking involved in the infringement) has to produce evidence of the non-existence of the causal link.

Italian Court of Cassation, decision no. 9116 of April 23, 2014

The decision assessed how the burden of proof should be shared in a follow-on proceeding (i.e. a civil compensation action following an NCA decision). The Court considered three different, although related, issues:

- (i) proof of the occurrence of an unlawful agreement: an NCA decision sanctioning an anticompetitive agreement between undertakings exempts the plaintiff from having to prove the existence of the agreement;
- (ii) proof of the causal link between the unlawful agreement and the damage sustained: an NCA decision can also found the presumption that the harm sustained by the consumer depends directly on the anticompetitive conduct engaged in by the defendant;
- (iii) proof of the harm itself the court states that proof of the harm cannot derive from the sole fact of the unlawful agreement (the harm cannot be *in re ipsa*). Nevertheless, the judge can uphold the occurrence of harm by starting from the conclusions reached during the proceeding before the authority and by then applying the general principles concerning causality, thus leading to a form of presumption.

Italian Court of Cassation, decision no. 7039 of 9 May 2012

The decision stated that, in a civil proceeding instated by a consumer seeking compensation for harm suffered due to an antitrust infringement, an administrative decision ascertaining the infringement can found a rebuttable presumption regarding the existence of a causal link between the infringement itself and the harm suffered by the consumer. The defendant can offer evidence to the contrary, but only on the basis of arguments other than those already considered and rejected within the administrative proceeding.

Italian Court of Cassation, decision no. 12551 of 22 May 2013

An administrative decision ascertaining the occurrence of an antitrust infringement can found a rebuttable presumption regarding the existence of a causal link between the infringement itself and the harm suffered by the consumer. The defendant can offer evidence to the contrary but only on the basis of arguments other than those already considered in the course of the administrative proceeding.

Italian Court of Cassation, decision no. 16786 of 23 July 2014

An administrative decision ascertaining the occurrence of an antitrust infringement can found a rebuttable presumption regarding the existence of a causal link between the infringement itself and the harm suffered by the consumer.

## Germany

### Higher Regional Court of Düsseldorf, 9 April 2014, VI-U (Kart) 10/12

The case does not regard consumers, but an action brought by a private lottery agent seeking damages to the amount of EUR 11 million from a state lottery as a consequence of a boycott agreed between the German lotteries. The anticompetitive agreement was documented in a decision of the Federal Cartel Office.

The lower court appointed an expert and rejected the claim in its entirety. However, the appellate court overturned the judgement.

The court assumed a causal link between the boycott and the failure of the claimant's business model, concluding, *inter alia*, that the business model was viable and that the lotteries, without the boycott, would have had economic incentives to cooperate with the claimant and pay commission.

The court relied on two provisions, to some extent lifting the burden of proof. First, under German procedural law the court can apply a balance of probabilities for both the causal link between the tortious act and the harm as well as the exact amount of damages (Sec. 287 Code of Civil Procedure). Secondly, according to German damages law, profits considered lost are those that in the normal course of events or in special circumstances, particularly due to the measures and precautions taken, could probably be expected (Sec. 252 German Civil Code). If the strict rules of evidential burden were applied, this would in many cases leave claimants without a remedy, even though they are most likely to have suffered some harm. Therefore, the decision interprets the spaces of discretion left open by legislation in order to allow the 'weaker party' to prove the link between infringement and harm, as well as the damages themselves.

### Lottery case Federal Court of Justice, Judgement of 12 July 2016 – Case KZR 25/14

The Federal Court of Justice in the Lottery case reiterated that the German Civil Procedure Rules require trial courts to estimate the damages if the claimant is unable to substantiate the exact amount. Nonetheless, the Federal Court of Justice made it clear that claimants must at least prove that they were 'affected' by the infringement.

In three other cases (**Judgement of 9 November 2016 – Case 6 U 204/15 Kart.**, **Judgement of 21 December 2016 – Case 8 O 90/14 (Kart)**; **Judgement of 28 June 2017 – Case 8 O 25/16.**, **Judgement of 27 July 2016 – Case 37 O 24526/14.9**), the Higher Regional Court of Karlsruhe and the District Courts of Munich and Dortmund not only confirmed that certain hardcore infringements of competition law constitute *prima facie* evidence of the existence of harm (similar to Article 17(2) of the Directive), but also argued that claimants can also rely on *prima facie* evidence to demonstrate that their individual purchases had been affected by the cartel, provided that these purchases were made during the cartel period and on the market in which the cartel was active.

The German case law, even though not related to consumer protection, is concerned with providing a remedy for weaker parties in private enforcement actions, and it interprets national

provisions either to use discretionary powers to assess causal connections or to allow such parties to rely on *prima facie* evidence founding presumptions.

### **United Kingdom and Wales**

On the question of causation, the British courts traditionally, apply the so-called “but for test”. The claimant must show that it is more likely than not that the harm would not have occurred “but for” the defendant’s breach of duty. The test was explained in **2 Travel Group Plc & Cardiff City Transport Services [2012] CAT 19, § 77**<sup>10</sup>.

The case does not regard consumers, but rather a follow-on action concerning abuse of dominant position. However, in applying the test, the Court sought to eliminate all the irrelevant causes in order to detect the effective cause of the resulting harm.

**Enron Coal Services Ltd & English Welsh & Scottish Railway Ltd [2011] EWCACiv 2**□ The Court of Appeal emphasised that, although the infringement had already been determined by a competition authority, causation between this infringement and further follow-on claims for damages had yet to be proven by the claimant. Although the Office of Rail Regulation (ORR) had already determined that the English Welsh & Scottish Railway (EWS) had infringed article 82 of the EC Treaty, this did not mean that the causation between the infringement and the harm suffered by Enron Coals Services Ltd had been proven.

The CAT rejected the broader view of causation advanced by 2 Travel, finding it “vague”. It also held that intention alone cannot be said to be causative, in particular if the defendant has not taken any effective steps to cause such harm.

In applying such a strict standard to causation, the Court openly rejected a functional application of the principle of effectiveness such as upheld, for instance, by Italian courts. This stance is now, however, clearly incompatible with the provisions of Directive no. 104/2014.

### **Netherlands**

Rechtbank Oost Nederland, Judgement of 16 January 2013 (ECLI:NL:RBONE:2013:BZ0403)

In a follow-on judgement, the Court stated that it was bound by the decision of the EU Commission with regard to the occurrence of the infringement and the defendant’s participation in it. The Court also held that it was for the defendant to provide evidence (e.g. regarding other market factors) that the unlawful agreement questioned by the Commission did not apply to the economic operation object of the suit. Therefore, the Court introduced a sort of rebuttable presumption, assuming the connection between the infringement and the specific legal relation assessed. The Court also stated that if the precise incidence of the unlawful conduct over prices’ fluctuation cannot be determined, Art. 6:97 of the Dutch Civil Code is applied, so that “The

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<sup>10</sup> “(t)he first step in establishing causation is to eliminate irrelevant causes, and this is the purpose of the “but for” test. The courts are concerned, not with identifying all of the possible causes of a particular incident, but with the effective cause of the resulting harm in order to assign responsibility for that harm. The “but for” test asks: would the harm of which the claimant complains have occurred “but for” the negligence (or other wrongdoing) of the defendant? Or to put it more accurately, can the claimant adduce evidence to show that it is more likely than not, more than 50 per cent probable, that “but for” the defendant’s wrongdoing the relevant harm would not have occurred. In other words, if the harm would have occurred in any event the defendant’s conduct is not a “but for” cause.”

court estimates the extent of the damage in the way which is most consistent with the nature of the damage caused. Where the extent of the damage cannot be assessed exactly, it shall be estimated”.

Prior to the implementation of Directive no. 104/2014, the status of NCA decisions in civil proceedings was not clear. In principle, as held by the **Supreme Court in the judgement of 2 June 1995 (Aharachi/Bedrijfsvereniging)** Dutch civil courts were not bound by NCA decisions. However, the same Supreme Court later ruled that not contested NCA decisions would assume legal force, thus becoming binding upon civil courts (**judgement of 22 December 2007, Van Rattingen Grondverzet/Loenen**). Now, Article 6:193l of the Dutch Civil Code (introduced, together with the entire Section 3B of the 6<sup>th</sup> Book, to transpose Directive no. 104/2014) provides for a rebuttable presumption that infringements ascertained by the EU Commission or the NCA caused damages. The Dutch legislature, further expanding the protection standards set by the Directive, appears to have followed the solutions already taken by the Oost Nederland Rechtbank.

## France

French courts have relied on discovery powers to ensure weaker parties’ protection in civil judgements. In particular, with **decision no. 80 of 19 January 2010 the French Court of Cassation** ruled that, when a party in a follow-on action proves that the disclosure of certain documents is necessary for exercising the right to defence, the Court may either order the NCA to disclose relevant information in its files or order one of the parties to disclose the documents.

## Portugal

Prior to Directive no. 104/2014, **the Lisbon Court of Appeal in the Nos v PT (II) case (decision of 20 December 2012)** had ruled that civil courts could not be bound by NCA decisions. The same view was held by the **Porto Court of Appeal in the decision of 1 March 2007 Nestlé (III)**. An older case law, however, showed how Portuguese courts did, in fact, sometimes base their decisions on NCA decisions (see **Lisbon Court of Appeal, decision of 18 April 1991, JCG v Tabaqueira**).

In general, the Portuguese case law was inconsistent with the main purpose of Directive no. 104/2014 and its Art. 9.

### *b) protection for indirect purchasers and causation regime in umbrella-pricing cases*

## Germany

Federal Court of Justice, KZR 75/10, judgement of 28 June 2011 (ORWI case – German Carbonless Paper)

The printing company ORWI brought a follow-on action against a member of the EU Carbonless Paper Cartel, SD Papier, following the European Commission’s decision of 20 December 2001. Technically, the claimant was an indirect purchaser because the cartelists distributed the cartelized paper products through wholesalers. However, in this case the wholesaler was a 100% subsidiary of the defendant cartelist. The Federal Court referred to CJEU

jurisprudence in *Courage* and *Manfredi* to rule that indirect purchasers are entitled to claim damages, in particular because in many cartel cases they are the ones who actually suffer the harm.<sup>11</sup>

The Federal Court held further that: (i) the concept of *Vorteilsanrechnung* (*compensatio lucri cum damno* or compensation of benefits with damages), which largely amounts to the passing-on defence, has always been an instrument of German law in respect of civil liability; (ii) both direct and indirect purchasers are principally entitled to claim damages, although the indirect purchasers bear the burden of proof in respect of the passing-on, and no presumptions apply; (iii) the passing-on defence is admitted as a matter of law but is limited to inflated prices (i.e. overcharge) and does not exclude harm suffered as a result of consequent reduced volume effects; (iv) the defendant bears the burden of proof in respect of the passing-on defence, and no presumptions apply.

In this case, the German Federal Court relied on CJEU case law to affirm, in light of the principle of effectiveness, the entitlement of indirect purchasers to bring claims. However, it did not use the same principle to justify legal presumptions and ease the weaker party's burden of proof. As such, this judgement is today inconsistent with the regime laid out in Directive no. 104/2014, which instead introduces a general presumption.

## **Netherlands**

### TenneT v Alstom ECLI:NL:RBGEL:2017:1724

The Court of Gelderland ordered Alstom to pay TenneT 14.1 million euros in damages on the grounds of the role that it had played in the gas-insulated switchgear cartel.

With regard to the overcharge, the court found that the burden of evidence rested on TenneT. In light of TenneT's lack of knowledge, however, the court found, in an earlier interlocutory judgement<sup>12</sup>, that the principle of effectiveness, as laid out in *Courage*, meant that Alstom could be required to provide information on the calculation of its prices.<sup>13</sup>

Alstom then argued that TenneT could not claim reimbursement for all or part of that harm because it had passed the higher price on to its customers. The passing-on defence was based on Section 6:100 of the Dutch Civil Code, which relates to the mandatory deduction of collateral benefits. However, the court found that Alstom had not complied with the burden of proof that rested on it to prove that TenneT had indeed passed on all or part of the overcharge.

ABB decided to appeal against this decision (ECLI:NL:GHARL:2018:4876). ABB sought a new judgement *inter alia* on the court's decision not to allow the passing-on defence. Regarding the overcharge, ABB argued that the causal relationship between the higher price and the infringement of competition law had not been proven or rendered plausible by the evidence brought forward by TenneT. ABB also insisted that the rejection of the passing-on defence by the court should be reconsidered, since the previous judgement of the court was incompatible

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<sup>11</sup> In doing so, the Court overruled the findings of the lower courts (Regional Court Mannheim (22 O 74/04, 2005) and Higher Regional Court Karlsruhe (6 U 118/05 (Kart.), 2010))

<sup>12</sup> ECLI:NL:RBGEL:2014:6118, *TenneT - Saranne / Alstom c.s.*: RO 2015/5, para 4.304.31

<sup>13</sup> TenneT's lack of knowledge and the procedural position taken by Alstom, which, despite the earlier interlocutory judgment, failed to provide any information on its pricing method, constituted the reason for the court to base its assessment of the amount of the overcharge on the documents submitted by TenneT.



with the principle of *restitutio in integrum* and the explicit prohibition of overcompensation in Dutch law. In order to determine the overcharge, as well as to reconsider the passing-on-defence, a new committee of inquiry was appointed in an interlocutory judgement. The final decision of the Court of Appeal Arnhem-Leeuwarden was therefore still pending in the summer of 2018.

#### Tennet v ABB, judgement of 8 July 2016, Dutch Supreme Court

This is the case in which the Dutch Supreme Court formally accepted passing-on as a valid defence under Dutch law. In this case the Dutch Court extensively cited EU case law, most notably *Courage* and *Manfredi*, while also referring to the principle of effectiveness as a requirement.

Subsequent to implementation of Directive no. 104/2014 in February 2017, the Dutch Civil Code has addressed passing-on in Article 6:193 p.

What is not clear, however, is how the defence should be applied in practice. Application proved problematic. The Supreme Court ruled that a passing-on defence can be qualified either as an issue directly affecting the amount of damages (i.e. the damages were to be reduced directly by that part of the overcharge that had been passed-on), or under the doctrine of *voordeelstoerekening* (Compensation of profits with damages or *compensatio lucri cum damno*). In the latter scenario, any benefit conferred upon the claimant as a result of the wrongdoing may be offset against the damages owed for that same wrongdoing. According to the Supreme Court, the approach to passing-on may differ in the two scenarios, but the end result should be the same. However, applying the concept of *voordeelstoerekening* requires that there be a sufficiently close causal link between the wrongdoing and the benefit. It also imposes a reasonableness test: to what extent is it reasonable to take the benefit into account (6:100 DCC)? This reasonableness test appears difficult to reconcile with the principle that compensation should be offered for actual loss at every level of the supply chain, and it should not exceed the overcharge at the relevant level (cf. Article 12(2) Directive).

The Supreme Court explicitly stated that if its earlier case law suggested that the doctrine of *voordeelstoerekening* required a very direct causal link between the wrongdoing and the benefit conferred on the claimant – which would in practice leave little room for a successful passing-on defence – that particular case law no longer applied.

The benefit that is conferred on the claimant in connection with the infringement will be taken into account, provided that it is reasonable to do so. In both approaches, the Court can place the burden of proving ‘passing-on’ on the defendant<sup>14</sup>.

#### **France**

#### Tribunal de Commerce de Nanterre, SA Les Laboratoires Pharmaceutiques Arkopharma v Ste Roche etc, No. 02004F02643 (11 May 2006)

The decision concerns the standard of proof and passing-on defence. The French court noted that, in its vitamins cartel infringement decision, the Commission had found that the cartel had effects on the final consumers only, and precluded intermediary consumers, such as Arkopharma,

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<sup>14</sup> However, under the doctrine of *voordeelstoerekening* the defendant may offset a benefit that was conferred upon the claimant against the damages owed for that same wrongdoing, provided there is an adequate causal link between the wrongdoing and the benefit, and provided that it be reasonable to take account of the benefit.

which had purchased vitamins from Roche, from claiming that they did not pass the alleged overcharges on to the final consumers, thus breaking the causal link between the higher prices as a result of the cartel and the harm from which Akropharma allegedly suffered. The Court observed that, since the cartel was international and covered 80% of the global market, the intermediary consumers could pass the overcharge on to the final consumers without incurring any risk that competitors would not pass on the overcharge.

Tribunal de Commerce de Paris, Société les Laboratoires Juva Production etc v SAS Roche etc, No. RG2003048044 (10 September 2003)

This judgement provides a further example of the strict standard of proof required of the claimants to demonstrate that they have not passed on the overcharge (the burden being on them rather than on the defendants). This is also a case brought following a Commission's decision on the vitamins cartel, which noted that in view of the 'essential' nature of the products sold by Juva (food complements), there would be no volume effect following the price increase because of the cartel and, in any case, the cartelized products constituted only a small proportion of the cost of the products sold by Juva; hence it was possible for the latter to pass the overcharges on to consumers by means of relatively modest price increases.

***c) burden of proof regime in stand-alone proceedings***

**Italy**

Court of Cassation, decision no. 11564 of 4 June 2015

A series of businesses engaged in the wholesale trade of fruit and vegetables at a trade centre sued the company which managed the centre according to an exclusivity clause with its owner. The plaintiffs argued that the managing company had forced them to accept unfavourable lease contracts with regard to individual stores and selling areas. The Court of Appeal, ruling in first instance according to the then in force version of Article 33 of Law no. 287/1990, rejected the plaintiffs' requests. It motivated its decision by stating that there was not a relevant market with regard to the lease contracts signed by the plaintiffs. Moreover, because of the lack of information provided by the plaintiffs, it was impossible to compare contractual clauses adopted in different trade centres.

The Court of Cassation annulled the judgement of the Court of Appeal. It stated, in the first place, that "the general concepts of 'relevant market' and 'abuse of dominant position' must be contextualized depending on the circumstances of the actual case adjudicated." In the second place, the Court analysed the issue regarding the burden of proof. It considered that the proceedings did not follow a decision of the NCA. In proceedings of this kind, the plaintiffs experience particular difficulty in fulfilling their burden of proof. Proving the existence of a relevant market requires, in fact, economic data and information which, more often than not, are at the disposal of the defendant (the company allegedly violating anti-trust regulation) rather than the plaintiff. Moreover, whereas in public enforcement proceedings the NCA has substantial investigative powers which it can activate on its own, in private enforcement proceedings those powers are much more limited.

The Court pointed out that Directive no. 104/2014 strives to foster coherence between the European legal framework and the national rules regarding private antitrust enforcement. The

Court then referred to Article 4 of the Directive, which stresses the principle of effectiveness of judicial protection in private antitrust proceedings, and to Article 47 of the CFREU. In the Court's reasoning, these rules create a legal framework which empowers the judge to deploy adequate procedural instruments to protect the position of a party which finds itself in an "asymmetrical information context" where relevant proof is at the disposal of the other party, which allegedly perpetrated the infringement. Instruments such as a technical consultancy, or a judicial order to produce documents before the Court, can serve this purpose, thus achieving full application of the principle of effectiveness.

## **Netherlands**

Midden Netherland District Court 10 July 2013, ECLI:NL:RBMNE:2013:3245 (interim judgement) and 30 December 2013, ECLI:NL:RBMNE:2013:7536 (EMS/Equens)

Although the claimant was successful in substantiating its claim that competition law had been infringed, the District Court subsequently ruled that merely showing that fewer merchants were acquired by EMS since the queue period had been introduced was not sufficient to prove that a sufficient causal link existed between this queue procedure and the alleged harm. This case therefore demonstrates that a claimant in a stand-alone case has to substantiate the infringement of competition law as well as a sufficient causal link between the infringement and the harm allegedly incurred.

At the same time, the Dutch judges added (during one of the workshops) that under the Dutch Code of Civil Procedure (Article 21-22 and 843a), the national judge has a broad margin of discretion to help consumers.

Since Directive 2014/104/EU was implemented in the Dutch Civil Code, there have been no further developments in case law concerning third parties claiming compensation for harm caused by infringement of competition law.<sup>15</sup> The rebuttable presumption suggested in Article 14 of the Directive has directly been adopted in Article 6:193p of the Civil Code. Moreover, the limitation periods are arranged in a way that does not make it excessively difficult to exercise the right of full compensation.

Other provisions functional to ensuring effective protection in stand-alone proceedings were already present in the Dutch Civil Code. For example, Article 843a of the Code of Civil Procedure already granted parties ample opportunity to acquire the documents that they needed to use as evidence to claim damages. This is also applicable to third parties who have suffered from cartel agreements. Even though the Dutch legislator has taken the burden of third parties into consideration, no further case law has so far developed in which third parties make use of these effective remedies.

## **United Kingdom**

English Welsh & Scottish Railway Limited v Enron Coal Services Limited [2009] EWCA Civ 647, 1 July 2009

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<sup>15</sup> This is remarkable, given that even before the implementation of the Directive, the Netherlands had already shown quite extensive private enforcement of competition law. In the Explanatory Memorandum of the implementation law on the Directive, the same concern was expressed as in the recital 41 of the Directive: for indirect purchasers, it may be especially hard to prove that they have suffered harm because of an infringement of competition law.

In this case, the claimant sought among other things damages in respect of an alleged overcharge it claimed to have paid, although the underlying infringement decision that was the basis of the claim related only to discriminatory pricing which had potentially put the claimant at a disadvantage when tendering for a contract. The part of the claim relating to the overcharge was struck out by the Court of Appeal, on the basis that it did not form part of the regulator's infringement finding.

## France

In the **Bottin Cartographes v. Google case**, both the **Paris Commercial Court (judgement of 31 January 2012)** and the **Paris Court of Appeal (judgement 20 November 2013)** upheld the view that a civil court may request an opinion from the NCA regarding features (e.g. market definition) of the matter under judgment in order to assess its anticompetitive nature.

### 2.3. Limitation period

#### Relevant CJEU cases

- **Manfredi** (C-295-98/04) - [link](#) to the database for analysis of the lifecycle of the case

#### *Main question addressed*

Question 1      How can a judge interpret national rules on limitation in such a way that in antitrust-related civil proceedings, the consumers' right to compensation is effectively protected, in light of Articles 101 and 102 as well as of the principle of effectiveness? (“**Manfredi**” – Question no. 4)

#### *Relevant legal sources*

See § 2.1

#### 2.3.1. Question 1 – Limitation regime in light of the principle of effectiveness

How can a judge interpret national rules on limitation in such a way that in antitrust-related civil proceedings, the consumers' right to compensation is effectively protected, in light of Artt. 101 and 102 as well as of the principle of effectiveness?

#### *The case*

See § 2.1.1

#### *Preliminary questions referred to the CJEU*

“(4) Is Article 81 EC to be interpreted as meaning that for the purposes of the limitation period for bringing an action for damages based thereon, time begins to run from the day on which the agreement or concerted practice was adopted or the day on which the agreement or concerted practice came to an end?”

As far as the core topic of this Casebook is concerned, the main point addressed in this section regards the impact that the principle of effectiveness – i.e. effectiveness of both EU Law and judicial protection – can have on the determination of national provisions regarding limitation periods.

#### *Reasoning of the CJEU*

The Court pointed out that, in the absence of community rules governing the matter, it is up to the Member States' legal systems to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101 TFEU, provided that the principles of equivalence and effectiveness are observed.

Nevertheless, the Court then stated that a national rule, such as the Italian one, under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted, could, in practice, make it impossible to exercise the right to seek compensation, thus contravening the principle of effectiveness. In particular, if the national rule imposes a short period of limitation as well, then the limitation may even run its full course before the infringement is brought to an end, thus making it impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.

It is the national court which has to assess whether the national provisions regarding limitation comply with the principles of equivalence and effectiveness, considering, in light of the reasoning laid out by the CJEU, which rules can better ensure the effective protection of the right to seek compensation of any individual who has suffered harm as a consequence of an antitrust infringement.

#### *Conclusion of the CJEU*

The CJEU ruled that, in absence of Community rules governing the matter, it is up to the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101 TFEU, provided that the principles of equivalence and effectiveness are observed.

It is up to the national court to determine whether a national rule which provides that the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101 TFEU begins to run from the day on which that prohibited agreement or practice was adopted, particularly where it also imposes a short limitation period that cannot be suspended, renders it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered.

#### *Impact on the follow-up case*

The Magistrates' Court decision of May 21, 2007 applied the principle of effectiveness in order to assess the moment from which the limitation period should run. The Court stated that, in order to guarantee an effective protection of the right of the consumer, the limitation period should run from the moment when the infringement ceased to be. Moreover, proof of the moment of the end of the infringement's rests on the defendant (i.e. the undertaking). Otherwise, the limitation period does not run.

### Elements of judicial dialogue

The CJEU's decision was extensively referred to by national courts when assessing the issue of limitation in private antitrust enforcement actions (see following section). The decision was, furthermore, a solid point of reference for subsequent legislative and judicial assessment of the limitation regime.

The principle of 'effectiveness' requires that national limitation periods should not start to run before the infringement decision is published and should be long enough to allow for effective compensation. However, Member States' legislation on limitation periods continued to vary greatly, with some more favourable than others.

The 2008 White Paper stated that while limitation periods play an important role in providing for legal certainty, they can also constitute a considerable obstacle to the recovery of damages. Much depends on the duration of the limitation period, the moment it begins to run, and whether or not it can be suspended. In the White Paper, the Commission argued that the principle that the rules governing the limitation period should be such that they effectively allow for antitrust damages claims to be brought has repercussions on the commencement date of the limitation period, the duration of the limitation period, and how enforcement proceedings by competition authorities may affect it.<sup>16</sup>

Directive 2014/104 (Art. 10) now states that "Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behaviour and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to it; and (c) the identity of the infringer".

Article 10 further seeks to harmonise the limitation period for bringing damage claims by providing that Member States' limitation periods must run for at least 5 years after the infringement has ceased, with recognition that the claimant can reasonably be expected to have knowledge of the relevant circumstances of the cartel. Moreover, limitation periods are suspended from running when the NCA initiates an investigation at least 1 year after the authority's infringement decision has reached an affirmed conclusion.

The CJEU further developed the principles of *Manfredi* (and *Kone*) regarding limitation in the *Cogeco* decision (C-637/17). In this decision, the CJEU assessed the compliance with EU law of a national legislation (i.e. Portuguese legislation) which, still pending the transposition timeframe for Directive 2014/104, provided that:

- a) the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable;

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<sup>16</sup> An appropriate limitation period for antitrust damages claims is important for stand-alone cases, but even more so for follow-on cases. Indeed, the finding of an infringement by a competition authority could in itself prompt victims of an antitrust infringement to bring a damages claim. If the limitation period is too short (compared to the length of proceedings of competition authorities) or cannot be suspended, a claim may already be time-barred by the time a decision by a competition authority is finally rendered, so that potential claimants are no longer able to bring a case.

- b) it is not possible to suspend or interrupt that period during proceedings before the national competition authority.

The CJEU, although confirming that Directive 2014/104 was not applicable to the case since it was still pending its transposition period, found that the national provisions were nonetheless in violation of Article 102 TFEU and the principle of effectiveness. In *Cogeco*, therefore, the CJEU appears to have taken a further step compared to *Manfredi*, since it directly assessed, in light of the principle of effectiveness, a national legal regime, verifying which provisions complied with EU law and which did not.

### Impact on national case law

#### **Italy**

**The Italian Court of Cassation, in 2007 (decision no. 2305 of February 2, 2007)**, established that a limitation period should not run from the moment when the infringement has been ascertained in an administrative proceeding, nor from the moment when the contract (in this case an insurance policy) was concluded. Instead, it should run from when the claimant (i.e. the consumer) realizes (or could reasonably realize) that the harm suffered was a direct consequence of the infringement.

A series of subsequent decisions upheld the same principle as laid down by the Court of the Cassation in the decisions examined: **Naples Court of Appeal, decision no. 763 of 2007; Turin Court of Appeal, decision of May 25, 2007; Naples Court of Appeal, decision of March 7, 2008; Milan Tribunal, decision no. 5251 of 2014.**

Similarly, two decisions of the Court of Cassation, though involving enterprises and not consumers (nos. 7677 of 2020 and 5381 of 2020), by referring to *Manfredi*, held that the limitation period runs from the moment that the plaintiff is adequately informed (or it is presumable that /he is informed) of the existence of both the infringement and the damage.

A recent development, while following the same pattern of reasoning already established, ensued from the decision of the **Rome Tribunal of November 23, 2016**: in this case the court reassessed the principle according to which the limitation period runs from the moment when the consumer is able to perceive the infringement as the direct cause of the harm sustained. This moment, however, must be assessed on a case-to-case basis, depending upon the information known by or accessible to the consumer. In this case, the court rejected the plaintiff's claim, observing that, having previously participated in an NCA proceeding involving the defendant, it had acquired enough information regarding the existence and the nature of the infringement since it had become part of the NCA proceeding. Therefore, the limitation period had started running from that moment, and had thus fully run when the civil proceeding was instated.

#### **United Kingdom**

**Arcadia Group Brands Ltd v Visa Inc [2014] EWHC 3561 (Comm); Arcadia Group Brands Ltd v Visa Inc [2015] EWCA Civ 883**: the case does not regard consumer protection but is nevertheless useful for pointing out the application of limitation periods in competition damages claims in the UK. The Court ruled that a substantial part of the claimant's claim should be struck

out for having been brought too late. The Court concluded that since 2006 at the latest, the claimants (a group of major retailers) had possessed (or could reasonably have diligently obtained) sufficient information to plead a claim adequately alleging that the Visa network's multilateral interchange fees unlawfully infringed Article 101(1) of the TFEU, the Chapter I prohibition of the Competition Act 1998, and equivalent provisions of the Irish Competition Act 2002. This information was, in large part, contained in decisions, notices, and press releases issued by the European Commission and Office of Fair Trading relating to their respective investigations into Visa's (and Mastercard's) MIFs. This judgement makes it clear that potential claimants must not wait too long before entering upon proceedings, particularly when an alleged infringement is ongoing and/or under investigation by a competition authority. Once a potential claimant has sufficient information and facts to satisfy the pleading standard, the time will start to run. This is the case even if this information and these facts are incomplete, thereby making it difficult to take a commercial decision as to whether or not a claim is worth bringing.

## Netherlands

**Rechtbank Oost Nederland, Judgement of 16 January 2013 (ECLI:NL:RBONE:2013:BZ0403)** □ The Court pointed out that, in order to determine the day from which limitation counting starts, one should refer to the moment when the plaintiff had (or could reasonably have had) knowledge of the infringement and of the causal link between the infringement and the damage sustained.

## 2.4. Punitive Damages

### Relevant CJEU cases

- **Manfredi** (C-295-98/04)- [link](#) to the database for analysis of the lifecycle of the case.

#### *Main question addressed*

Question 1 May the principles of effectiveness, proportionality and dissuasiveness justify the imposition of punitive damages in civil proceedings concerning compensation for antitrust infringements? (“**Manfredi**” – Question n. 5)

#### *Relevant legal sources*

See § 2.1

### 2.4.1. Question 1 – Admissibility of punitive damages

May the principles of effectiveness, proportionality and dissuasiveness justify the imposition of punitive damages in civil proceedings concerning compensation for antitrust infringements?

#### *The case*

See § 2.1.1



### Preliminary questions referred to the CJEU

(5) “Is Article 81 EC to be interpreted as meaning that when the national court sees that the damages that can be awarded on the basis of national law are in any event lower than the economic advantage gained by the infringing party to the prohibited agreement or concerted practice, it should also award of its own motion punitive damages to the injured third party, making the compensable amount higher than the advantage gained by the infringing party in order to deter the adoption of agreements or concerted practices prohibited under Article 81 EC?”

With this question, the national court was asking, in essence, whether Article 101 EU is to be interpreted as requiring national courts to award punitive damages greater than the advantage obtained by the offending operator, thereby deterring the adoption of agreements or concerted practices prohibited under that article.

### Reasoning of the CJEU

The CJEU maintained that, in the absence of EU rules governing the matter, it is up to the domestic legal system of each Member State to set the criteria with which to determine the extent of the damages for harm caused by an agreement or practice prohibited under Article 101 EU, provided that the principles of equivalence and effectiveness are observed.

The Court stated, first, that in accordance with the principle of equivalence, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on EU competition rules, it must also be possible to award such damages in actions founded on EU rules. However, EU law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.

Secondly, the CJEU stated that it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured parties must be able to seek compensation not only for actual loss (*damnum emergens*), but also for loss of profit (*lucrum cessans*) plus interest.

### Conclusion of the CJEU

In the absence of Community rules, it is up to the domestic legal system of each Member State to set the criteria with which to determine the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.

To be noted is that the CJEU neither advocates nor upholds the introduction of punitive damages in Member States’ legal systems. The Court’s interest lies in ensuring respect of the principle of effectiveness and the guarantee of a high level of protection for consumers, so that the full effectiveness of the treaty, as well as its practical effect, be preserved.

### Impact on the follow-up case

The Magistrates Court's decision of 21 May 2007 ruled that the plaintiff (i.e. the consumer) was to be awarded a compensation high enough to exert a deterrence effect. The judge pointed out that the plain application of the Italian Civil Code provisions regarding compensation (Articles 1223 and 1224) could hinder the effective protection of the consumer since the infringer, though paying compensation corresponding to the harm caused, would still gain profit from its infringement. In other words, the decision ruled for the admissibility of punitive damages in private antitrust enforcement actions; a decision which, however, still remains an isolated occurrence.

### Elements of judicial dialogue

From the information presented in the previous section, it may be inferred that the focus of the CJEU is respect of the principle of effectiveness. Thus, the concept of punitive damages does not clash, on a general and broad level, with the EU legal system provided that it serves the purpose of ensuring the principle as well as effective judicial protection. The case law of the CJEU, even regarding matters not pertaining to antitrust infringements, seems to reassess such reasoning. Two cases appear to be of particular significance:

- i) In the Arjona Camacho case, the Court was tasked with interpretation of Article 18 of Directive 2006/54 concerning “loss and damage sustained by a person injured as a result of discrimination on grounds of sex (i.e. in matters of employment), in a way which is dissuasive and proportionate to the damage suffered”;
- ii) The Stowarzyszenie decision concerned the admissibility of punitive damages for violation of intellectual property rights.

In both these decisions, the CJEU essentially upheld the principle that, theoretically, punitive damages do not clash with the EU legal system provided that they do not lead to unjust enrichment, in light of the principles of proportionality and dissuasiveness. Moreover, the CJEU seems to consider that national legislation on punitive damages is required in order to empower judges to award them. In other words, a judge cannot derive the legal ground to award punitive damages from EU Law alone; rather, s/he should rely on national legislation.

Directive 2014/104/EU reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of EU competition law – particularly regarding the definition of damage, as stated in the case-law of the Court of Justice – and it does not pre-empt any further development. The Directive, in principle, precludes the award of punitive damages.

Pursuant to Article 3, MSs are to ensure that any natural or legal person that has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain that the person has been deprived of (loss of profit or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law.

Full compensation is to place a person who has suffered harm in the position in which he/she would have been had the infringement of competition law not been committed. It is therefore to cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.<sup>17</sup>

Without prejudice to compensation for loss of opportunity, full compensation under Directive 2014/104/EU should not lead to overcompensation, whether by means of punitive, multiple, or other damages.

### Impact on national case law

#### **Italy**

The decision of the Magistrates' Court of Bitonto is to date the only decision addressing the issue of punitive damages in antitrust infringement civil proceedings initiated by consumers. Nevertheless, some considerations on the general concept of punitive damages and its introduction in the Italian legal system have been developed over the course of the past decade.

The decision of the Magistrates' Court of Bitonto is still an isolated occurrence, since the Court of Cassation repeatedly upheld the incompatibility of punitive damages with the principles regulating civil compensation in Italian Law (see **decisions nos. 1183/2007 and 12717/2015**). Nevertheless, a **recent decision of the Court of Cassation (no. 16601/2017)** marked a new development by ruling that there is no logical or theoretical contrast between the Italian legal system and the notion of punitive damages, provided that they do not lead to compensation for harm which has never been actually sustained.

In other words, the Italian Supreme Court seems to have adopted the findings of the CJEU by admitting, in theory, the introduction of punitive damages and, on the other hand, imposing strict limits such as, in the first place, the prohibition of unjust enrichment (the Court does not explicitly mention this concept; instead, it refers to the compensation of non-sustained harm). The Italian system still neither recognises nor regulates punitive damages, so that award of them by a judge seems incompatible with the findings of both the CJEU and the Court of Cassation. Nevertheless, at least at the theoretical level, decision no. 16601/2017 removed an obstacle in the way of incorporating the concept into the Italian legal system.

#### **Netherlands**

##### TenneT v Alstom (see § 2.1)

The court weighed up the interests of TenneT and Alstom, and in particular the risk of possible overcompensation of TenneT and that the consequences of the damages payable by Alstom

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<sup>17</sup> The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time in which the harm occurred to the time in which compensation is paid, without prejudice either to the qualification of such interest as compensatory or default interest under national law or to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent upon the Member States to lay down the rules to be applied for that purpose. The right to compensation is recognised for any natural or legal person – consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority.

could be too high or too low. The court thus took into account the possibility for consumers (who, as TenneT's customers, overpaid electricity costs) to enforce their entitlement to damages. The court thereby found that the chances of a consumer successfully suing Alstom were virtually zero. It consequently drew attention to the possibility (if the indirect customers (consumers) nevertheless wished to recover their loss from Alstom) for Alstom "in that case to refer those customers to TenneT et al. and/or to implead TenneT et al.". The court furthermore considered it plausible that the compensation to be awarded to TenneT would in turn partly "benefit [the indirect customers/consumers], partly by being passed on in the future energy prices and partly via the treasury" (since the Dutch State is the sole shareholder in TenneT). In those circumstances, the court did not consider it unreasonable for TenneT to be overcompensated "in a sense". The alternative, i.e. "making it possible for Alstom et al. to retain the profit unlawfully obtained" would be unreasonable in the court's opinion, and it would even constitute unjust enrichment.

Therefore, the Court, although not mentioning punitive damages, sought to justify a logic of 'overcompensation' by interpretative means and in light of the effectiveness of the system of market corrections linked to antitrust enforcement.

## 2.5. Jurisdiction

### Relevant CJEU cases

- **Manfredi** (C-295-98/04) - [link](#) to the database for analysis of the lifecycle of the case.

#### Main question addressed

Question 1      How does the principle of effectiveness affect the regime of jurisdiction for claims for damages based on infringement of Articles 101 and 102? ("**Manfredi**" – Question no. 2)

#### Relevant legal sources

See § 2.1

### 2.5.1. Question 1 – Jurisdiction

How does the principle of effectiveness affect the regime of jurisdiction for claims for damages based on infringement of Articles 101 and 102?

#### The case

See § 2.1.1

#### Preliminary questions referred to the CJEU

(2) Is Article 81 EC to be interpreted as meaning that it precludes the application of a national provision similar to that in Article 33 of Law [No 287/90] under which a claim for damages for

infringement of Community and national provisions for anti-competitive arrangements must also be made by third parties before a court other than that which usually has jurisdiction for claims of similar value, thus involving a considerable increase in costs and time?

With this question, the national court was asking whether EU law precludes a national provision under which third parties must bring their actions for damages for infringement of Community and national competition rules before a court other than that which usually has jurisdiction in actions for damages of similar value, thereby involving a considerable increase in costs and time. The question was justified by the fact that, at the time of the proceeding, Article 33 of Law no. 287/1990 assigned jurisdiction for civil actions arising from antitrust infringements to the Court of Appeal in first instance.

The significance of the principle of effectiveness is immediately evident: because the national provisions requiring the consumer to bring the claim before a specific court – other than the one that usually has jurisdiction – involve an increase in costs and time for the consumer, the consumer's exercise of the rights conferred by Article 101 could be hindered, or rendered impossible or extremely difficult.

#### *Reasoning of the CJEU and its Conclusions*

The CJEU stated that in the absence of Community rules governing the matter, it is up to the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to hear actions for damages based on infringement of the Community competition rules and to prescribe the detailed procedural rules governing those actions, provided that the provisions concerned be no less favourable than those governing actions for damages based on infringement of national competition rules and that those national provisions do not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under Article 101 TFEU.

Therefore, the Court in essence asked national judges to evaluate whether the national provisions to be applied make it impossible or excessively difficult to exercise the right to seek compensation. The increase in costs and time might in fact have such an effect, thereby contrasting with the principle of effectiveness. The assessment of the jurisdiction's regime and related national provisions must therefore take into account: (i) the need to guarantee a high level of consumer protection; (ii) the need to ensure that a consumer can exercise the rights conferred by EU Law without excessive difficulty.

#### *Impact on the follow-up case*

The decision of the Magistrates' Court of Bitonto, of 21 May 2007, for the first time within a national context employed the concept of effectiveness on a large scale to provide a rationale for its judgement. As far as its jurisdiction was concerned, the Magistrates' Court referred to the principle of effectiveness to advocate the overruling of the then national provision, which required consumers to file their complaints before a second instance judge, with the consequent increases in costs and time. The Italian court stated that such national provisions rendered it excessively difficult for individual consumers to obtain compensation; hence, according to the effectiveness principle, any claim for compensation should be heard before first-instance judges.

### Elements of judicial dialogue

The question addressed arose from the peculiar legislative framework that, at the time of the dispute, governed the jurisdiction for antitrust civil actions in the Italian legal system, pursuant to Article 33 of Law no. 287/1990. Following the CJEU's decision, those rules were subject to several amendments which gave jurisdiction to first-instance courts rather than the Court of Appeal.

The CJEU did not further rule on the matter, which since *Manfredi* has been dealt with by national legislatures. In most cases, national provisions specify that specialized sections (usually commercial sections) of first-instance courts are competent to hear cases deriving from the infringement of EU competition law.

**Italy:** Legislative Decree no. 3/2017 transposed Directive no. 104/2014 and also modified the provisions regarding jurisdiction for private antitrust enforcement cases. In particular, the Decree modified Article 4 of Legislative Decree no. 168/2003, which previously selected twelve competent tribunals. Article 4 § 1<sup>ter</sup> now assigns jurisdiction to the specialized sections of the Tribunals of Milan, Rome and Naples.

**France:** Articles R 420-3 and R 420-4 of the Commercial Code provide for sixteen specialized first-instance courts competent to hear private antitrust enforcement disputes. Eight of them are civil lower courts, and eight of them are commercial courts. Civil lower courts hear disputes among private litigants, including consumers. Appeals against rulings by these lower courts may be filed with the Paris Court of Appeal.

**Germany:** § 87 of the Act against Restraints of Competition states that Regional Courts have exclusive jurisdiction over civil actions based on antitrust infringements. However, the *Länder* governments may assign exclusive jurisdiction to one Regional Court for the districts of several Regional Courts (§ 89 ARC)

**Spain:** Article 86 ter 2 f) of the Organic Law on the Judiciary Power (n. 6/1985) assigns jurisdiction to the First Instance Commercial Courts.

The aforementioned examples exhibit a uniform pattern whereby jurisdiction is assigned to specialized sections of first-instance courts or lower courts, thus complying with the criteria laid out in *Manfredi*.

## 2.6. Access to information concerning leniency programmes and civil actions upon commitment decisions

### Relevant CJEU cases

- Judgement of the Court (Grand Chamber) of 14 June 2011, *Pfleiderer AG v Bundeskartellamt*, Case C-360/09 (“**Pfleiderer**”)
- Judgment of the Court (First Chamber) of 6 June 2013, *Bundeswettbewerbsbehörde v Donau Chemie et al.*, Case C-536/11 (“**Donau Chemie**”)

- Judgement of the Court (Third Chamber) of 23 November 2017, *Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA*, Case C-547/16 (“**Gasorba**”)

Main question addressed

- Question 1 Can parties adversely affected by a cartel be given, for the purpose of bringing civil-law claims, access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are (also) intended to enforce Article 101 TFEU? (“**Pfleiderer**”)
- Question 2 May the consumer bring claims for compensation upon an infringement concerned by a commitment decision? To what extent may the consumer use a commitment decision as evidence to prove the existence of the infringement as well as the causal link with the harm sustained? (“**Gasorba**” – Question no. 1)

Relevant legal sources

**EU level**

**Article 101 of the Treaty on the Functioning of the European Union**

**Regulation 1/2003**

**National legal sources**

**“Pfleiderer” (Germany)**

Paragraph 406e of the German Code of Criminal Procedure; Paragraph 46 of the Law on Administrative Offences (*Gesetz über Ordnungswidrigkeiten*), in the version of 19 February 1987 (BGBl. 1987 I, p. 602), as last amended by Paragraph 2 of the Law of 29 July 2009 (BGBl. 2009 I, p. 2353; ‘the OWiG’)

**2.6.1. Question 1 – Access to information pertaining to leniency proceedings**

Can parties adversely affected by a cartel be given, for the purpose of bringing civil-law claims, access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are (also) intended to enforce Article 101 TFEU?

The case

In January 2008, the German competition authority (*Bundeskartellamt*) imposed fines amounting in total to 62 million euros on three European manufacturers of decor paper and on five

individuals who were personally liable for agreements on prices and capacity closure. Considering that it had been adversely affected, the Pfleiderer company, a customer of these three companies, submitted an application to the *Bundeskartellamt* seeking full access to the file relating to the imposition of fines with a view to preparing civil actions for damages. The application included the documents and information voluntarily submitted by the companies in question under their application for leniency. The *Bundeskartellamt* refused to communicate the documents and information. Its decision was challenged before the Bonn Local Court, which referred to the Court of Justice the question of whether Union law, and in particular Articles 11 and 12 of Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 TEC (now Articles 101 and 102 TFEU), precludes communication of documents of this type.

#### *Preliminary questions referred to the CJEU*

“Are the provisions of Community competition law – in particular Articles 11 and 12 of Regulation No 1/2003 and the second paragraph of Article 10 EC (now), in conjunction with Article 3(1)(g) EC (now) – to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are (also) intended to enforce Article 81 EC? (now Article 101 TFEU)”

The issue emphasised by the question was how a national judge should balance the interests underlying the effective application of Articles 101 and 102 TFEU, on the one hand, with the right of any individual to claim damages for loss caused to him/her by conduct which is liable to restrict or distort competition, on the other. How should a national judge establish whether victims of an illegal cartel can obtain effective remedies when documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages, and which may compromise the leniency programmes?

#### *Reasoning of the CJEU*

In the consideration of an application for access to documents relating to a leniency programme submitted by a person who is seeking to obtain damages from another person who has taken advantage of the leniency programme, it is necessary to ensure that the applicable national rules are no less favourable than those governing similar domestic claims, and that they do not act in such a way as to make it practically impossible or excessively difficult to obtain the compensation and to weigh up the respective interests in favour of disclosure of the information and in favour of protection of the information voluntarily provided by the applicant for leniency.

That weighing-up exercise can be conducted by the national courts and tribunals only on a case-by-case basis, in accordance with national law, taking all the relevant factors in the case into account.

The CJEU found that EU law does not lay down common rules on the right of access to documents relating to a leniency procedure which have been voluntarily submitted to a national



competition authority pursuant to a national leniency programme. Accordingly, it is for the Member States to establish and apply national rules on this right of access. More particularly, it is for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access is to be permitted or refused, by weighing up the interests protected by Union law, i.e. the effective application of Articles 101 and 102 of the TFEU, on the one hand, and the right of any individual to claim damages for loss caused to him/her by conduct which is liable to restrict or distort competition, on the other.

On the one hand, the Court pointed out that leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be successful. However, the effectiveness of the programmes could be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages. The persons concerned could be deterred from using the leniency procedure by the possibility of disclosure of the information that it provides in this context, and in particular by the knowledge that it could be the subject of exchanges between the Commission and the national competition authorities under Article 11 of Regulation (EC) No 1/2003. On the other hand, the Court emphasised that the right of any person who has been adversely affected by anti-competitive conduct to claim damages also enhances the working of the competition rules by discouraging agreements or practices which are liable to restrict or distort competition.

#### *Conclusion of the CJEU*

The CJEU concluded that, in the consideration of an application for access to documents relating to a leniency programme, submitted on the basis of national law by a person who is seeking to obtain damages from another person who has taken advantage of such a programme, it is necessary, on the one hand, to ensure that the applicable national rules are no less favourable than those governing similar domestic claims and that they do not act in such a way as to make it practically impossible or excessively difficult to obtain such compensation and, on the other hand, to weigh up, on a case-by-case basis, the respective interests in favour of disclosure of the information provided voluntarily by the applicant for leniency and the protection of that information.

EU Law does not prohibit access to leniency documents by third parties seeking damages. Access should be determined according to national law, which must weigh up the interests arguing in favour and against a disclosure of documents received under leniency. The possibility of such access being granted is a further way in which private enforcement could undermine public enforcement. The Court held that the EU rules on cartels should not preclude a person's right to bring an action for damages by denying that person's access to documents relating to a leniency procedure.

Safeguarding this right ultimately depends on a balancing that needs to be struck between the interests protected by disclosure and the interests protected by non-disclosure of the relevant information, which is a task for the national courts. The CJEU gave no further indications regarding this balancing exercise.

### Impact on the follow-up case

The District Court of Bonn in the *Pfleiderer* follow-up judgement (decision of 12 January, 2012) held that the access to leniency applications was to be refused since it could compromise future investigations and cartel members could refrain, in the future, from applying for leniency. Adopting a logic of balance of interests, the Court held that the interest in keeping leniency applications secret outweighed *Pfleiderer*'s interest. Indeed, the applicants had voluntarily disclosed information to the NCA in the expectation that the NCA would not have shared it with anyone. Furthermore, *Pfleiderer* had already obtained access to the fining decision and the index of the evidence seized during the proceeding.

### Elements of judicial dialogue

The issue addressed by the court concerned the crucial relation between private and public enforcement. After *Pfleiderer*, the issue was again touched upon by the *Donau Chemie* decision (C-536/11).

In this case, after a leniency application, the Austrian Competition Authority brought before the Cartel Court of Vienna a case concerning a cartel of wholesalers of printing materials. The Cartel Court found that Article 101 had been infringed, and imposed fines. One year later, an industry association considered filing an action for private damages against the cartelists and requested access to the file of the Cartel Court. However, according to Austrian cartel law, access to a case file can only be given with the consent of all the parties to the proceedings. The parties can refuse to give such consent, without necessarily giving any reasons. The Cartel Court sent a preliminary question to the CJEU asking whether this provision was in line with EU law.

The case therefore concerned access to judicial documents by the parties, whereas *Pfleiderer* concerned access to administrative documents. The close connection between the two decisions, in the logic of the CJEU, justified a comprehensive assessment of the legal issue.

The CJEU stated that the principle of effectiveness precludes a national provision under which access to documents is made subject solely to the consent of all the parties, without leaving any possibility for the court to weigh up the interests involved.

Within the opinion, Advocate General Jääskinen deepened the *Courage* test in light of Article 47 of the CFREU and Article 19(1) TEU. According to Jääskinen, it does not suffice for procedural rules not to render damage claims “practically impossible or excessively difficult”; rather, procedural rules must also ensure that such claims can be made in an “accessible, prompt and reasonably cost effective” way (§ 47 of the Opinion).

He argued that restricting third-party access to the Austrian Cartel Court file raises the problem of effective judicial protection of claims based on EU law. In this case, the classic principle of effectiveness needs to be reconsidered in light of Article 19(1) TEU, which was introduced with the Lisbon Treaty. Article 19(1) states that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. This in turn requires consideration of the right of access to a court, as protected by Article 47 of the Charter of Fundamental Rights of the European Union interpreted in light of Article 6(1) of the European

Convention of Human Rights and Fundamental Freedoms (‘the ECHR’) and the case-law of the European Court of Human Rights related to this provision.

In the opinion of Jääskinen, a national tribunal deciding on the civil law consequences of an illegal restriction of competition cannot have the power, derived from the right to access, to consider all the relevant questions of fact and law if it is prevented (in this case by law) from assessing and granting access to key evidential material, such as files compiled in public law competition proceedings, and in which an unlawful restriction of competition, such as a cartel, has already been established. Limiting the availability of critical evidential material undermines the right of litigants to a judicial determination of their dispute. It also negatively affects their rights to bring cases effectively.

The right of access to a court is not, however, absolute. For Jääskinen, it can be subjected to limitations, provided that such limitations do not undermine the very core of the right of access, pursue a legitimate aim, and are applied in situations in which there is proportionality between the means employed and the legitimate aim sought to be achieved. Jääskinen emphasised that Article 47 of the CFREU also comes into play when deciding whether allowing interested third-party access to closed public law competition proceedings would infringe upon the right to a fair hearing, at least when some of this information has been provided under a public law guarantee of leniency.

In Jääskinen’s opinion, what is required, under the imperative of *effet utile*, is the faculty for a national judge deciding on third-party access to the court file to conduct a weighing-up exercise of the kind prefigured in *Pfleiderer*. The national legislature may regulate the factors to be taken into account in the balancing exercise, but not preclude it from taking place, except, perhaps, for the information provided by undertakings benefiting from leniency.

In conclusion, within parameters that may be set by the national legislator, and provided that the EU law principles discussed above are respected, there must be some room for balancing the public interest relating to effective implementation of competition rules against the private interests of the victims of infringements of the same rules (§§ 49-69).

In its judgement, the CJEU did not extend the scope of the *Courage* test as Advocate General Jääskinen had done, but derived from its traditional formulation the same conclusions that he had reached, i.e. the centrality of the balance of interests to be achieved by the judge; a balance which national legislation cannot impede. Therefore “any request for access to the [cartel file] must be assessed on a case-by-case basis [by the national courts], taking into account all the relevant factors of the case” (§ 43).

The CJEU also dismissed the Austrian government’s contention that broad access to the cartel file could undermine leniency programmes: “[g]iven the importance of the actions for damages brought before national courts in ensuring the maintenance of effective competition in the EU (...) the argument that there is a risk that access to evidence contained in a file in competition proceedings (...) may undermine the effectiveness of a leniency programme (...) cannot justify a refusal to grant access to that evidence” (§ 46).

*Pfleiderer* and *Donau Chemie* concerned the conflict between private claimants seeking access to documents received in the course of leniency applications and the interest of leniency applicants in keeping that information confidential. These cases well illustrate the difficulty of reconciling, on the one hand, the right to claim damages – which depends on access to information by third parties – with, on the other hand, the effectiveness of public enforcement, which may need to rely on the confidentiality of the information that undertakings provide to the public authorities.

If documents relating to a leniency procedure are disclosed to persons affected who intend to bring an action for damages (these will include consumers), this may deter leniency applicants and hinder what has become a very important means to detect wrongdoings and enforce competition rules.

The decisions, from the perspective of horizontal dialogue, concentrate on the fact that both of the enforcement mechanisms (leniency and private enforcement) have potential positive and negative effects, and in fact it is up to the national judge to find an optimal balance between these two enforcement mechanisms.

The debate on the issue must be further developed with references to Directive no. 104/2014 and Directive no. 1/2019. We therefore refer to § 2.5.2 for a joint assessment.

### 2.6.2. Question 2 – Commitment decisions and the right to compensation

May a consumer claim compensation for an infringement concerning a commitment decision? To what extent may the consumer use a commitment decision as evidence to prove the existence of the infringement as well as the causal link with the harm sustained?

#### The case

The plaintiffs and the defendant had a contractual relationship concerning the lease of a service station and of the land on which the station was built. They also had an exclusive supply agreement, according to which the lessees were required to use the defendant as their sole supplier throughout the term of the lease, and the defendant periodically communicated the maximum retail selling prices of fuel and permitted the lessees to apply discounts to be covered by their commission, without reducing the supplier's receipts.

The Commission initiated a proceeding under Article 101 TFEU against the defendant and found that the long-term exclusive supply agreements, including the contracts linking the parties in the main proceedings, raised concerns as to whether they were compatible with Article 101 TFEU, since they might create a significant 'foreclosure effect' on the Spanish retail fuel market.

In response, the defendant offered to the Commission the following commitments: it would refrain in the future from concluding long-term exclusivity agreements; it would offer the service station tenants concerned financial incentives to terminate their existing long-term supply agreements early; and it would refrain for a certain period of time from buying any independent service station for which it did not yet act as supplier. Those commitments were made binding by Commission Decision 2006/446/EC of 12 April 2006.

Following this decision, the plaintiffs and others brought an action against the defendant before the *Juzgado de lo Mercantil No 4 de Madrid* (Madrid Commercial Court, Spain), on 17 April 2008, for the annulment of the lease agreements on the ground that it was contrary to Article 101 TFEU, as well as for compensation of the harm sustained. The case was dismissed. The plaintiffs then brought an appeal before the Tribunal Supremo since they considered that the commitment decision would not preclude a national court from declaring an agreement, to which that decision applies, invalid for infringement of Article 101 TFEU.

The Tribunal Supremo decided to stay the proceeding and refer to the CJEU.

#### *Preliminary questions referred to the CJEU*

“(1) Under Article 16 of Regulation [No 1/2003], does [the commitment decision] preclude a national court from declaring that the agreements to which that decision applies are invalid on account of the duration of the exclusive supply period, even though they may be declared invalid for other reasons such as, for example, the imposition of a minimum retail price by the supplier on the buyer (or reseller)?”

The referring Court asked, in essence, whether or not a national judge may declare the invalidity of agreements covered by a commitment decision as well as grant compensation for the harm sustained on account of the said agreement.

#### *Reasoning of the CJEU*

The CJEU considered that Article 9(1) of Regulation 1/2003 makes binding the commitments proposed by undertakings to meet competition concerns raised by the Commission in a preliminary assessment. Such decision, however, does not certify that the practice assessed complies with Article 101.

Since the Commission carries out a preliminary assessment and not an evaluation on the basis of Article 101, “it cannot be precluded that a national court may conclude that the practice which is the subject of the commitment decision infringes Article 101 TFEU and that, in so doing, it proposes, unlike the Commission, finding that an infringement of that article has been committed”.

Moreover, recitals 13 and 22 of Regulation No 1/2003, read together, expressly state that commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to decide on the case.

Therefore, commitment decisions may not create legitimate expectations as to whether conduct complies with Art. 101, and it certainly may not legalise market behaviours of enterprises.

Nevertheless, national judges cannot overlook such decisions and, in light of the principle of sincere cooperation and for the purpose of the uniform and effective application of EU competition law, they must at least consider the decision as an indication regarding the anticompetitive nature of the practice concerned.

### Conclusion of the CJEU

The Court concluded that a commitment decision concerning certain agreements between undertakings, adopted by the Commission under Article 9(1) of that regulation, does not prevent national courts from examining whether those agreements comply with the competition rules and, if necessary, declaring those agreements void pursuant to Article 101(2) TFEU.

### Impact on the follow-up case

The Tribunal Supremo with decision no. 67/2018 carried out, on the basis of the CJEU decision, a full assessment of the lease and exclusive supply agreements, verifying, in particular, the conditions for the application of an exemption under Article 101(3) of the TFEU.

### Elements of judicial dialogue

The decision did not directly concern consumer protection; nor did it explicitly apply the principle of effectiveness or the CFREU. However, it focused on an issue which is particularly important for the system of private antitrust enforcement, i.e. the entitlement to bring claims on the basis of commitment decisions and the procedural status of such decisions. The issue assessed was complementary to the ones in *Pfleiderer* and *Donau Chemie*, since they all concerned the balance between public and private enforcement and the weighing-up of respective interests. The CJEU was straightforward in affirming that commitment decisions may not create legitimate expectations regarding compliance with Article 101 and that, as a consequence, national courts have the power to carry out an independent assessment and, when they see fit, declare invalidity and grant subsequent compensation.

The implicit relevance of the principle of effectiveness in this case derives from the fact that commitment decisions, *per se*, render private follow-on actions unappealing and hard to sustain for consumers who cannot rely on previous ANC decisions. On these premises, the CJEU on one hand allows private parties to bring claims upon commitment decisions and, on the other hand, requires the national judge to consider the commitment decision as an indicator, “if not *prima facie* evidence”, of the anti-competitive nature of the defendants’ conduct. The CJEU does not specify the criteria that should guide the judge in such evaluation; it only mentions that the principle of sincere cooperation and the effective application of EU law require national judges to take commitment decisions into account.

### Directive no. 104/2014 and Directive no. 1/2019

Access to documents and commitment decisions as assessed by the CJEU in the decisions now cited are also regulated by two EU directives.

Directive no. 104/2014, in particular, regulates a regime for access and disclosure. Article 5 of the Directive enables either party to seek disclosure, by reference to relevant categories of evidence, on the basis of a reasoned plausible case. Disclosure requests can be made against the defendants and/or third parties and extend to documents contained in the investigation file of the national competition authority or EU Commission.

In addition to explicit protection of confidential information and privileged information, Articles 6 and 7 contain specific prohibitions preventing the disclosure of leniency and settlement materials and deferring the disclosure of investigation documents (such as the Statement of Objections or any Replies thereto) until the competition authority has closed its proceedings. These rules represent a legislative correction to the *Pfleiderer* test, dealt with by the CJEU, which left it to the national court to decide the appropriate balance between competing interests in favour and against disclosure, especially in relation to the disclosure of documents from the competition authority's file, including leniency documents.

Directive no. 1/2019, enacted to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, once again touches upon the critical issue of the relation between leniency procedures and commitment decisions with proceedings before national courts.

Among its general purposes, the Directive includes that of promoting the efficiency of leniency proceedings through reasonable incentives for undertakings (Recital no. 11). In practice, this purpose is implemented in several provisions of the Directive and, in particular, Article 31, which regulates the access to files by parties and limitations on the use of information. Apart from a general duty of non-disclosure, § 3 states that “Member States shall ensure that access to leniency statements or settlement submissions is only granted to parties subject to the relevant proceedings and only for the purposes of exercising their rights of defence”.

Furthermore, § 4 rules that parties having obtained access to the file of the enforcement proceedings of the NCA may use information taken from leniency statements and settlement submissions only for the purpose of exercising their rights of defence before national courts and only in certain proceedings<sup>18</sup>.

With regard to commitment decisions, the Directive (Recital no. 39) reaffirms the principle stated in *Gasorba*, so that “Commitment decisions are without prejudice to the powers of competition authorities and national courts to make such a finding of an infringement and decide upon a case”.

In the absence of clearer provisions, the CJEU case law remains the most relevant reference. Therefore, as far as access is concerned, the *Pfleiderer* test may apply, and the judge will have to carry out a balance of interest, save for those cases where disclosure is now explicitly prohibited.

With regard to commitment decisions, national judges must still consider them as indicators of anti-competitive practices and decide on claims brought before them, doing so in light of the effective application of EU law. A further specification by the CJEU in terms of a test, based on the principle of effectiveness, determining the procedural status of commitment decisions would be desirable.

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<sup>18</sup> Namely, proceedings concerning (a) the allocation between cartel participants of a fine imposed jointly and severally on them by a national competition authority; or (b) the review of a decision by which a national competition authority found an infringement of Article 101 or 102 TFEU or national competition law provisions.

### Impact on national case law

Different courts have reached opposing conclusions regarding the disclosure of particular items of evidence.

#### **Germany**

Case 51/Gs53/09 Q AG v Bundeskartellamt [2013]ECC20

In this case, the *Amtsgericht* in Bonn rejected a request for access to leniency material on the basis that the effectiveness of the German Competition Authority's leniency programme, and ultimately its public enforcement regime, could be undermined if the leniency material were disclosed.

#### **Italy**

Court of Cassation, decision no. 26869 of 2020

The Court of Cassation directly referred to *Gasorba* in order to uphold two decisions by lower courts which ascertained the existence of an abuse of dominant position and ordered a company to pay compensation by relying on a commitment decision taken previously by the NCA. The Court confirmed that, in light of both the national and European legal orders, the national judge cannot ignore commitment decisions since they have an adjudication value.

#### **United Kingdom**

National Grid Electricity Transmission v. ABB and Others, [2012] EWHC 869 (Ch), § 26

In this case, the UK High Court decided in favour of the disclosure of documents which contained extracts from the corporate leniency statements as well as redacted passages of the confidential decision within a confidentiality ring.

Emerald Supplies Ltd. & Others v British Airways and Others [2014] EWHC 3513 (Ch)

In the *Air Cargo* case, the claimants sought a copy of a redacted version of the Commission's infringement decision on the airfreight cartel. Four years post-decision, the hamstrung Commission was still unable to provide a provisional version. Following a request from the national court, the Commission indicated that it would not be able to resolve the conflicts until 2020. The claimants then asked the national judge to conduct an *in camera* review of the redactions that had been maintained by the defendants and to issue an order on the extent of redactions permitted. The presiding judge refused to carry out the editing exercise, even with the assistance of an independent assistant, on the basis that it was an impossible and objectionable task (§§ 36-42).



## 2.7. Competition infringements and validity of the contracts affected by the infringement

This section differs from the others in this chapter because it does not revolve around decisions by the CJEU, but rather around a series of recent national decisions which have further developed the logic of private antitrust enforcement in relation to the effectiveness of consumer protection. In particular, such decisions address the issue of the validity of a contract stipulated as a consequence of an anti-competitive practice or, anyway, affected by that practice.

Through the analysis of such decisions, the purpose of this section is to trace, where it exists, a common pattern reflecting an evolution of competition law from the perspective of effective remedies, as well as to outline practical difficulties and theoretical shortcomings which could be the object of future preliminary rulings by the CJEU.

### Relevant cases

- **Italy:** Court of Cassation, decision of 12 December 2017, no. 29810; Court of Cassation, decision of 22 May 2019, no. 13846; Court of Cassation, decision of 15 June 2019, no. 21878; Court of Cassation, decision of 26 September 2019, no. 24044

### *Main question addressed*

Question 1      How does a competition infringement affect the validity of the contracts stipulated by consumers? May a judge, in light of the principle of effectiveness, declare the nullity of a contract whose content was determined pursuant to an anti-competitive agreement or conduct?

### *Relevant legal sources*

#### EU level

Articles 101 and 102 of the Treaty on the Functioning of the European Union

#### National legal sources

L. 287/1990; Articles 1418 and 1419 of the Italian Civil Code

### 2.7.1. Question 1 – Competition law infringements and validity of connected contracts

How does a competition infringement affect the validity of the contracts stipulated by consumers? May a judge, in light of the principle of effectiveness, declare the nullity of a contract whose content was determined pursuant to an anti-competitive agreement or conduct?

### *The facts*

The cases assessed in this section all arose from the decision of the Bank of Italy no. B423 of 2 May 2005, which declared the Italian Banking Association's model scheme for guarantee

contracts<sup>19</sup> to be, with regard to certain clauses<sup>20</sup>, contrary to Law no. 287/1990 and therefore partially null and void.

Subsequently, both consumers and non-consumers acting as guarantors brought before Italian courts claims regarding the validity of the guarantee contracts stipulated on the basis of the model scheme. In arguing for the nullity of the contracts, the plaintiffs asked not (or not only) for compensation for damages sustained but for the restitution of the capital paid pursuant to such contracts, thus referring to the remedy connected to contractual nullity. The decisions of the local courts varied greatly over time, and decision no. 29810/2017 of the Court of Cassation was the first to comprehensively assess the issue.

Since 2017, the Court of Cassation as well as local courts have issued several judgements which will be analysed in the following sub-sections.

#### *The evolution of the Italian case law and the reasoning of the Court of Cassation*

In its **decision no. 29810/2017**, the Court rejected, in the first place, the argument claiming that contracts stipulated before the decision of the Bank of Italy could not be declared null. The Court directly referred to its previous case law, which had introduced the principle of effectiveness as the interpretative key with which to assess the logic of the Italian antitrust system (namely, **decisions nos. 2207/2005 and 11904/2014**) and held that the logic of the antitrust protection does not focus solely on the illicit agreement, but also on the contracts stipulated by consumers which constitute the outcome of the original agreement and give it effect.

Furthermore, Article 2 of Law no. 287/1990 (as derived from the now Article 101 of the TFEU) did not address only conduct taking the form of an agreement but any conduct which may result in a distortion of market competition. Therefore, regardless of the form (e.g. agreement or model scheme), anti-competitive practices fall within the scope of the provision.

Decision no. 29810/2017 was not clear in ruling for the nullity of derived contracts. However, it placed great emphasis on the functional connection, in light of the system of antitrust law, between illicit practices and derived contracts stipulated by consumers, whose effective choice among market products would be impaired by the unlawful conduct.

This aspect was further consolidated in subsequent case law which again assessed the issue and also focused on the procedural status of the decision of the Bank of Italy. While supporting the nullity of derived contracts, **decisions nos. 13846/2019 and 21878/2019** stated that, in order to ensure the effectiveness of the protection of consumers, they must be rendered able to make use of the ascertainment contained in the provisions of the NCAs. Although the point is not clarified further, the reference to the principle of effectiveness suggests that consumers may rely on NCAs' decisions for nullity claims to the same extent as in compensation claims. Indeed, the Court pointed out that the defendant may not challenge the constituting facts of the infringement

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<sup>19</sup> No. 165619 of 2003

<sup>20</sup> In particular Articles 2, 6 and 8 of the model scheme, concerning, respectively, annulment-inefficacy-revocation of payments; guarantor's liability, invalidity of the guaranteed obligation.

ascertained by the NCA, at least not on the basis of the materials already considered before the authority.

As a consequence, the principle of effectiveness (as already interpreted by the Italian Court of Cassation) would require that consumers may rely on NCA decisions not only to prove the infringement, but also to prove the connection between the infringement and the contracts that represent its outcome.

With **decision no. 24044/2019** the Court of Cassation further assessed the topic and ruled that the nullity of certain clauses of the model scheme requires the application of the notion of partial nullity, as regulated in Article 1419 of the Italian Civil Code. Therefore, the application of the invalidity rule is selective and only concerns those contractual clauses giving rise to the anticompetitive conduct.

Since 2017, Italian courts have been debating the validity of contracts stipulated on the basis of anti-competitive practices. Certain lower courts have adopted a sceptical approach: **three decisions of the Treviso Tribunal (30 July 2018; 5 August 2019; and 26 August 2019)** denied outright that the validity of guarantee contracts could be affected by the nullity of the original model scheme, and they confirmed the view that consumers may only lodge compensatory claims.

Some lower courts, however, gradually came to support the view advocated by the Court of Cassation. **The decision of the Salerno Tribunal of 2 October 2019** even expanded the scope of the invalidity. It did so by opting for the absolute and total nullity of the guarantee contract, in application of Article 1418 of the Civil Code rather than Article 1419.

More recently, the majority of the decisions by lower courts have adopted a more restrained approach. A **decision by the Cuneo Tribunal (no. 1091 of 2021)** held that Article 2 of Law no. 287 of 1990 provides for the mere nullity of the anti-competitive agreement, and that in the absence of a specific legal provision the judge cannot infer the nullity of the contract stipulated between consumers and enterprises involved in the said agreement. Furthermore, the parties of the anti-competitive agreement and the parties of the contract are different, and it is difficult to ascertain whether or not, in the absence of the agreement, the consumer would have nonetheless given consent to the contract. Therefore, neither total nor partial nullity may be inferred, and the contract should remain valid. A similar view was taken by the **Tribunal of Ravenna (decision no. 359 of 2021)** and the **Tribunal of Rome (decision no. 9615 of 2021)**, which emphasised that the main remedy available to the consumer should be compensation for damages.

#### *Elements of judicial dialogue*

The decisions cited trace a pattern which, though still not complete and crystal clear, seems to emphasise the connection between anti-competitive practices and derived contracts in order to question the validity of the latter. Be it by direct reference or by reference to relevant case law, the *fil rouge* of this interpretative evolution has been the effective application of EU Law, functional to both the correct functioning of the market and the protection of consumers. The Court of Cassation has been in constant dialogue with its own case law: that same case law which

first implemented in the Italian legal system the principle of effectiveness as derived from *Courage* and *Manfredi*.

Many issues are still unresolved. One of them regards the possibility, for the judge, to declare *ex officio* the nullity of the contract. While the aforementioned decision of the Salerno Tribunal argued for the *ex officio* declaration, earlier decisions (**Milan Tribunal, 8 August 2019; Spoleto Tribunal, 20 June 2019**) had rejected such argument. Presumably, both lower and higher courts will issue further decisions on the topic. What is important for the purpose of this analysis, is that the Court of Cassation developed a logic closely bound up with implementation of the principle of effectiveness.

#### Questions for Further Discussion

The foregoing analysis has emphasised certain points that are being debated by Italian courts but are topics significant for assessment of the role of effectiveness for consumer protection in the system of antitrust law. On this basis, some tentative questions for further discussion may be outlined:

- i) May a judge, in light of the principle of effectiveness, declare the nullity of a contract whose content was determined pursuant to an anti-competitive agreement or conduct?
- ii) In light of the principle of effectiveness and for the purpose of ensuring an effective remedy for consumers, to what extent may they rely on NCA decisions in order to prove the connection between the anticompetitive conduct and the contracts they stipulated, for the purpose of claiming the invalidity of such contracts?
- iii) May the judge declare *ex officio* the nullity of a contract stipulated on the basis of an anticompetitive conduct?
- iv) May the nullity be declared by administrative authorities in light of the principle of effectiveness?

To some of these questions, the aforementioned case law has tried to offer answers consistent with the system of private antitrust enforcement. Some other questions raise significant issues, such as the role of the principle of effectiveness in proceedings before NCAs – an issue which also pertains to the balance and interaction between the public and private enforcement of antitrust law.

#### National case law in other Member States

##### **Portugal**

##### Court of Appeal of Lisbon, decision of 3 April 2014 (IMS Health)

In this decision, the Court assessed a case where the defendant had referred to anticompetitive behaviours to claim the invalidity of the contract upon which the plaintiff's claim was based. According to the Court, the national judge can and must consider such anticompetitive behaviour as grounds to determine the violation of mandatory rules of contract law able to affect the validity of the contract.

The position was, however, not unanimous within the Court. In a dissenting opinion, Prof. Menezes Cordeiro pointed out that the prohibition of abuse of dominance is only punishable by

finances and may not transform into a rule limiting private autonomy with regard to the validity of the contracts stipulated.

## 2.8. The guidelines for judges that emerge from the analysis

### Entitlement to compensation for third parties suffering damage causally related to an invalid agreement. Assessment and proof of the causal relation

The issue assessed in this chapter concerns interpretation of Article 101 of the TFEU in light of the principles of effectiveness and equivalence with regard to two logically connected questions: i) does Article 101 entitle third parties with a relevant legal interest to rely on the invalidity of an agreement, or a practice prohibited by Article 101 of the TFEU, and then claim damages for the harm suffered where there is a causal relationship between the agreement or concerted practice and the harm?; ii) on what grounds can the judge assess the causal link?

According to CJEU case law (*Manfredi*, C-295-298/04), the principle of invalidity can be relied upon by anyone, and the courts are bound by it once the conditions for applying Article 101(1) of the TFEU are met, and so long as the agreement concerned does not justify exemption under Article 101(3) of the TFEU. The full practical effectiveness of the prohibition on agreements, decisions and concerted practices would be adversely affected if it were not open to any individual to claim damages for a loss caused to him/her as a result of undertakings infringing Article 101 of the TFEU.

In the absence of EU rules governing the matter, it is up to the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of the consumer's right to compensation, including those on application of the concept of a 'causal relationship', provided that the principles of equivalence and effectiveness are observed.

The principle of effectiveness is relevant from two different, though intertwined, perspectives: on the one hand, effectiveness in the relationship between the legal systems of the EU and the MSs implies that national provisions cannot render impossible or excessively difficult the exercise of rights conferred by EU Law; on the other hand, it implicitly upholds the right to an effective remedy, as also laid down in Article 47 of the CFREU, in close connection with the idea of the practical effectiveness of the treaty provisions.

Some national courts have referred to the conclusions reached in the *Manfredi* case, and specifically to the principle of effectiveness in the interpretation of causality, with particular regard to the burden of proof, in order to design a legal framework for sharing the burden of proof in a way that provides consumers with an effective means of judicial protection, in particular through legal presumptions concerning proof of a causal link. In other cases, national judges have interpreted procedural rules on discovery in order to ensure that weaker parties may rely on all the relevant information to support their claim. Rules on discovery and *ex officio* inquiry powers of judges are particularly important in stand-alone cases for determining the economic and factual bases of the practices assessed and their impact on competition. Similarly, certain

courts have chosen to ask NCAs for information about the determination of relevant markets and anticompetitive effects.

A case-by-case test governed by the principle of effectiveness is also to be applied in cases of umbrella pricing, in order to consider all the relevant market factors and determine the incidence of an anticompetitive conduct over third parties' prices alterations.

Directive 104/2014 does not directly address the issue, which remains a matter to be disciplined by national legal systems as long as it is in accordance with the principles of equivalence and effectiveness. The Directive nevertheless contains certain provisions regarding indirect purchasers, including – in Article 14(2) – a rebuttable presumption in order to prove the 'passing on' of the overcharge.

In the presence of a NCA decision, Article 9 of the Directive rules that such decision irrefutably establishes the occurrence of the infringement.

#### Limitation Period

The main issue addressed is the starting point for the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101 of the TFEU. Should it run from the day on which the prohibited agreement or practice was adopted, or from the day on which the agreement or practice came to an end?

The CJEU (*Manfredi*, C-295-298/04) confirmed that, in the absence of EU rules governing the matter, it is up to the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101 of the TFEU, provided that the principles of equivalence and effectiveness are observed.

The Court stated that a national provision whereby the limitation period runs from the day on which the agreement or practice was adopted might, in practice, render it impossible to exercise the right to compensation, thus violating the principle of effectiveness. However, it is up to the national judge to assess whether or not any such violation actually occurs, and whether the national provisions regarding limitation comply with the principles of equivalence and effectiveness, considering which rules can better ensure effective protection of the right to seek compensation of any individual who has suffered harm as a result of an antitrust infringement. The national courts of some MSs, following the *Manfredi* decision, have proposed that, for the limitation period to start running, the person claiming compensation should have sufficient grounds to recognise that the harm sustained was causally related to the infringement. Therefore, it is when he/she may reasonably become aware of a causal connection that the limitation period begins.

The matter is now regulated by Article 10 of Directive no. 104/2014, which opts for the view already embraced by national courts.

### Punitive Damages

It might be asked whether the national courts are to award punitive damages in excess of the advantage obtained by the offending operator, thereby deterring the use of agreements or concerted practices prohibited under that article.

According to CJEU case law (*Manfredi*, C-295-298/04), and in the absence of EU rules governing the matter, it is up to the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 101 of the TFEU, provided that the principles of equivalence and effectiveness are observed.

In more recent decisions – i.e. *Arjona Camacho* and *Stowarzyszenie* – the CJEU has ruled that there is no theoretical and systemic incompatibility between the EU Legal System and the concept of punitive damages – provided that they do not lead to unjust enrichment – but the national judge may not award punitive damages on the sole basis of EU Law in the absence of a national provision empowering the judge to do so. The national courts addressing this issue have so far closely followed the CJEU's stance.

However, Article 3 of Directive no. 104/2014 explicitly prohibits overcompensation by means of punitive or multiple damages. The spaces for different interpretations are therefore narrow.

### Jurisdiction

In light of the principle of effectiveness, the question arises as to whether Article 101 of the TFEU should be interpreted as precluding national provisions under which third parties are to bring their actions for damages for an infringement of EU and national competition rules before a court other than the one which usually has jurisdiction in actions for damages of a comparable value, thereby involving a considerable increase in cost and time.

According to CJEU case law, (*Manfredi*, C-295-298/04), in the absence of EU law rules governing the matter, it is up to the domestic legal system of each Member State to designate the courts and tribunals with jurisdiction to hear actions for damages based on an infringement of the EU competition rules and to prescribe the detailed procedural rules governing those actions, provided that the principles of equivalence and effectiveness are observed. On the basis of the principle of effectiveness some national courts have stated that increases in cost and time due to the filing of an action before a specific court could make it impossible or excessively difficult to exercise the right to compensation.

The matter is now regulated at the national level by a statute assigning jurisdiction to specialized sections of first-instance courts.

### Access to information concerning leniency programmes and civil actions upon commitment decisions

The issue addressed concerns granting access to leniency applications to persons adversely affected by a cartel, for the purpose of bringing civil-law claims, or to information and documents voluntarily submitted by applicants for leniency that the national competition authority of a Member State has received within the framework of proceedings for the imposition of fines, which are (also) intended to enforce Article 101 of the TFEU.

The relevant CJEU case law (*Pfleiderer* AG, C-360/09; *Donau Chemie* AG, C-536/11) focuses on the concept of balancing the various interests involved, and it declares that EU law does not lay down common rules on the right of access to documents relating to a leniency procedure that have been voluntarily submitted to a national competition authority pursuant to a national leniency programme. It is up to the Member States to establish and apply national rules on this right of access. More particularly, it is up to the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused, by weighing up the interests protected by EU law, i.e. the effective application of Articles 101 and 102 of the TFEU, on the one hand, and the right of any individual to claim damages for a loss caused to him/her by conduct that is liable to restrict or distort competition, on the other.

Effective application of Articles 101 and 102 of the TFEU must not make it impossible or excessively difficult to exercise the right to compensation. The issue is now also regulated by Articles 5, 6 and 7 of Directive 104/2014, which set out specific provisions and limits regarding access to leniency.

Pursuant to CJEU case law (*Gasorba*, C-547/16), compensatory claims may also be based on commitment decisions, since they create no legitimate expectations about immunity from civil actions. The national judge is also required to take into account the commitment decisions at least as an indicator in order to assess the anticompetitive nature of the conduct questioned.

#### *Competition Infringements and validity of the contracts affected by the infringement*

The question concerns the effect of an antitrust infringement on the validity of contracts stipulated by consumers on its basis. May a judge declare the nullity of a contract affected by an anticompetitive conduct (e.g. unlawful agreement)?

At present, there is no relevant EU case law on the topic. However, some national courts (especially Italian ones) have addressed the issue and stated that the need for an effective protection of consumers requires the judge to consider the contract as the logical outcome of the infringement, thus declaring its nullity, at least regarding the contractual clauses directly affected by the infringement. Some Italian courts have opted for partial nullity as an ideal solution, while some other, more recent, decisions have ruled that the judge cannot declare the nullity (total or partial) of the contract.

It is still not clear whether or not such nullity may also be declared *ex officio* by the judge.

Given the ongoing debate among national courts, the issue involves several topics which could be of great interest also from the perspective of the following tentative preliminary questions calling for intervention by the CJEU:

- i) May a judge, in light of the principle of effectiveness, declare the nullity of a contract whose content was determined pursuant to an anti-competitive agreement or conduct?
- ii) In light of the principle of effectiveness, and for the purpose of ensuring an effective remedy for consumers, to what extent may the latter rely on NCA decisions in order



to prove the connection between the anticompetitive conduct and the contract they stipulated, for the purpose of claiming the invalidity of such contracts?

- iii) May the judge declare *ex officio* the nullity of the contract stipulated on the basis of an anticompetitive conduct?
- iv) May the nullity be declared by administrative authorities in light of the principle of effectiveness?

### 3. Effective consumer protection between administrative and judicial enforcement

This chapter provides an overview of the administrative mechanisms with which consumer protection is enforced, and the relationship between such mechanisms and the judicial protection of consumers and professionals.

The objective is to show how EU law and general principles should be applied in order to ensure the effective application of EU law and thereby effectively safeguard consumers and undertakings.

**Section 3.1** focuses on the functioning of the means of administrative enforcement and, in particular, on the coordination of multiple administrative authorities vested with the same powers to penalise unfair commercial practices. The purpose of the section is to determine what principles should be applicable in such a case, and how to prevent any lack of protection or duplication of sanctions in the absence of clear legislative indications.

**Section 3.2**, which describes different modes of sequence and connection between the administrative and judicial means deployed to prevent the use of unfair terms, seeks to show how Article 47 CFREU and EU general principles can guide opting for an extension or a limitation of the effects of the injunctions upon those who were not parties to the injunction proceeding.

More specifically, whilst in the *Invitel* case the national court was seized in relation to an action for an injunction brought by the competent consumer protection authority, in the *Biuro* case the national court was seized with regard to the judicial review of the administrative sanction imposed on the business party. The former case allowed the CJEU to clarify that the deterrent nature and dissuasive purpose of the actions for an injunction brought in the public interest, along with the objective of ensuring effective consumer protection, lead to acknowledgement that the declaration of invalidity of an unfair term produces effects even with regard to those consumers not involved in the injunction proceeding. Instead, the *Biuro* case gave the CJEU the chance to point out that, by virtue of Article 47 CFREU, the declaration of unfairness of a clause has effects also on professionals who were not parties to the proceeding culminating in the declaration itself in so far as even such professionals are provided with an effective judicial remedy.

#### 3.1. Effective protection and distribution of competences among different administrative authorities

##### Relevant CJEU case

- Judgement of the Court (Second Chamber) of 13 September 2018, *Autorità Garante della Concorrenza e del Mercato v Wind Tre SpA, Vodafone Italia SpA*, Joined Cases C-54/17 and C-55/17

As anticipated above, this section concerns coordination among the multiple administrative bodies responsible for sanctioning unfair commercial practices at a national level.

In the case analysed, the Italian legal system pursued consumer protection against unfair commercial practices. It did so on the basis of the principle of procedural autonomy by giving

multiple administrative bodies the power to sanction such practices in relation to the different sectors in which they were carried out. Despite the basic intention of thereby raising the level of consumer protection, in the absence of clear legislative indications on the allocation of sanctioning power, a system of this kind instead produces a fragmentation which undermines the guarantee of effective protection of both consumers and the undertakings sanctioned.

When the administrative sanction is challenged – pursuant to Article 11 Directive 2005/29 CE on unfair commercial practices, as well as in accordance with Article 47 CFREU as the general criterion for judicial review also of administrative decisions (see the CJEU’s stance on this matter in *Biuro*, section 3.2.2 – courts are required to secure compliance with the **principles of effectiveness, proportionality and dissuasiveness**, as well as consistency with the general principle of good administration.

The three aforementioned principles are used in the context of unfair commercial practices with particular reference to sanctions (Article 13, Directive 2005/29/EC). This provides courts with precise guidelines, requiring them first to verify that these criteria have been fully met in imposing the sanction. In fact, when several administrative bodies are potentially competent to impose the same sanction with regard to the same conduct, there is a particularly high risk that the sanction will be duplicated or, on the contrary, reduced in order to ‘counterbalance’ a possible overlap of penalties, or not even imposed at all.

The **principle of good administration** is another fundamental guiding criterion, even where, as in the case in point, it is not possible to directly apply Article 41 CFREU in the strict sense. In this regard, to be mentioned is that the right to good administration enshrined in Article 41 CFREU does not apply to national institutions, but only to EU institutions, bodies and agencies. Nevertheless, since the principle of good administration is one of those resulting from the constitutional traditions common to the Member States, pursuant to Article 52 CFREU it is possible to apply the general principle of EU law of good administration to the Member States whenever they act within the scope of EU law.

#### Main question addressed

- Question 1 What is the role played by principles of effectiveness, proportionality and dissuasiveness in pursuing effective consumer protection when multiple administrative authorities are competent to sanction unfair commercial practices? What other principles act as guiding criteria to prevent or overcome conflicts between administrative authorities in such a case?
- Question 2 How do the principles involved guarantee protection and defence for sanctioned enterprises as well?
- Question 3 When does a conflict arise between general and sectoral provisions on unfair commercial practices, and how does this conflict impact on the allocation of the sanctioning power among the respective enforcement authorities?

## Relevant legal sources

### EU level

#### Article 3.4, Directive 2005/29

“In the case of conflict between the provisions of this Directive and other [EU] rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.”

### National legal sources

#### Article 19.3, Consumer Code (implementing Article 3.4, Directive 2005/29)

“In the event of any contradiction, the provisions contained in the Directives or in other [Union] provisions and in national implementing provisions regulating specific aspects of unfair commercial practices shall prevail over the provisions of this Title and shall apply to those specific aspects.”

#### Article 27.1-bis, Consumer Code

“Even in the regulated sectors, under Article 19.3, competence to intervene in relation to conduct by traders that constitutes improper commercial practise, without prejudice to compliance with the legislation in force, shall reside exclusively with the [AGCM] (...).”

### **3.2. Questions 1, 2, 3 – Allocation of competences among administrative authorities in the field of unfair commercial practices implemented in regulated sectors**

1. What is the role played by principles of effectiveness, proportionality and dissuasiveness in pursuing effective consumer protection when multiple administrative authorities are competent to sanction unfair commercial practices? What other principles act as guiding criteria to prevent or overcome conflicts between administrative authorities in such a case?
2. How do the principles involved guarantee protection and defence for sanctioned enterprises as well?
3. When does a conflict emerge between general and sectoral provisions on unfair commercial practices and how does this conflict impact on the allocation of the sanctioning power among the respective enforcement authorities?

## The case

The joined cases C-54/17 and C-55/17 concern two proceedings initiated by two different telecommunications operators (*Wind* and *Vodafone Italia*, respectively) against the Italian competition authority (“*Autorità Garante della Concorrenza e del Mercato – AGCM*”), which had sanctioned both companies for having used an unfair commercial practice. Through the sanctioned conduct, both operators had in fact sold SIM cards without informing the users of

the existence of pre-activated functionalities, such as internet browsing services and voicemail services, which, however, entailed additional costs which were charged to the unaware users.

Deeming the AGCM not competent to sanction such conduct, the operators appealed before the Regional Administrative Court. That court upheld the appeal in light of the Italian administrative case law of that time, according to which the principle of specification provided for in Article 19.3 of the Consumer Code (implementing Article 3.4, Directive 2005/29) excludes the application of general provisions whenever specific law provisions regulating specific aspects of unfair commercial practices are concerned. According to the first-instance court, in fact, the practice at issue was regulated by the sectoral legislation on electronic communications, which gives the power to penalise practices regarding electronic communication services to the national regulatory authority (namely the “*Autorità per le Garanzie nelle Comunicazioni – AGCom*”).

The AGCM appealed against the decision before the Council of State. The Sixth Chamber of the Council of State decided first of all to refer to the Plenary Chamber some questions concerning the interpretation of Article 27.1-bis of the recently-introduced Consumer Code. The Plenary Chamber noted that it is necessary to specifically analyse the conduct sanctioned in order to assess whether or not that conduct is regulated by the sectoral legislation in a comprehensive and detailed manner. Only if it is so regulated must the competence of the AGCM be excluded. Nevertheless, the Plenary Chamber found that, although an infringement of information obligations (regulated by the sectoral legislation) had been committed, the conduct in dispute had first and foremost to be framed as an aggressive commercial practice, the sanctioning of which falls exclusively within the competence of the AGCM. The Sixth Chamber decided to refer the interpretation provided by the Plenary to the CJEU in order to verify its consistency with EU law.

#### *Preliminary questions referred to the CJEU*

The referring court asked, in essence, whether Article 3.4 of Directive 2005/29 must be interpreted as precluding national rules under which conduct constituting inertia selling, within the meaning of Annex I, point 29 of Directive 2005/29, such as that at issue, must be assessed in light of the provisions of that Directive, with the result that, according to that legislation, the sectoral regulatory authority (**AGCom**) is not competent to sanction such conduct.

#### *Reasoning of the Court*

The reasoning of the CJEU revolved around the notion of ‘conflict’ This notion is in fact pivotal within Article 3.4 of Directive 2005/29, according to which “*In the case of conflict between the provisions of this Directive and other EU rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects*”.

The Court noted that Article 3.4 refers to a situation of a radical contradiction of law by virtue of which EU provisions regulating specific sectoral aspects of commercial practices impose on enterprises obligations which are incompatible with those provided for in Directive 2005/29.

In the dispute in question, according to the Court, it must therefore be ascertained whether the commercial practice implemented by the operators is regulated by the sectoral EU law on

electronic communication, namely the Universal Service Directive and the Framework Directive, and, if so, whether such sectoral legislation establishes obligations radically incompatible with those introduced by the Directive on unfair commercial practices.

The conduct of the two companies was framed by the CJEU as “inertia selling” within the meaning of Annex I, point 29 of Directive 2005/29, which in fact describes, within the list of “aggressive commercial practices”, the practice of “*Demanding immediate or deferred payment for (...) products supplied by the trader, but not solicited by the consumer*”. On the other hand, the same practice is not envisaged by the sectoral legislation on telecommunication services, which only sets out a series of information obligations for the provider of such services. As a result, there is no conflict between the two legislative systems involved and, consequently, it is not possible to make the sectoral provisions prevail and apply in the proceeding in question as provided for in Article 3.4 of the Directive on unfair commercial practices. Therefore, the AGCom is not competent to penalise the conduct concerned.

### Conclusion of the CJEU

The CJEU accordingly concluded that:

“(70) Article 3.4 of Directive 2005/29 must be interpreted as not precluding national rules under which conduct constituting inertia selling, within the meaning of Annex I, point 29 of Directive 2005/29, such as that at issue in the main proceedings, must be assessed in the light of the provisions of that directive, with the result that, according to that legislation, the ARN [AGCom], within the meaning of the Framework Directive, is not competent to penalise such conduct.”

### Impact on the follow-up case

In its follow-up decision, the Council of State illustrated the three different phases that had characterized the interpretation of Article 19.3 of the Consumer Code until the ruling by the CJEU.

The first phase was that in which the Italian administrative judges, starting from a well-known decision rendered by the Plenary Chamber of the Council of State in 2012, interpreted Article 19.3 in light of the speciality principle deriving from Article 15 of the Italian Criminal Code. According to this provision, when several criminal laws regulate the same matter, the special legislation derogates from the general one. Borrowing this criterion, therefore, the Italian administrative courts used to declare the Consumer Code inapplicable in the presence of sectoral provisions on unfair commercial practices.

The second phase was characterized by the adoption by the Council of State, in the context of the proceeding in question, of a new interpretation of the speciality principle. This was made necessary by the infringement proceeding initiated by the European Commission and the subsequent introduction by the Italian legislator of Article 27.1-*bis* into the Consumer Code (*see below*). Nevertheless, also this new criterion derived from criminal law and established that when the same person commits several similar crimes, the most serious crime absorbs the less serious ones. In light of this new criterion, the Council of State analysed the conducts implemented in

the case in question and came to the conclusion that the violation of information obligations regulated by the sectoral legislation is totally absorbed by the unfair commercial practice represented by inertia selling, which is regulated by the Consumer Code and penalised by the AGCM.

The third and last interpretative approach was the one proposed by the CJEU, which abandoned the speciality principle of criminal law derivation and introduced an independent criterion of incompatibility between provisions. The Court in fact specified that "*the term 'conflict' refers to the relationship between the provisions in question*" and stated that such a conflict "*is present only where provisions, other than those of Directive 2005/29, which regulate specific aspects of unfair business practices, impose on undertakings (...) obligations which are incompatible with those laid down in Directive 2005/29*". This means, in other words, that in the presence of unfair commercial practices, the competence generally lies with the AGCM. Only in the event of incompatibility between provisions does the competence lie with the sectoral regulatory authority.

According to the Council of State, the criterion introduced by the CJEU prevented interpretative doubts and, consequently, prevented two different authorities from initiating two different proceedings in relation to the same conduct. Unlike the previous criteria adopted by the Italian administrative case law, this criterion thus averted the risk of violation of the *ne bis in idem* principle. The reference to the *ne bis in idem* principle was made possible by the express recognition by the Council of State of the substantially 'criminal' nature of the sanctions imposed on enterprises in the case in question. As considered since the *Grande Stevens* case adjudicated by the ECtHR, in fact, although they were classified as 'administrative' in domestic law, the sanctions imposed by the administrative authority in proceedings such as the one in question must be considered 'criminal' and must consequently enjoy the protection and all the procedural guarantees provided by the European Convention of Human Rights: first and foremost, the right to a fair trial under Article 6.

Although neither Article 47 CFREU nor the principle of effectiveness are expressly mentioned in this proceeding, it is necessary to acknowledge that easy identification of the authority competent to sanction unfair practices is a fundamental prerequisite for securing effective consumer protection, as well as effective protection and defence of the sanctioned companies themselves. Similarly, it is necessary to acknowledge that this prerequisite guarantees compliance with the principle of proportionality because it avoids duplication of penalties, as well as compliance with the principle of dissuasiveness because it prevents the imposition of a low sanction in order to 'counterbalance' possible subsequent duplications of penalties in relation to the same conduct. Respect for the three guiding principles in turn gives rise to the guarantee of compliance with the general principle of good administration. This latter is deemed to be a principle resulting from the constitutional traditions common to the Member States and is thus applicable pursuant to Article 52 CFREU to the Member States whenever they act within the scope of EU law.

#### *Elements of judicial dialogue*

The case analysed included both types of judicial dialogue, vertical and horizontal. It is in fact interesting to note that the Chamber of the Council of State competent for the case developed

both an ‘internal’ dialogue with its higher Chamber and a direct dialogue with the EU Court of Justice during the preliminary reference procedure. In addition, a further type of dialogue, in a broader and non-judicial sense, can be identified in the case in question. This concerns the infringement proceeding initiated by the European Commission against the Italian Republic on account of the improper application of the principle of the special rule set out in Directive 2005/29, which was implemented by the Italian administrative courts in a way that led them to ‘automatically’ refrain from applying Directive 2005/29 itself (by excluding the application of the national provisions implementing that Directive) whenever an unfair commercial practice occurred in a field covered by a sectoral legislation. This infringement proceeding, initiated after the main proceeding before the first-instance Regional Court, induced the Italian legislator to introduce Article 27.1-*bis* into the Consumer Code, the interpretation of which is the subject of both the above judicial dialogues.

### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

No specific impact has been evidenced to date, although the chance of conflict among administrative authorities entrusted with sanctioning unfair commercial practices exists in several legal systems.

By way of example, in Portugal the criterion used to identify the administrative authority competent to sanction an unfair commercial practice is the *ratione materiae*. According to Article 19 of Decree-Law 57/2008, competence relies on the regulatory entity of the specific sector (including Bank of Portugal, Securities Market Commission and the Insurance and Pension Funds Supervisory Authority). The Economic and Food Safety Authority (*Autoridade de Seguranca Alimentar e Economica – ASAE*), which is the national authority in charge of the surveillance and discipline of the exercise of economic activities in the food and non-food sectors, has default competence for the other sectors.

### **3.3. The personal scope and the effects upon administrative enforcement of the judicial declaration of unfairness of a clause**

#### **Relevant CJEU cases in this cluster**

- Judgement of the Court (First Chamber), of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Case C-472/10 (“**Invitel**”)
- Judgement of the Court (Fifth Chamber) of 21 December 2016, *Biuro podróży 'Partner' Sp. z o.o., Sp. komandytowa w Dąbrowie Górniczej v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, Case C-119/15 (“**Biuro Podróży Partner**”)

Within this cluster, both cases constitute reference points for the judicial dialogue within the CJEU and between EU and national courts on the question of *erga omnes* effects of injunctions and invalidity in administrative and judicial enforcement.



The judgements in the *Invitel* and *Biuro Podróży Partner* cases are directly related, and they provide two supplementary conclusions as to the effects of a review of clauses in business-to-consumer (B2C) contracts. They pertain, in particular, to the *in abstracto* review – i.e. to the model of examination of the standard terms of a contract that is carried out regardless of any contract actually concluded. The core issue in both cases is **whether a judgement declaring a clause abusive can have extended effects, including upon administrative enforcement**. In particular, these cases jointly answer the question of whether the *in abstracto* declaration of unfairness can allow administrative bodies to apply sanctions (or oblige them to do so).

In this regard, the *Biuro Podróży Partner* judgement approved the core findings of the *Invitel* judgement as regards the efficacy of unfairness **in favour of consumers**. At the same time, it adopted this decision as the basis on which to take a step forward and ascertain the limits of *erga omnes* effect of unfairness **against professionals** – in particular, for the purpose of administrative remedies for violation of a judicial injunction that prohibits use of a particular clause.

### Main questions addressed

- Question 1 What is the role of the right to effective judicial remedy (Article 47 CFREU), along with the principle of effectiveness (Article 7 of the 93/13/EC Directive), in ascertaining the scope of consumers who may claim remedies for breach of a judicial injunction prohibiting the use of a particular contract clause as abusive?
- Question 2 How do the principle of good administration and Article 47 CFREU contribute to defining the relationship between the administrative and judicial enforcement of consumer law?
- Question 3 What is the relationship between the judicial declaration of abusiveness and the administrative sanction grounded on it? What does the right to an effective remedy, granted to the professional sanctioned by an administrative authority on account of the use of a clause declared *in abstracto* unfair, concretely involve?
- Question 4 Are courts bound by administrative decisions concerning unfair contract terms and practices? If they are not bound, what legal effect do administrative decisions have upon judicial remedies?
- Question 5 To what extent can the judicial declaration of the unfairness of a clause bind administrative authorities also regarding professionals who did not take part in the proceedings before a court? What limits are imposed in this respect by Article 47 CFREU against the background of the principles of effectiveness and proportionality?

### Relevant legal sources

#### **EU level**

93/13/EC Directive (especially Article 7)

Charter of Fundamental Rights of the EU (especially Article 47)

### **National level (Hungary and Poland)**

#### Articles 209/A – 209/B of the Hungarian Civil Code

The provisions in question set forth the general test of fairness of clauses in B2C contracts, implementing the test introduced in the EU 93/13/EC Directive. Moreover, they vest a number of bodies with competence to claim declaration of invalidity of such terms in judicial proceedings. The declaration of unfairness is to be effective for every party contracting with a seller or supplier that has applied a particular term. It entails the invalidity of a clause, regarding all the parties concluding contracts that contain such a clause, as well as all professionals that include this clause in their standard contract terms. Consumers are then entitled to bring further claims against such sellers or suppliers.

#### Articles 479<sup>36-45</sup> of the Polish Code of Civil Procedure

The provisions whose conformity with EU law was challenged (currently not in force, see below) regulated the *in abstracto* review of contract clauses. The judicial proceedings in question were designed for the purposes of exercising abstract control of standard contract terms and protecting the collective consumers' interest. The control in question is carried out *in abstracto* – i.e. regardless of the particular circumstances of individual contracts. This procedural scheme was implemented in the Polish legal system through Article 7 of the 93/13/EC Directive, which provides a way to protect consumers' collective interest in civil proceedings. It was regulated separately from the so-called *in concreto* review – i.e. incidental examination of a contract clause within particular proceedings (e.g. where a consumer is sued for payment based on this clause).

As opposed to this mode of examination – available to every civil court – the *in abstracto* review was carried out by one specialized judicial body: the Court of Competition and Consumer Protection (*Sąd Ochrony Konkurencji i Konsumentów*) – a specialized division of the District Court in Warsaw.

If the Court deems the clause unfair, it cites its content and issues an injunction prohibiting its use. A copy of the final judgement, with the cause of action granted, is sent to the President of the Office of Competition and Consumer Protection (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*), who maintains a public register of the contract clauses that have been declared unfair *in abstracto*. A final judgement granting the action has an effect upon third parties when a provision of the model agreement considered to be prohibited is published in this register. The Court orders that every final judgement shall be published in the “Court and Commercial Gazette” (*Monitor Sądowy i Gospodarczy*) (Article 479<sup>42-45</sup> of the Code of Civil Procedure). Under Article 479<sup>43</sup> of the Code of Civil Procedure, the judgement declaring (*in abstracto*) the abusiveness of a clause is “effective towards third persons”, from the day of listing this clause in the public register administered by the President of the Office of Protection of Competition and Consumers.

The declaration of a clause's unfairness vests an administrative authority (the President of the Office of Competition and Consumer Protection) with the power to exercise control over

whether the professionals acting in the market comply with the injunction issued by a court in the *in abstracto* review. If the clause, despite the prohibition, is still included in contracts, the President can impose a pecuniary fine on the business party. Hence, the administrative authority has not only a declaratory but also a sanctioning power in the case of non-compliance, e.g. use of the unfair clause in standard contract terms listed in the public register of unfair clauses.

The consequences of using an unfair clause may be also self-remedied by a business party that undertakes – prior to issuing a decision declaring a clause abusive – the obligation to take particular actions. The President of the OCCP issues a decision that obliges the business party to comply with these obligations. Finally, Article 23d determines the *ratione personae* outcomes of a declaration of unfairness. It will be effective regarding the business party against whom the unfairness has been declared, and all the consumers who concluded a contract with him/her using the standard terms indicated in the decision.

#### The legislative reform of April 2016 in Poland

The legislative framework discussed in the *Biuro Podróży Partner* case was repealed as of 17 April 2016 before the final judgement was rendered. The new act almost entirely cancelled the former provisions of the Code of Civil Procedure, introducing a new model of *in abstracto* review (Articles 23a – 23d of the Act on Competition and Consumer Protection). The amendment replaced the former judicial review, carried out by the Court of Protection of Competition and Consumers, with the administrative control performed by the President of the Office of Competition and Consumer Protection (the central market regulatory authority in Poland). The reform centralized sanctioning of the use of unfair contract terms, as the President is still competent to impose fines for applying contract terms that have previously been declared abusive.

The new regulation sets forth a general prohibition against the use of abusive clauses in contracts concluded with consumers (Article 23a) and confers upon the President of the Office the competence to issue a decision that declares *in abstracto* the unfairness of the clause (Article 23b). The decision may also provide specific remedies that allow the removal of the effects of using such a clause (for instance, by obliging a business party to publish a statement). Under section 4 of Article 23b, the remedies chosen by the President ought to be proportionate to the gravity and the type of breach, as well as necessary for the removal of its consequences. The consequences of using an unfair term may be also self-remedied by a business party, who undertakes the obligation to take particular actions – prior to issuing a decision declaring a clause abusive under the aforesaid Article 23b. The President of the Office issues a decision that obliges the entrepreneur to fulfil these obligations (Article 23c). Finally, Article 23d determines the *ratione personae* outcomes of a declaration of unfairness. It is effective in regard to the entrepreneur, against whom the unfairness has been declared, and all the consumers, who concluded with him/her a contract using standard terms indicated in the decision.

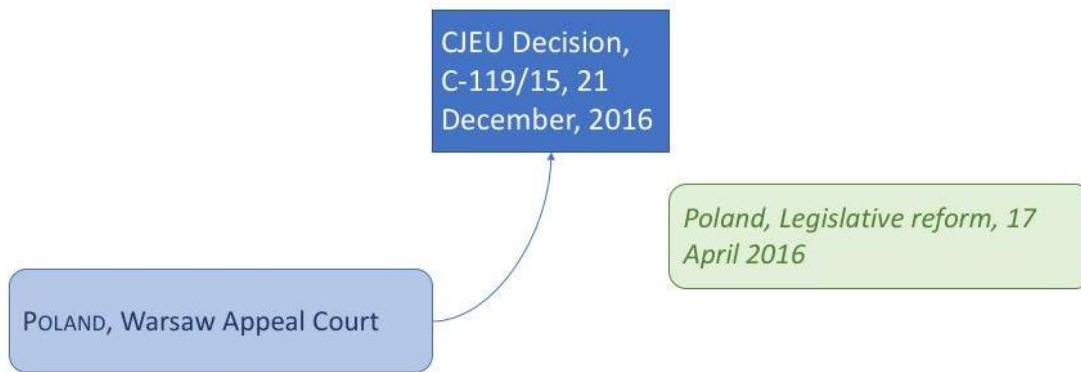


Fig. 3.1, *Biuro*

### 3.3.1. Question 1 – The personal scope of effects of *in abstracto* review as regards consumers

What is the role of the right to effective judicial remedy (Article 47 CFREU), along with the principle of effectiveness (Article 7 of the 93/13/EC Directive), in ascertaining the scope of consumers who may claim remedies for breach of a judicial injunction prohibiting the use of a particular contract clause as abusive?

#### The case

*Invitel* concerned the applicability of a judgement related to unfairness to consumers other than those who were technically parties to the proceedings. *Biuro Podróży Partner* concerned the applicability of unfairness to professionals other than those who were parties to the administrative proceedings which held a clause *in abstracto* unfair.

In the *Invitel* case, the CJEU answered a preliminary question asked by the Pest County Court (*Pest Megyei Bíróság*), which was deciding a case concerning unfair clauses in the telecom industry. The Hungarian consumer protection authority (*Nemzeti Fogyasztóvédelmi Hatóság – NFH*) brought to a court a claim against a professional – the telecom company *Invitel Távközlési Zrt* – to ascertain whether certain terms on additional fees used in its contracts concluded with consumers were unfair. With the preliminary question, the Hungarian court sought to ascertain whether domestic law could provide a possibility to issue injunctions that prohibited the use of particular clauses with an *erga omnes* effect – i.e. in favour of every consumer, regardless of his/her participation in the reviewing proceedings.

#### Preliminary question referred to the CJEU:

In the *Invitel* case:

May Article 6(1) of that Directive be interpreted, where an order which benefits consumers who are not party to the proceedings is made, or the application of an unfair standard contract term is prohibited, in an action in the public interest, as meaning that an unfair term which has become part of a consumer contract is not binding on all

consumers also as regards the future, so that the court has to apply the consequences in law thereof of its own motion?

In the *Biuro Podróży Partner* case:

In light of Article 6(1) and Article 7 of [Directive 93/13], in conjunction with Articles 1 and 2 of [Directive 2009/22], can the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in the register of unlawful standard contract terms be regarded, in relation to another undertaking which was not a party to the proceedings culminating in the entry in the register of unlawful standard contract terms, as an unlawful act which, under national law, constitutes a practice which harms the collective interests of consumers and for that reason forms the basis for imposing a fine in national administrative proceedings?

#### Reasoning of the CJEU:

In the *Invitel* decision, the CJEU pointed out that – due to the principle of effectiveness set forth in the 93/13/EC Directive – the review of terms in consumer contracts may lead to injunctions with an *erga omnes* effect. In such a case, an injunction will generally prohibit the use of the particular contract term in every contract concluded with consumers. Irrelevant, therefore, is whether a particular consumer was involved in the original proceedings when the injunction was issued and whether he/she concluded a contract before or after the injunction. The principle of effectiveness suggests that remedies for using abusive clauses should broadly apply beyond the parties to the relevant proceedings.

Specifically, the CJEU stated that Article 7(1) of Directive 93/13 requires the Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers. With regard to injunctions brought in the public interest, these means are to include the possibility for persons or organisations having a legitimate interest under national law in protecting consumers to take action in order to obtain a judicial decision as to whether contract terms drawn up for general use are unfair and, where appropriate, to have them prohibited. The CJEU, ruling on the principle of dissuasiveness, and considering the independence of injunctions from any particular dispute, stated that such actions may be brought even though the terms which it is sought to have prohibited have not been used in specific contracts.

The *Invitel* reasoning was accepted and further developed by the CJEU in the *Biuro Podróży Partner* case (the background of the case will be discussed below, under question 2).

#### Conclusion of the CJEU:

Under the *Invitel* and *Biuro Podróży Partner* decisions, domestic law may provide the possibility to use injunctions that prohibit *erga omnes* use of particular clauses in consumer contracts because they are unfair. In this case, the injunction in question can be effective in favour of all consumers, regardless of the date when they concluded their contracts, and regardless of whether they were involved in the initial proceedings when the unfairness was declared. In the *Invitel* case, the CJEU stated that:

“44. (...) Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) and (2) thereof, must be interpreted as meaning that:

- it does not preclude the declaration of invalidity of an unfair term included in the standard terms of consumer contracts in an action for an injunction, provided for in Article 7 of that directive, brought against a seller or supplier in the public interest, and on behalf of consumers, by a body appointed by national legislation from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same general business conditions apply, including with regard to those consumers who were not party to the injunction proceedings;
- where the unfair nature of a term in the general business conditions has been acknowledged in such proceedings, national courts are required, of their own motion, and also with regard to the future, to take such action thereon as is provided for by national law in order to ensure that consumers who have concluded a contract with the seller or supplier to which those general business conditions apply will not be bound by that term.

As has been summed up in the *Biuro Podróży Partner* decision:

20. (...) the Court’s case law (suggests) that the effects of a judicial decision declaring unfair terms may be extended to all consumers having concluded a contract containing the same terms with the same seller or supplier, without being a party to the proceedings brought against that seller or supplier.”

#### Impact on the follow-up case:

With regard to the *Invitel* case, while the case was still pending, the national consumer protection authority withdrew its complaint against Invitel in 2012, in exchange for Invitel’s pro-consumer commitments – upon which the court closed the case.

Subsequent to the ruling of the CJEU, an amendment to Law No. C of 2003 on electronic communications banned the use of money order fees in that sector, as of 17 November 2012. Under the new provisions, companies operating in the field of electronic communication services have to bear the costs of this payment method, which is still in place in Hungary in many other areas of consumer services, including public utilities.

In Polish law, due to the profound change of the model of abstract review of contract clauses (see above), the CJEU judgement tackled provisions no longer in force. They still, however, had relevance for the *ratione personae* effects of declarations of abusiveness made in the former ‘judicial’ model.

Notwithstanding these obvious limitations, the *Biuro Podróży Partner* judgement provides significant guidance on the application of Article 47 of the Charter in the area of consumer remedies, as well as being an important development in the doctrine of *in abstracto* review, the cornerstone of which was laid by the *Invitel* case.

### Elements of judicial dialogue:

The *Biuro Podróży Partner* case was linked to the CJEU's *Invitel* decision (C-472/10). It aimed to supplement the previous decision by answering the question of whether the possibility of extended effects of the unfairness of a clause – which had been ascertained in the *Invitel* judgement as regards consumers – applied also to all the professionals in the market. In particular, the *Biuro Podróży Partner* judgement established a plain understating of the problem of whether a judicial injunction (issued in civil proceedings) which prohibited the use of a clause as being unfair had an *erga omnes* effect against all the business parties that might use this clause in their contracts.

### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

#### **Portugal**

The case law of *Biuro* fully applies in the Portuguese legal order, where a system of publicity of the unfairness of terms, similar to that operating in Poland, is envisaged.

Consumers and professionals' associations and the Public Prosecutor may initiate proceedings in order to have a term declared abusive. Terms declared abusive are subject to official publicity. According to Article 34 of Decree-Law 486/85, the judicial decisions should be communicated to the Ministry of Justice and they are all publicly available in the national register of unlawful standard contract terms.<sup>21</sup>

Therefore, even if a consumer has not participated in the proceedings in which a clause had been declared unfair (either because it was an individual proceeding initiated by another consumer, or because it was a proceeding initiated by a collective or public entity), he/she can refer to this declaration in his/her own dispute with a professional. It is not relevant whether the contract was concluded after the clause had been declared abusive.

### **3.3.2. Question 2 – Fundamental rights and the judicial/administrative enforcement relation**

How do the principle of good administration and Article 47 CFREU contribute to defining the relationship between administrative and judicial enforcement of consumer law?

#### The case and Preliminary question referred to the CJEU

The problem at issue was not addressed directly in the preliminary questions referred in the *Invitel* and *Biuro Podróży Partner* cases. However, it was strongly present in the background of both cases. It was particularly apparent in the context of the *Biuro Podróży Partner* decisions, where the national court sought directly to determine whether (and to what extent) the administrative body was bound – in deciding upon sanctions for the use of unfair contract terms – by the declaration of unfairness made by the civil court.

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<sup>21</sup> <http://www.dgsi.pt/jdgpj.nsf?OpenDatabase>

### Reasoning of the CJEU

As follows from both decisions by the CJEU, the interrelation between judicial and administrative enforcement in consumer cases is clear in judgements (*Invitel*, *Biuro Podróży Partner*) that deal with the extension of the effects of a declaration of unfairness beyond the array of the parties to the particular civil proceedings. Relying on the principle of effectiveness, the CJEU expanded the effects of decisions on the unfairness of a clause, and as a consequence created connections between administrative and judicial enforcement. In this regard, the right to effective judicial remedy, explicitly established in Article 47 CFR, plays a role, although it is not applicable to administrative proceedings. Specifically, in the *Biuro* case, the CJEU, interpreted Directives 2009/22 and 93/13 in conjunction with and in the light of Article 47 CFR. The CJEU recalled that:

“the interpretation of Directives 93/13 and 2009/22 in the light of Article 47 of the Charter must take account of the fact that any person whose rights guaranteed by EU law might be infringed is entitled to an effective judicial remedy. This concerns not only consumers who feel that they have been wronged by an unfair term of a contract they have concluded with a seller or supplier, but also a seller or supplier, (...) who argues that the contract term in dispute cannot be held to be unlawful and sanctioned by a fine solely because an equivalent term has been entered in the national registry of unlawful standard contract terms, without that seller or supplier having been a party to the proceedings culminating in the entry of such a term in that register.”

This applies, especially, to the declaration of abusiveness that follows the previous decision, which found a clause abusive *in abstracto* and with effect for all consumers. This dimension of administrative/judicial enforcement was addressed to a particularly vivid extent in the *Biuro Podróży Partner* case, when the Court of Appeal in Warsaw was reviewing a decision of the national regulatory authority (the President of the Competition and Consumer Protection Office).

### Conclusion of the CJEU

The CJEU (*Biuro Podróży Partner* judgement) stated, that, in light of Article 47 CFR, national legislations could provide that the declaration of unfairness established in a public register applies to a seller or supplier which was not a party to the proceedings culminating in the entry in that register, if

“that seller or supplier has an effective judicial remedy against the decision declaring the terms compared to be equivalent in terms of the question whether, in the light of all relevant circumstances particular to each case, those terms are materially identical, having regard in particular to their harmful effects for consumers, and against the decision fixing the amount of the fine imposed, where applicable”.

**Article 47 of the Charter is not directly applicable to administrative decisions**, including the decisions of domestic regulatory authorities. This assumption follows indirectly also from the *Biuro Podróży Partner* decision, which refers to Article 47 only **as a source of the right to effective judicial protection (including the right to be heard)**, without applying it to administrative proceedings. What is noteworthy, even in the context of the adequacy of pecuniary fines, is that the CJEU referred to Article 47 (in the *Biuro Podróży Partner* decision) only as the general criterion



for **judicial review of administrative decisions**, not the administrative decisions themselves. In the latter respect, the principle of good administration is applicable. On the relation between Article 47 and administrative decisions, see also the remarks below, under the following question.

#### Elements of judicial dialogue

On the relation between the *Invitel* and *Biuro Podróży Partner* cases, see the introductory remarks under this Section.

### 3.3.3. Question 3 – Judicial declarations of abusiveness and administrative sanctions

What is the relationship between the judicial declaration of abusiveness and the administrative sanction grounded on it? What does the right to an effective remedy, granted to the professional sanctioned by an administrative authority on account of the use of a clause declared *in abstracto* unfair, concretely involve?

#### The case and Preliminary question referred to the CJEU

The issue was not addressed directly in the preliminary questions in the *Invitel* and *Biuro Podróży Partner* cases. However, it was clearly apparent in the background. This pertains in particular to the latter case, where the preliminary question was asked in the course of reviewing the decision of the regulatory authority (the President of the Competition and Consumer Protection Office), which imposed a fine for using an unfair clause, although the professional subjected to this sanction did not take part in the proceedings where unfairness had been originally declared.

#### Reasoning of the CJEU

As has been pointed out in the *Biuro Podróży Partner* judgement, the national administrative bodies (including in particular the regulatory authority responsible for the consumer market) can enforce consumer law in an interconnected manner with courts.

The general principles that steers relations between these two means of enforcement are **the right to effective judicial remedy**, derived from Article 47 CFR, and the principle of effectiveness. Specifically, Article 47 CFR plays an important role in enhancing the importance of the judicial review of administrative decisions in order to guarantee the right to an effective remedy.

Furthermore, it should be noted that, with regard to administrative proceedings, the principle of good administration should apply.

#### Conclusion of the CJEU

Particularly clear conclusions were set forth by the CJEU in the *Biuro Podróży Partner* case. On discussing the possibility of applying an administrative sanction with reference to the previous civil judgement (as the premise for this remedy), the Court emphasised the need to respect the professional's right to effective judicial remedy – in particular, the right to be heard. As it pointed

out (p. 40), “under the principle of effective judicial protection, a seller or supplier on whom a fine is imposed due to the use of a term held to be equivalent to a term in the register concerned must, in particular, have the possibility of challenging that sanction”.

This pertains, first of all, to the possibility of **challenging the conclusion that the particular clause is sufficiently similar to another clause previously declared unfair**. Secondly, the right to effective judicial remedy should also entail the measures that allow for review of the sanction itself – especially to re-assess whether the amount of pecuniary fine is adequate and just (see further p. 40 of the *Biuro Podróży Partner* decision).

In both respects the CJEU concentrated especially on the **right to be heard** – considering it to be the particular substrate of the right to effective judicial remedy in the meaning of Article 47 of the Charter. In the context of unfair clauses in consumer contracts, this entails, first and foremost, **vesting every professional and every consumer with the possibility to demand a separate review of a contract clause, even if the (apparently) similar clause has already been declared unfair**.

#### Elements of judicial dialogue

On the relation between the *Invitel* and *Biuro Podróży Partner* cases, see the introductory remarks under this Section.

### 3.3.4. Question 4 – Binding power of administrative decisions upon courts

Are courts bound by administrative decisions concerning unfair contract terms and practices? If they are not bound, what legal effect do administrative decisions have on judicial remedies?

#### The case and Preliminary question referred to the CJEU

Both CJEU decisions also provide indirect clues as to the situation opposite to the one discussed directly in the preliminary questions – i.e. **the possible impact of administrative enforcement on judicial enforcement**. The problem in question is particularly important for those legal systems where the administrative authorities – on their own or in parallel to courts – are competent to review clauses in consumer contracts. This raises the question of **whether an administrative declaration of abusiveness can subsequently entail consequences for the judicial enforcement** – especially if it is prejudicial to the judicial application of remedies.

#### Reasoning and conclusions of the CJEU

The issue was not addressed in either of the two decisions discussed in this Chapter. However, in light of Article 47 CFR, professionals **must be vested with the right to present their point of view before a court** (e.g. to claim that the clause in question is not similar to the clause that has been previously declared unfair by an administrative authority). This right can be derived directly from Article 47 of the Charter, as it pertains to judicial proceedings. The standard in question also applies to the possibility of **reviewing the degree of a sanction imposed by a court** (especially when it is gradable).

### Elements of judicial dialogue

On the relation between the *Invitel* and *Biuro Podróży Partner* cases, see the introductory remarks under this Section.

### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

#### **Italy**

The issue of the possible – or even binding – impact of administrative enforcement on judicial enforcement has been recently addressed by a decision of the Italian Court of Cassation (Cass., 31 August 2021, n. 23655).

The litigation concerned the unfairness of an indexation clause to the Swiss franc in a credit agreement (also known as ‘double indexation’ or ‘exchange rate risk clause’). As a result of the contractual term, the borrower was required to repay the amount of credit according to the difference between the exchange rate at the time when the relationship was established and the exchange rate at the time of payment.

In exercising its supervisory competence, the Italian competition authority (“*Autorità Garante della Concorrenza e del mercato* – **AGCM**) had previously fined the bank concerned for the lack of clarity and comprehensibility of the foreign currency indexation clause in a credit agreement.

According to the competition authority, the contract did not make it clear to the consumer that s/he bore the full exchange rate risk of the transaction, and that the amount of the loan instalments might vary significantly if the Swiss franc appreciated against the euro. The consumer was therefore claiming before the civil court that the clause should be declared unfair, and payments made on its basis should be returned.

In particular, the case concerned the evidentiary effect of the competition authority's findings in civil proceedings.

In the Italian legal system, the case law on the evidentiary effect of the antitrust authority's findings in civil proceedings is currently divided between two opposite positions. According to the Council of State, public enforcement measures have a typically afflictive function because they are intended to protect a public interest in the competitiveness of the market. Therefore, the investigation carried out by the competition authority does not have the full scope required for the protection of individual rights to damages.

The Court of Cassation, however, had affirmed on several occasions that the measures taken by the competition authority and, more broadly, the administrative court constitute privileged evidence in relation to the existence of the company's conduct, the position it holds in the market, and its abuse. The consumer, in the context of the action for damages, can therefore prove its claim and, particularly, the causal link between the misconduct and the individual damage, by relying on the Authority's investigation, in accordance with the model of a presumption *iuris tantum*. The existence of a finding by the antitrust authority as to the existence of the fact and of the abusive practice reverses the burden of proof so that it falls on the

enterprise. The professional is required to prove that the damage to the consumer did not result from his/her own conduct.

The Court of Cassation, in the case under consideration, maintained that the same reasons not only exist to confirm the above-mentioned orientation but go even further. The same principle applies, *mutatis mutandis*, when the administrative authority's measure covers not only the ascertainment of the historical fact, but also the assessment of its unlawfulness, such as the judgement formulated on the lexical content of the contractual document and on its capacity to clarify to the ordinary contractor the meaning of the commitments undertaken. Where, therefore, the competition authority has ascertained the unfairness of a clause comprised in a standard contractual model, this finding operates in civil proceedings with the effect of privileged evidence. The civil court intending to depart from the antitrust finding must provide reinforced reasons and specific rebuttal in relation to the contract that allow exclusion of the contractual term's unfairness.

Although no express reference was made to *Invitel* and *Biuro Podróży Partner*, this case shows the potential expansionary effect of the dialogue between administrative and judicial enforcement, allowing courts to rely on the authorities' findings in determining the unfair nature of a contractual clause.

### 3.3.5. Question 5 – The *erga omnes* effect regarding professionals

To what extent can the judicial declaration of the unfairness of a clause bind administrative authorities regarding the professionals who did not take part in the proceedings before a court? What limits are imposed in this respect by Article 47 CFREU against the background of the principles of effectiveness and proportionality?

#### *The case and Preliminary question referred to the CJEU*

The problem was addressed directly in the CJEU judgement in the *Biuro Podróży Partner* case. The case pertained to a business party – Biuro Podróży Partner sp. z o.o. (Travel Agency “Partner” Ltd.). The subject matter of the case was a judicial review of a decision by the President of the Office of Competition and Consumer Protection of 22 November 2011, which imposed a financial penalty on Biuro Podróży Partner sp. z o.o. for using a contractual clause that had previously been declared abusive with respect to another business party and entered into the public register (within the legislative framework of *in abstracto* review of contract clauses, see above). The travel agency made an appeal to the Court of Competition and Consumer Protection within a scheme of judicial control of the decisions of the President of the Office provided by Polish law. In its decision of 11 October 2013, the court of first instance dismissed the appeal, agreeing that the clause used by the travel agency was unfair, and hence prohibited, as already declared abusive *in abstracto*. The judgement was challenged by the travel agency before the Court of Appeal in Warsaw.

#### *Reasoning of the CJEU*

The possible scope of the *erga omnes* effect of a declaration of unfairness against the business parties was the core element of the *Biuro Podróży Partner* case. The Court based its reasoning on a

clear **balance between the fundamental rights entailed by Article 47 CFR and the principle of effectiveness set forth by Article 7 (1) of the 93/13/EC Directive**. This principle – expressed by the CJEU at the general level – **applies, in particular, to the administrative sanctions entailed by a violation of a court injunction issued as a result of an *in abstracto* review of contract clauses**. The conclusions adopted in the *Biuro Podróży Partner* judgement directly addressed the prerequisites that have to be met to make professionals who were not involved in the initial reviewing procedure (and could not defend their rights) liable for not complying with the injunction.

Firstly, the principle of effectiveness may provide a ***rationale* for extending the effects of a declaration of unfairness to every business party that has introduced into a contract a clause that was previously declared unfair and entered into a public register** (even if this professional did not participate in the proceedings that led to the issue of a judicial injunction). This outcome would obviously increase the level of consumer protection, strengthening the remedies available in the entire system. This role of effectiveness has been broadly discussed above, at question 1.

Secondly, however, the Court observed that, **according to the principle of effectiveness, the personal scope of a clause’s unfairness cannot be established without taking into account the other overriding standards of the legal system – especially the right to effective judicial protection**. Upon the grounds of *in abstracto* review, the CJEU particularly emphasised the need to provide every business party – accused of using unfair clauses and therefore subject to an administrative penalty – with the right to challenge the decision to impose that sanction. As has been ascertained by the CJEU, **the right to access the court is a component of the right to effective judicial remedy** (Article 47 CFR). In particular, the domestic system should put in place instruments to control not only the fine itself but also the grounds of its application – namely, the judicial decision declaring a clause abusive. Bearing this in mind, the Court concluded that domestic legislation that meets the said prerequisites derived from Article 47 CFR is not in conflict with EU law.

The balancing of these two criteria was implicitly based upon **the principle of proportionality** (referred to in Article 7 of the Directive as “adequacy”). Due to the general standpoint adopted by the CJEU, ascertaining the personal scope of a clause’s unfairness according to the principle of effectiveness cannot ignore the general standards of the legal system – especially the right to effective judicial protection. The *Biuro Podróży Partner* judgement deployed proportionality as a moderating factor which makes it possible to temper the personal scope of the effects entailed by the (*in abstracto*) declaration of abusiveness.

Against the background of the *Biuro Podróży Partner* case, the role of the principle of proportionality was twofold. Apart from moderating the *ratione personae* scope of unfairness as such, it also played an important implicit role as a safeguard, in that **the administrative sanctions, entailed by the injunction issued by the civil court, are compliant with the principle of proportionality** (for further conclusions of the CJEU, see below). The CJEU summed up this element of its findings thus:

“45. Although the fixing of a fine due to use of a term that has been held to be unfair is undoubtedly one way of putting a stop to that use, **it must nevertheless comply with the principle of proportionality**. Thus, Member States must guarantee that any seller or supplier that believes that the fine imposed on it does not comply with that general principle of EU law has the possibility of bringing proceedings to challenge the amount of the fine.”

#### Conclusion of the CJEU

As a result of the aforesaid balancing, the Court concluded that the personal scope of the effects of abusiveness control may differ as regards consumers and professionals. Although consumers may benefit from extended effects of unfairness (e.g. by claiming that a particular clause does not apply to them – see question 1), extending the effects of abusiveness to business parties is subject to stricter limitations.

As was ascertained in the judgement:

“47. Article 6(1) and Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with Articles 1 and 2 of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests and in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in a national register of unlawful standard contract terms from being regarded, in relation to another seller or supplier which was not a party to the proceedings culminating in the entry in that register, as an unlawful act, provided, which it is for the referring court to verify, that that seller or supplier has an effective judicial remedy against the decision declaring the terms compared to be equivalent in terms of the question whether, in the light of all relevant circumstances particular to each case, those terms are materially identical, having regard in particular to their harmful effects for consumers, and against the decision fixing the amount of the fine imposed, where applicable.”

#### Elements of judicial dialogue:

On the relation between the *Invitel* and *Biuro Podróży Partner* cases, see the introductory remarks under this Section.

### **3.4. The guidelines for judges that emerge from the analysis**

1. Domestic systems can regulate judicial or administrative injunctions that prohibit the use of particular contract clauses with an *erga omnes* effect. The injunction may have effects on consumers and professionals that did not take part in the proceedings. In the former case, according to *Invitel*, as the injunction is issued, every consumer may claim his/her rights arising from it (e.g. deny payment, claim reimbursement, etc.). In the latter case, every business party may be obliged to refrain from using a particular clause and be subject to administrative or judicial

sanctions in the case of non-compliance with the prohibition, provided that the business party's procedural rights, established by the principle of good administration and Article 47 CFR, are respected. This is particularly pertinent to legal systems which recognize a separate mode of administrative enforcement in those cases in which the professional did not comply with an injunction and continued using a clause that had been found to be unfair.

2. The general principle that steers relations between administrative and judicial enforcement is the right to effective judicial remedy derived from Article 47 CFR and the right to good administration (endorsed by Article 41 CFR with respect to EU institutions). Furthermore, the principles of effectiveness, equivalence, and proportionality play a significant role in CJEU case law and, as a consequence, impact on national jurisprudence. More practically, domestic courts should consider that Article 47 CFR has an even stronger impact on the coordination between administrative decisions and the court's assessment when both concern unfair terms, the former *in abstracto*, the latter *in concreto*. Indeed, further to the CJEU's reasoning in the *Invitel*, C-472/10 and *Biuro*, C-119/15 cases, courts should derive all consequences from an earlier ascertainment of unfair terms. This includes the non-bindingness of those terms with respect to consumers in present and future transactions when, in light of national applicable law, the ascertainment may be extended to terms equivalent to the ones found to be unfair. Though used by other businesses that were not party to the proceedings, these shall have, under Article 47 CFR, adequate means to challenging the decision establishing that equivalence (*Biuro Biurocase*, C-119/15)).

3. When multiple administrative authorities concur in the enforcement of consumer protection – some of them operating in specific sectors such as telecommunications, energy, banking and finance – Article 47 CFR shall ensure effective coordination among their roles and prevent any omission or duplication. When applying national rules that define authorities' competence and the range of application of special-scope legislation in respect of general consumer-protection legislation, courts should ensure the effective application of EU law and the effective protection of consumer rights.

4. The CJEU plays a leading role in providing criteria to be applied in the distribution of competences between enforcement authorities, always within the limits of the principle of procedural autonomy of the MS. In addition to the criteria introduced by the CJEU in relation to specific sectors and circumstances (e.g. the criterion for identifying the authority competent to sanction unfair commercial practices), the guiding criterion for regulating the relationship between administrative authorities and the performance of their tasks is always compliance with the principles of effectiveness, proportionality and dissuasiveness, and through them, overall compliance with the principle of good administration. In particular, in accordance with the principle of proportionality, *bis in idem* should be prevented when sanctioning infringements that are relevant under both general- and special-scope legislation.

5. With regard to the extension of collective redress, Article 80 GDPR does not preclude national legislation which allows a consumer protection association to bring legal proceedings in the absence of a mandate conferred on it for that purpose and independently of the infringement of specific rights of the data subjects (*Meta*, C-319/20). The legal proceedings can be brought against the person allegedly responsible for an infringement of the laws protecting personal data because

of infringement of the prohibition of unfair commercial practices, a breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions, when the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that regulation.



## 4. Collective redress and the coordination of collective and individual proceedings.

When collective and individual redress are available, the question of their coordination arises. Article 47 CFR and the principle of effectiveness can play a significant role in the interpretation of existing coordination mechanisms. This chapter is organized as follows. First, Section 4.1 analyses the issue of coordination between collective and individual redress with regard to the judge's power/duty to suspend a standing procedure. Second, Section 4.2 addresses the question of the effects of decisions. Third, Section 4.3 studies the possibility of intervention by consumer protection associations in individual proceedings. Fourth, Section 4.4 analyses the interaction between representative actions against infringements of personal data protection rules and those against infringements of consumer protection rules (in this case, unfair commercial practices). Finally, Section 4.5 summarizes the main features of the reform put in place by Directive (EU) 2020/1828 on Representative Actions, a product of the Commission's New Deal for Consumers. Finally, Section 4.6 concludes with guidelines for judges.

At stake in this field is the relationship between courts and legislator, as the AG's opinion in the *Schrems II* (C-498/16) judgement demonstrates. In that lawsuit, AG Bobek argued that it is not the role of courts to attempt creating collective redress in consumer matters at the stroke of a pen. This is because, considering the complexity of the issue, comprehensive legislation is needed, not an isolated judicial intervention within a related but somewhat remote legislative instrument clearly unfit for that purpose. In AG Bobek's opinion, the legislative process should not be judicially pre-empted or rendered futile.

### 4.1. Power/duty to suspend a standing procedure

#### Relevant CJEU cases in this cluster

- Judgement of the Court (First Chamber), of 14 April 2016, *J. Sales Sinués and Y. D. B. v Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.)*, Joined Cases C-381/14 and C-385/14 ("**Sales Sinués**") - [link](#) to the database for analysis of the lifecycle of the case.
- Judgement of the Court (Fifth Chamber) of 21 December 2016, *Biuro podróży 'Partner' Sp. z o.o., Sp. komandytowa w Dąbrowie Górniczej v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, Case C-119/15 ("**Biuro Podróży Partner**") - [link](#) to the database for analysis of the lifecycle of the case. Within this cluster, the main case which can be taken as a reference point for judicial dialogue within the CJEU and between EU and national courts is *Sales Sinués* (381/14 and C-385/14).

#### Main questions addressed

- Question 1      When national legislation provides for forms of coordination of individual and collective redress, should the former prevail over the latter?
- Question 2      Can the individual action be suspended until the decision on the collective action has been made?

### Relevant legal sources

#### **EU level**

##### Article 7 of 93/13/EC Directive

“1. Member States shall ensure that, in the interests of both consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriately effective means to prevent the continued use of such terms.”

##### Charter of Fundamental Rights of the EU (especially Article 47)

#### **National level**

#### **Spain**

##### Article 43 of the Code of Civil Procedure (*Ley de enjuiciamiento civil*) of 7 January 2000

The Article addresses the case of connection (same subject matter) between two civil proceedings, which cannot be joined unless one of the proceedings may be deemed preliminary to the decision on the other. This provision allows the court to suspend one proceeding in order to wait for the decision by the other.

#### **4.1.1. Question 1 and 2 – The relationship between individual and collective redress: suspensive powers/duties**

1. When national legislation provides for forms of coordination of individual and collective redress, should the former prevail over the latter?
2. Can the individual action be suspended until the decision in the collective action has been taken?

### The case

In 2005, Mr Sales Sinués concluded an agreement for the novation of a mortgage loan with Caixabank which contained a ‘floor’ clause (*cláusula suelo*), i.e. a minimum interest rate below which the interest rate could not fall, independently of market rate fluctuations. In 2013, Mr Sales Sinués brought an individual action seeking annulment of the clause before the *Juzgado de lo Mercantil* nº 9 in Barcelona because of its (alleged) unfair nature.

Given that, in 2010, a collective action had been initiated by a consumer-protection association ADICAE (Asociación de Usuarios de Bancos Cajas y Seguros) against 72 banking institutions,

including Caixabank, seeking (*inter alia*) an injunction that prohibited the continued use of ‘floor’ clauses in loan agreements, Caixabank requested a suspension of the individual action brought by Mr Sales Sinués, pending final judgement in the collective action.

#### Preliminary question referred to the CJEU

The court in Barcelona found that the applicable procedural rules required it to suspend the individual action, which would lead to a subordination of the individual action to the collective action as regards both the course of the proceedings and the outcome. First, the consumer would be necessarily linked to the outcome of the collective action, even if s/he had decided not to participate in it, which would prevent the court from analysing all the circumstances in the individual action. Secondly, the consumer would be dependent on the period within which a final judgement in the collective action was to be given. Thirdly, even if the consumer wanted to participate in the collective action, s/he would be subject to constraints relating to the determination of the competent court and to the pleas that might be put forward.

Because the referring court doubted the compatibility of those procedural rules with EU law, it asked the CJEU the following questions:

Can it [i.e. the applicable procedural rule] be considered an effective means or mechanism pursuant to Article 7(1) of Directive 93/13?

To what extent does the suspensory effect of a stay of proceedings preclude a consumer from complaining that unfair terms included in a contract concluded with him/her are void, and therefore infringe Article 7(1) of Directive 93/13?

Does the fact that a consumer is unable to dissociate him/herself from collective proceedings constitute an infringement of Article 7(3) of Directive 93/13?

Or, on the other hand, is the suspensory effect of a stay of proceedings provided for in Article 43 of the Code of Civil Procedure compatible with Article 7 of Directive 93/13 in that the rights of consumers are fully safeguarded by collective actions – the Spanish legal system provides other, equally effective, procedural mechanisms for the protection of consumers’ rights – and by the principle of legal certainty?

#### Reasoning of the CJEU:

The CJEU joined all the questions presented by the referring court and addressed the protection afforded by Directive 93/13 under Article 7, affirming that the imbalance between the individual consumer and sellers/suppliers cannot be found in the relation between consumer associations and sellers, nor in the proceedings involving them. The CJEU also distinguished the deterrent nature and dissuasive purpose of actions for an injunction, together with their independent (abstract) character.

Although no explicit reference to the Charter was made by the CJEU, the consumer’s right to effective judicial protection (right to adjudication within a reasonable amount of time, right to an effective remedy before a court of law) could be prejudiced if s/he were forced to await the outcome of the collective action.

Under the **principle of effectiveness**, the CJEU assessed the effects of the suspension of the individual action in the Spanish context and acknowledged that, on the one hand, the outcome of the collective action may be binding for the individual consumer, even if s/he has decided not to participate in it; and on the other hand, it may prevent the national court from analysing in

particular the individual negotiation of alleged unfair clauses. In addition, the national court may not examine the relevance of suspension of the individual action. Thus, the applicable procedural rules appeared to be incomplete and insufficient, and did not constitute “adequate and effective means” in the sense of Article 7 of Directive 93/13. The CJEU considered that the need to ensure consistency could not justify those rules, because of the difference in nature between collective and individual actions; thus, there is no risk of incompatible decisions. The effective exercise of subjective rights conferred by Directive 93/13 cannot be called into question by reference to the organization of the Member State’s judicial system.

#### Conclusion of the CJEU:

The individual and collective redress mechanisms, although included in the same article within Directive 93/13, serve a different purpose and have a different nature. The CJEU clarified that the imbalance between consumers and sellers/suppliers is not the same as the relationship between consumer protection associations and sellers; consumer protection associations do not have an inferior position. The fact that the consumer cannot dissociate his/her claim *ex ante* and is bound to the effect of the collective redress *ex post* hampers the effective exercise of consumer rights.

Thus, national law cannot impose automatically the suspension of the individual action “*pending a final judgment concerning an ongoing collective action brought by a consumer association on the basis of Article 7(2) of Directive 93/13 seeking to prevent the continued use, in contracts of the same type, of terms similar to those at issue in that individual action*”.

The decision of the CJEU, however, leaves some leeway as regards the possibility of a case-by-case suspension of the individual action, but without providing specific criteria that may be used by national courts to decide in this regard.

#### Impact on the follow-up case:

The CJEU’s judgement has been interpreted in different ways by national courts in Spain. Roughly speaking, there are two interpretations:

- Individual actions are not connected in any way to collective actions. Individual consumers do not have to wait for the outcome of collective actions, but they also cannot rely on that outcome. This could be considered as a complete ‘opt-out’ for the good and the bad. This is the approach taken by e.g. the *Audiencia Provincial* in Barcelona (decision no. 139/2017 of 30 March 2017).
- While the difference between individual and collective actions must be acknowledged, an abstract assessment of unfair terms in a collective action could/should help individual consumers. This is the approach taken by the *Juzgado de lo Mercantil* in Barcelona (e.g. *Juzgado de lo Mercantil* n° 9, decision n° 413/14-D3 of 11 July 2016): if certain terms are found to be unfair in a collective action, the corresponding claim in an individual action should be awarded without further formalities; if the term is found to be valid, the individual consumer is still entitled to an assessment of his/her personal and specific circumstances. The judgement involved Catalunya Banc, which had also been a party to the collective proceedings initiated by ADICAE.

#### Elements of judicial dialogue:

The referring court sought guidance from the CJEU in a situation in which (1) the case law at the national level was not unanimous and (2) it was not sure whether the approach taken by its own Court of Appeal was compatible with EU law. A similar issue was already a matter of

dialogue between Spanish courts and CJEU, as the latter evaluated the unfairness of jurisdiction clauses to be applied to collective claims in C-413/12 (*Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL*). Thus, the referring court seems to have relied on the use of preliminary reference in order to trigger an intervention of the CJEU in favour of the interest of individual consumers. The preliminary reference is structured as a request to indicate the means to solve the conflict.

The outcome of the *Sales Sinues* decision (381/14 and C-385/14) was subsequently addressed by the CJEU with regard to the power of the judge to “adopt interim relief of its own motion, for as long as it considers appropriate, pending a final judgment in an ongoing collective action, the outcome of which may be applied to the individual action” (*Oliva* decision, C-568/14 to 570/14). In the *Oliva* decision, the Court ruled in essence that, while the conclusions of *Sales Sinues* (381/14 and C-385/14) regarding the suspension or stay of the individual proceedings remain valid, the consumer must be provided with “temporary protection to mitigate the negative effects of excessively long court proceedings, unless he has expressly made an application for the adoption of interim measures” for as long as there is an ongoing collective action. The Court ruled that, although the principle of procedural autonomy empowers the Member States to lay out the procedural framework for the exercise of the rights conferred by EU Law, the principle of effectiveness must be respected. In the case addressed, the interim relief would be essential for the full and effective protection of the consumer, preventing the counterparty from carrying on using an unfair contractual term .

[Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU](#)

## Italy

A case regarding the coordination between individual and collective action, but not exactly on the question of the suspension of the individual proceeding *vis-à-vis* the collective one, can be found in the decision of Tribunal of Rome, 2 November 2016, no. 20283, which stated that “Article 140-bis legislative decree 206/2005 allows the consumer to present a collective action, but it does not limit the possibility for the consumer to present an individual action. The collective action is only one of the remedies available for the individual, who can always pursue the individual remedies”.

A similar question had been addressed by Italian jurisprudence before the *Sales Sinués* decision (381/14 and C-385/14), in a decision of the Court of Appeal of Rome, (24 September 2002), which stated that the collective action for an injunction is a general and abstract one, which may affect the clauses that are included in all of the potential and actual contracts concluded by the professional. The same clause, however, may be legitimately included within a single contract for which a specific negotiation on the clause has taken place between the consumer and the professional. Thus, the two proceedings unfold on partially different levels, and the issuing of an injunction has the consequence of the unlawfulness of the automatic insertion of those clauses in contracts as general conditions. Moreover, the injunction does not always determine the consequences of the nullity of a contract clause which in certain circumstances may be valid.

## Portugal

Collective actions in Portugal are regulated by Law 83/95, of August 31st (as amended). The legal regime is based on an opt-out system. Hence, a court, before which an individual action has been brought by a consumer seeking a declaration that a contractual term binding him/her to a seller or supplier is unfair, would automatically suspend such an action pending a final judgement concerning an ongoing collective action brought by a consumer association on the basis of Article 7(2) of Directive 93/13 seeking to prevent the continued use, in contracts of the same type, of terms similar to those at issue in that individual action, would not be feasible in Portugal.

### 4.2. *Erga omnes* effects of decisions<sup>22</sup>

#### Relevant CJEU cases in this cluster

- Judgement of the Court (First Chamber), of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Case C-472/10 (“**Invitel**”).
- Judgement of the Court (Fifth Chamber) of 21 December 2016, *Biuro podróży 'Partner' Sp. z o.o, Sp. komandytowa w Dąbrowie Górniczej v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, Case C-119/15 (“**Biuro Podróży Partner**”) - [link](#) to the database for analysis of the lifecycle of the case.
- Judgement of the Court (First Chamber), of 14 April 2016, *J. Sales Sinués and Y. D. B. v Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.)*, Joined Cases C-381/14 and C-385/14 (“**Sales Sinués**”) - [link](#) to the database for analysis of the lifecycle of the case.

Within this cluster, the main cases which can be presented as reference points for the judicial dialogue within the CJEU and between EU and national courts are *Invitel* and *Biuro Podróży Partner*.

#### Main questions addressed

- Question 1      If a consumer has not participated in the proceedings in which a clause has been declared unfair, can s/he refer to this declaration in his/her own dispute with a professional, even if his/her contract has been concluded after the clause has been declared abusive? Does the involvement of an organisation or public authority acting for consumers’ collective interests alter the answer to this question?
- Question 2      Are there differences in the effects of a declaration of unfairness depending upon whether only a particular professional participated in the judicial review of the clause, or an organisation representing the industry was involved?

#### Relevant legal sources

##### EU level

93/13/EC Directive (especially Article 7)

Charter of Fundamental Rights of the EU (especially Article 47)

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<sup>22</sup> By Mateusz Grochowski and Monika Jozon.

## National level (Hungary and Poland)

### Hungary

#### Articles 209 – 209/B of the Hungarian Civil Code

The provisions in question set forth the general test of fairness of clauses in B2C contracts, implementing the respective test introduced in the EU 93/13/EC Directive. Moreover, they vest a number of bodies with competence to claim declaration of invalidity of such terms in judicial proceedings. The declaration of abusiveness is to be effective for every party contracting with a seller or supplier who applied a particular term. The bodies competent to seek declaration of unfairness may also claim a clause to be abusive regardless of whether it has been applied in any contract that was actually concluded.

### Poland

#### Articles 479<sup>36-45</sup> of the Polish Code of Civil Procedure

The provisions regulated the *in abstracto* review of contract clauses. They were intended to protect collective consumers' interests if unfair terms had been introduced into contracts by professionals. Review of the clauses was based on the general model derived from the 93/13/EC Directive (using the general clause as a criterion of assessment), but it led to different effects. When a clause was found unfair *in abstracto*, the court would issue an injunction that prohibited its use, and order the entry of this clause in a public register maintained by the President of the Office of Competition and Consumer Protection [*Prezes Urzędu Ochrony Konkurencji i Konsumentów*] – i.e., the national consumer regulatory authority. Every final judgement was also made public by being published in the “Court and Commercial Gazette” [*Monitor Sądowy i Gospodarczy*]. The injunction and the publishing procedure were intended to protect the collective interests of all consumers who might sign a contract containing the particular clause. This was established in particular in Article 479<sup>43</sup> of the Code of Civil Procedure, which set forth an extended effect of a declaration of unfairness, stating that a judgement finding a clause to be abusive *in abstracto* is “effective towards third persons”.

The rules in question are no longer in force and (as of 2016) the *in abstracto* review of B2C clauses has been transformed from the judicial to the administrative model (the review is currently carried out by the President of the Office of Competition and Consumer Protection).

#### 4.1.2. Question 1 – Unfairness and protection of collective consumers' interests

If a consumer has not participated in the proceedings in which a clause has been declared unfair, can s/he refer to this declaration in his/her own dispute with a professional, even if his/her contract has been concluded after the clause has been declared abusive? Does the involvement of an organisation or public authority acting for the consumers' collective interests alter the answer to this question?

### The case

The answers to these questions have been given principally in the *Invitel* decision (C-472/10). The CJEU decided therein upon the preliminary question that had been referred by the Pest County Court (*Pest Megyei Bíróság*), which was deciding a case brought by the Hungarian consumer protection authority (*Nemzeti Fogyasztóvédelmi Hatóság – NFH*) against a telecom operator (*Invitel Távközlési Zrt*). The proceedings initiated by NFH were intended to protect collective consumers' interests, and aimed at obtaining a judicial declaration of unfairness so that consumers could obtain reimbursement of the fees paid under the clauses in question.

### Preliminary question referred to the CJEU:

The questions referred to in the *Invitel* case were:

May Article 6(1) of the 93/13/EC Directive be interpreted as meaning that an unfair contract term is not binding on any consumer when a body appointed by law and competent for the purpose seeks a declaration of the invalidity of that unfair term which has become part of a consumer contract on behalf of consumers in an action in the public interest (*actio popularis*)?

May Article 6(1) of that Directive be interpreted, when an order which benefits consumers who are not party to the proceedings is issued, or the application of an unfair standard contract term is prohibited, in an action in the public interest, as meaning that an unfair term which has become part of a consumer contract is not binding on all consumers also as regards the future, so that the court has to apply the consequences in law thereof of its own motion?

### Reasoning of the CJEU

In the *Invitel* case (C-472/10), as the starting point of its reasoning, the CJEU emphasized an obligation of the Member States, set forth in the 93/13/EC Directive, to provide adequate, dissuasive, and effective means when unfair terms are used in consumer contracts. These means undoubtedly include, according to the Court, granting individuals or organizations the right to initiate a judicial review of clauses in order to protect consumers' (collective) interests. Moreover, the principle of dissuasiveness justifies an application of the review initiated thereby to the clauses which – although included in the published standard terms – have never become a part of any contract actually concluded. Further, due to the principle of effectiveness, the clauses found unfair ought to be non-binding on all the consumers, regardless as to whether or not they were parties to the proceedings where the injunction was issued.

### Conclusion of the CJEU:

The CJEU ruled that the declaration of unfairness of a clause – and a judicial injunction resulting therefrom – is effective for every consumer who concludes a contract which uses a particular term. Therefore, the CJEU stated that a Member State can construe a review of abusiveness as a means to protect the collective interests of consumers.

The conclusion reached in the *Invitel* case (C-472/10) has created more substantial outcomes for the practical aspects of protecting collective consumer interests through regulation of unfair contract terms. The conclusion in question is especially important for those cases in which consumers are represented by public bodies or non-governmental organisations acting in favour of collective consumers' interests. Injunctions that are effective *erga omnes* allow these entities to effectively protect all consumers contracting with particular professionals.



### Elements of judicial dialogue:

The *Invitel* (C-472/10) and *Biuro Podróży Partner* (C-119/15) decisions supplement each other. They jointly establish a comprehensive standard for the *erga omnes* efficiency of injunctions issued by courts or other domestic bodies which prohibit the use of particular clauses as abusive. The *Biuro Podróży Partner* case (C-119/15) is closely related to the CJEU's *Invitel* decision (C-472/10), complementing its conclusions with a professional party's issue. As a result, the *Invitel* (C-472/10) judgement ascertains the admissibility and limits of the protection of collective consumers' interests from the perspective of claims brought by consumers themselves. The *Biuro Podróży Partner* decision (C-119/15) determined the range of professionals who are obliged to comply with an injunction (issued without their direct participation) and who may be made liable for using a particular contract clause.

### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

#### **Italy**

The issue of the legal effects of prohibitory injunctions enacted by courts was assessed by the Italian Court of Cassation already with decision no. 13051/2008, which ruled that an injunction prohibiting the use of particular clauses had an effect on both the existing contractual relationship – i.e. at the moment of the issuance of the injunction – and future relationships. The Court pointed out that only by producing an effect upon the future, and thus preventing the use of abusive clauses, could a collective prohibitory injunction function as an adequate instrument of judicial protection. This statement holds particular value with regard to those contracts – such as banking contracts – where clauses usually produce effects repeatedly over time.

Other decisions of Italian lower courts have reassessed such principles and ruled that prohibitory injunctions have an effect on existing relationships as well as on relationships to be concluded in the future with the same professional (see Tribunal of Milan, decisions of 25 March, 3 April, 1, 13, 29 July, and 1 October 2015, 12 March, 5 April 2018; Tribunal of Biella, 7 July 2015; Tribunal of Rome, 20 October 2015, Tribunal of Ivrea, 29 March 2018). Moreover, another decision by the Milan Tribunal (of 5 August 2015) explicitly referred to the effectiveness of the collective prohibitory injunction, pointing out that, without producing *erga omnes* effects both for the present and for the future, the injunction would not fulfil its purpose of preventing damage caused by abusive clauses, thus also discouraging individual consumers from initiating lengthy and expensive individual actions in order to protect their rights.

#### **4.1.3. Question 2 – The collective prohibitory effect of unfairness control**

Are there differences in the effects of a declaration of unfairness depending upon whether only a particular professional participated in the judicial review of the clause, or an organisation representing the industry as a whole?

### The case and Preliminary question referred to the CJEU

The answer to this question was provided implicitly in the *Biuro Podróży Partner* decision (C-119/15). The CJEU was resolving a question referred by the Court of Appeal of Warsaw in a

case concerning a pecuniary fine imposed by the national regulatory authority (Office of Competition and Consumer Protection) on a professional (a travel agency named “Partner”) for its use of a contract clause that had been previously declared abusive towards another professional. The travel agency lodged an appeal with the Court of Competition and Consumer Protection (a specialized division of the District Court of Warsaw), within a scheme of judicial control of the decisions of the President of the Office, provided by Polish law.

In its decision of 11 October 2013, the court of the first instance dismissed the appeal, agreeing that the clause used by the travel agency was prohibited, and already declared abusive *in abstracto*. The judgement was challenged by the travel agency before the Court of Appeal of Warsaw. Due to the Polish provisions in force at that time – discussed at length above – the unfairness of a clause could be declared *in abstracto* – with an extended effect. Consequently, an injunction was able, in principle, also to protect collective consumer interests, and not just the individual interests of the parties involved in the review proceedings. By its preliminary question, the Court of Appeal of Warsaw considered, amongst other issues, the precise scope of the collective interests of consumers that are protected by unfair clauses legislation *vis-à-vis* professionals:

In light of Article 6(1) and Article 7 of [Directive 93/13], in conjunction with Articles 1 and 2 of [Directive 2009/22], can the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in the register of unlawful standard contract terms be regarded, in relation to another undertaking which was not a party to the proceedings culminating in the entry in the register of unlawful standard contract terms, as an unlawful act which, under national law, constitutes a practice which harms the collective interests of consumers and for that reason forms the basis for imposing a fine in national administrative proceedings?

#### Reasoning of the CJEU:

According to the CJEU’s reasoning, the review of contract clauses from the perspective of their abusiveness has a clear collective dimension. It can be used to protect consumers’ collective interests by extending the effects of the control beyond the relation between the parties of the particular proceedings. In other words, it is possible for domestic legal systems to provide extended effects of the declaration of non-bindingness of unfair terms, especially allowing it to act “for” all consumers or “against” all business parties who use the particular clause. Although the former case seems rather straightforward (particularly in light of the CJEU’s *Invitel* judgment, (C-472/10), the latter is much more controversial. It gives rise to profound concerns about fundamental rights – in particular, the right to access a court (which may be significantly limited if any sort of *erga omnes* efficacy is introduced).

As a result, the CJEU’s *Biuro Podróży Partner* judgement (C-119/15) pointed out that the *erga omnes* effect of abusive clauses is admissible “against” all the business parties (even those not involved in the proceedings where the abusiveness has been ascertained) only so long as the minimal procedural guarantees have been met. Especially – according to Article 47 CFREU – the business party ought to be able to effectively challenge the judicial or administrative decision declaring that terms of the particular contract are similar or identical with the terms that have been previously declared to be abusive. This standard is a clear basis for introducing collective redress that may be effective against (possibly) unlimited groups of business entities.

### Conclusion of the CJEU

The CJEU concluded that a business party may be made liable for using a clause that has been found unfair in other proceedings and prohibited from being used with a general injunction. The result in question is admissible, however, only so long as the domestic law provides the professional with effective measures to challenge the decision that found the clause used by him/her to be identical with the clause previously prohibited as unfair. The measure in question should satisfy the requirement of “effective judicial remedy” set forth in Article 47 CFREU.

It follows from these conclusions that an injunction that prohibits the use of a contract clause with respect to an individual professional is not effective, automatically and unconditionally, against all other professionals that are active in the market. To ascertain this effect, the domestic court has to review whether the national law meets the minimal procedural guarantees set forth in the *Biuro Podróży Partner* case (C-119/15). The situation may change if the review of clauses was conducted against an industrial organisation representing the collective interests of a group of professionals or an entire sector of industry (within the meaning of Article 7, section 2 of the 93/13/EC Directive). In such a case, a declaration of abusiveness can be made effective against every professional whose interests have been aggregated by the organisation. This would fulfil the procedural guarantee of a right to defence specified in the *Biuro Podróży Partner* decision (C-119/15). For other professionals, due to the guidelines provided by the CJEU, the standard in question has to be examined separately.

### Impact on the follow-up case:

Because of the profound change in the procedure for the abstract review of contract clauses (see the introductory remarks on the Polish legislative reform of April 2016 in Chapter 2 above), the judgement dealt with a provision no longer in force. Under the current model (in force as of 2016), the *in abstracto* examination of clauses has been regulated as being the exclusive competence of the President of the Office of Competition and Consumer Protection, thus becoming a part of the administrative enforcement scheme. However, the *Biuro Podróży Partner* decision (C-119/15) still has relevance for the *ratione personae* effects of declarations of abusiveness made in the former ‘judicial’ model.

### Elements of judicial dialogue:

See above under the first question.

### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU:

#### **Portugal**

Collective actions in Portugal are regulated by Law 83/95, of August 31<sup>st</sup> (as amended). Collective actions are not admissible when the professional is in position to present an individual defence *vis-à-vis* the consumer.

### 4.3. Intervention of a consumer-protection association in the proceedings subject to the consumer's consent

#### Relevant CJEU cases

- Judgement of the Court (Third Chamber), 27 February 2014. *Pohotovost' s. r. o. v Miroslav Vašuta*, C-470/12, ("**Pohotovost'**") - [link](#) to the database for the analysis of the lifecycle of the case
- Judgement of the Court (Eighth Chamber) of 20 September 2018, *EOS KSI Slovensko s.r.o. v J. D. and M. D.*, Case C-448/17 ("**EOS KSI'**")

#### Main question addressed

Question 1 What is the impact of the principles of effectiveness, proportionality, equivalence, dissuasiveness, and of Article 47 CFR, on the role of consumer protection associations in regard to actions brought by an individual consumer?

#### Relevant legal sources

##### EU level

##### Directive 87/102

Art. 1

(...) 2. For the purpose of this Directive:

- d) "total cost of the credit to the consumer" means all the costs, including interest and other charges, which the consumer has to pay for the credit;
- e) "annual percentage rate of charge" means the total cost of the credit to the consumer, expressed as an annual percentage of the amount of the credit granted and calculated in accordance with Article 1a."

##### Art. 1a states:

"(a) The annual percentage rate of charge, which shall be that rate, on an annual basis which equalises the present value of all commitments (loans, repayments and charges), future or existing, agreed by the creditor and the borrower, shall be calculated in accordance with the mathematical formula set out in Annex II.

(...)

2. For the purpose of calculating the annual percentage rate of charge, the "total cost of the credit to the consumer" as defined in Article 1(2) (d) shall be determined, with the exception of the following charges: ...

- (a) The annual percentage rate of charge shall be calculated at the time the credit contract is concluded, without prejudice to the provisions of Article 3 concerning advertisements and special offers.

(b) The calculation shall be made on the assumption that the credit contract is valid for the period agreed and that the creditor and the consumer fulfil their obligations under the terms and by the dates agreed. ...

6. In the case of credit contracts containing clauses allowing variations in the rate of interest and the amount or level of other charges contained in the annual percentage rate of charge but unquantifiable at the time when it is calculated, the annual percentage rate of charge shall be calculated on the assumption that interest and other charges remain fixed and will apply until the end of the credit contract. ...”

Article 4(2) of that directive provides:

“The written agreement shall include:

(a) a statement of the annual percentage rate of charge;

(b) a statement of the conditions under which the annual percentage rate of charge may be amended. ...”

Directive 87/102 was repealed with effect from 11 June 2010 in accordance with Article 29 of Directive 2008/48/EC. Given the date of the facts at issue in the main proceedings, it is Directive 87/102 which is applicable in the present case.

#### Directive 93/13

According to Article 1(2) of Directive 93/13:

“The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the [European Union] are party, particularly in the transport area, shall not be subject to the provisions of this Directive.”

Article 3(1) of that Directive (See Chapter 1, § 1.2.1.); Article 4 of that Directive (See Chapter 1, § 1.3.1.)

Article 5 of the Directive is worded as follows:

“In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).”

Article 6(1) of that Directive (See Chapter 1, § 1.2.1.); Article 7 of that Directive (See Chapter 1, §1.1.1.)

Article 8 of the same Directive provides:

“Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.”

## National level

### Slovakia

Article 53a of the *Občiansky zákonník* (Civil Code), which transposes Article 7(1) of Directive 93/13, prohibits any seller or supplier from continuing to use a contractual term which has been held to be unfair by a court in a judgement given in a dispute in the field of consumer law. However, that provision requires the consumer to initiate the proceedings or, if s/he is the defendant, to lodge a procedural document.

Article 93 of the *zákon č. 99/1963 Zb., Občiansky súdny poriadok* (Law No 99/1963 on the Civil Procedure, Code in the version applicable at the material time ('the Code of Civil Procedure')), provides:

“(1) A person who has a legal interest in the outcome of the proceedings may participate in proceedings as an intervener in support of the forms of order sought by the applicant or the defendant ...

(2) A legal person, the purpose of whose activity is the protection of rights under specific legislation, may also participate in proceedings as an intervener in support of the forms of order sought by the applicant or the defendant.

(3) That legal person may participate in proceedings of its own initiative, or at the request of a party transmitted to it by the court. The court will adjudicate on the admissibility of the intervention only if requested to do so.

(4) In the proceedings, the intervener has the same rights and obligations as a party to those proceedings. However, it acts only on its own behalf. If its pleadings oppose those of the party on whose behalf it is intervening, the court must assess them after examining all the circumstances.”

#### Under Article 172 of the Code of Civil Procedure:

“(1) Even failing a specific request by the applicant, and without hearing the defendant, the court may issue an order for payment, if, in the application, the right to payment of a sum of money based on the facts alleged by the applicant is claimed. In an order for payment, it shall order the defendant to pay the applicant within 15 days of its notification the debt payable plus legal costs, or to lodge an objection at the court which issued the order for payment. The objection against the order for payment must contain a statement of reasons on the substance.  
...

(3) If the court does not issue an order for payment, it shall order a hearing to be held. (...)

(7) If the application relies on a right which in part is in clear contradiction with the legislation, the court shall issue an order for payment, with the applicant's consent, only for the part which is not affected by that contradiction; once consent is given, the subject matter of the procedure is limited to that part of the application and the court will not adjudicate on the remainder. Even after the issue of the order for payment, the subject matter of the proceedings shall continue to

be the part of the application on which the court adjudicated by issuing that order for payment; that provision shall apply also if an objection is lodged. ...

(9) Where a claim for a right to payment of a sum of money is made on the basis of a consumer contract and where the defendant is a consumer, the court shall not issue an order for payment if the agreement contains unfair terms.”

According to Article 4(2)(g) of Law No 258/2001 on consumer credit, applicable to the facts in the main proceedings, a consumer credit agreement which does not state the annual percentage rate of the charge (‘APR’) is to be deemed interest-free and free of charge.

#### The case

On 24 October 2005, Mr J. D. concluded with the *Všeobecná úverová banka a.s* a revolving consumer credit agreement that amounted to 30,000 Slovenian crowns (SKK) (approximately 995 euros). The lender transferred its debt to the debt recovery company EOS. Relying on a breach of that agreement by the borrower, EOS brought an action for payment before the District Court of Humenné. On 24 August 2012, that court granted the order for payment sought. That order was not granted by a magistrate, but by a civil servant, and the court did not take account of the fact that the credit agreement at issue did not mention the APR and failed to examine the possible unfair nature of the contractual terms. The Slovak consumer protection association, ‘HOOS’, intervening in support of the rights of Mr D. and Mrs D., lodged an objection against the order for payment.

By order of 17 January 2013, the District Court of Humenné dismissed the objection on the ground that, as the consumer had not lodged the objection himself, the conditions necessary for HOOS to be able to intervene in the proceedings were not satisfied.

Hearing an appeal brought by HOOS, by order of 30 September 2013, the Regional Court of Prešov, set aside the order of the District Court of Humenné to arrange for a hearing, to take evidence, and to give a fresh ruling on the substance of the dispute after carrying out a judicial review of the contract terms of the credit agreement in the main proceedings. The Regional Court of Prešov upheld the objection of the HOOS on the ground that that association had the same rights as a consumer borrower, and held that the case in the main proceedings could not be subject to the expedited procedure which makes no provision for a hearing or the taking of evidence.

The Principal Public Prosecutor lodged an extraordinary appeal in cassation against the decision of the Regional Court of Prešov, before the Supreme Court. By order of 10 March 2015, the Supreme Court set aside the order of the Regional Court of Prešov and referred the case back to that court. The Supreme Court held that the intervention of a consumer protection association can take place only after contentious proceedings have been initiated: that is, only when the consumer lodges a statement of opposition against an order for payment.

The Regional Court of Prešov asked whether national legislation satisfied the principle of equivalence laid down by EU law, as regards the conditions under which a consumer protection

association may intervene in proceedings in the interests of the consumer, in relation to the general rules of Slovak law on intervention in the interests of the defendant.

In that connection, the referring court stated that, when a consumer who is a defendant in a case, in proceedings intended to prevent the use of unfair terms in contracts with a seller or supplier referred to in Article 53a of the Civil Code, is inattentive or inactive or uncontactable, his/her rights would not be adequately protected if the court dealing with a request for the grant of an order for payment were to waive its review of the unfairness of the terms concerned.

The provisions of Slovak law do not permit a consumer-protection association to intervene in the interests of the consumer in the proceedings because those provisions require that:

- the consumer must give written consent to such an intervention;
- the pleas in defence raised by that association must also be approved by the consumer as the defendant;
- the consumer must give his/her consent for such an association to bring an action against a judgement concerning him/her.

According to the referring court, in the main proceedings, Slovak law was applied less favourably than in a situation without any elements of EU law, contrary to the case-law laid down in the judgement of 27 February 2014, *Pohotovost'* (C-470/12, paragraph 46). In a situation which is not covered by EU law, the dispute arises on the day on which the originating application is lodged before the national court, so that the intervener is authorised to intervene in the proceedings from its inception.

#### *Preliminary questions referred to the CJEU*

“(1) In the light of the judgment [of 27 February 2014, *Pohotovost'*, C 470/12], and the considerations set out by the [Court] at paragraph 46 [thereof], is a legal provision incompatible with the principle of equivalence under EU law when — in the context of the equivalence of the interests protected by law and the protection of consumer rights against unfair contractual terms — it does not permit, without the defendant consumer’s consent, a legal person whose activity involves the collective protection of consumers against unfair contractual terms and is designed to achieve the objective set out in Article 7(1) of [Directive 93/13], as transposed by Article 53a(1) and (3) of the Civil Code, to participate as an intervener in legal proceedings from the outset and to make effective use, for the consumer’s benefit, of the means of action and defence in court proceedings, in order to secure, in the context of such proceedings, protection from the systematic use of unfair contractual terms; whereas, in other circumstances, another party (intervener), intervening in court proceedings in support of the defendant and having an interest in the resolution of the subject matter on the merits (from a patrimonial view point) that is the object of the proceedings, does not in fact, unlike a consumer protection association, require the consent of the consumer, on whose behalf it is intervening, in order to take part in the proceedings from the outset and effectively exercise the means of defence and action for the defendant’s benefit?”



### Reasoning of the CJEU

The CJEU considered that neither Directive 93/13 nor the Directives which followed it contain any provision governing the role which may or must be accorded to consumer protection associations in individual disputes involving a consumer. Thus, Directive 93/13 does not govern whether such associations must be entitled to intervene in support of consumers in such individual disputes. Therefore, in accordance with the principle of procedural autonomy, Member States must establish rules on this topic, respecting the principles of equivalence and effectiveness. **The judgement is based on the application of the principle of equivalence**, which precludes national legislation which subjects the intervention by consumer protection organizations in disputes falling within the scope of EU law to conditions less favourable than those applicable in disputes which fall exclusively within the scope of national law. Whereas, in accordance with national law, in a case without any elements of EU law proceedings are initiated on the day on which the originating application is lodged with a court, so that the intervener is authorised to intervene in the proceedings from the outset, it appears, by contrast, that in the case in the main proceedings, which falls within the scope of EU law, the proceedings are initiated only when the consumer challenges an order for payment so that the consumer protection association concerned may intervene only from the time the objection is lodged. It is for the national court to determine whether the principle of equivalence is observed in the case before it, examining the actions concerned in the light of the subject matter, cause of action and their essential elements.

The CJEU, recalling *Pohotovost* (C-470/12), stated that the refusal to grant the association leave to intervene in proceedings involving a consumer did not affect its right to an effective judicial remedy to protect its rights as an association of that kind, including its rights to collective action as recognized by Article 7(2) of Directive 93/13.

### Conclusion of the CJEU

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read together with the principle of **equivalence**, must be interpreted as meaning that it precludes national legislation which prevents a consumer protection organisation from intervening, in the interests of the consumer, in proceedings seeking an order for payment concerning an individual consumer and to lodge an objection in the absence of a challenge to that order by the consumer if that legislation in fact subjects intervention by consumer associations in disputes falling within the scope of Union law to conditions less favourable than those applicable to disputes exclusively within the scope of national law, which is for the referring court to ascertain.

### Elements of judicial dialogue

The CJEU, in deciding the EOS KSI (C-448/17), mentioned *Photovost*' (C-470/12). In that case, the CJEU applied the principle of equivalence stating that in the concrete case there was not a violation of that principle. With regard to Article 47 CFR, in *Photovost*' (C-470/12) the CJEU stated that neither Article 38 CFR nor Article 47 CFR can, by itself, impose an interpretation of Directive 1993/13 which gives consumer protection associations the right to intervene in individual disputes involving consumers. Furthermore, in *Photovost*' (C-470/12) the CJEU

considered that the refusal to grant the association leave to intervene in proceedings involving a consumer did not affect the association's right to an effective judicial remedy set forth in Article 47 CFR to protect its rights as an association of that kind, including its rights to collective action as recognized by Article 7(2) of Directive 93/13. Furthermore, with regard to the principle of equivalence, in *Photovost*' (C-470/12) the CJEU considered that the applicable Paragraph 37(1) of the national Enforcement Code precludes the intervention of any third party in all enforcement proceedings of a decision of a national court or of a final arbitration award, whether the intervention in question is based on the infringement of European Union law or national law. Thus, the CJEU stated that such national legislation cannot be regarded as infringing the principle of equivalence because it does not allow a consumer protection association to intervene in proceedings for enforcement of a final arbitration award.

*Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

**Slovakia**

In its judgement of 10 March 2015, 8 MCdo 6/2014, the Supreme Court relied on *Photovost*' (C-470/12) in deciding a case where a consumer was sued for payment of outstanding consumer credit debt by the claimant. In this case, the first-instance court issued an order for payment (summary decision issued without a hearing only on the basis of the claimant's application and supporting documents), which was duly served on the defendant, who was free to file an opposition within 15 days. During that term, a consumer association filed the opposition and stated that it wanted to become an intervener under Article 93 of Civil Procedure Code. The first-instance court rejected the opposition because it deemed that the association was not allowed to file it. The appellate court quashed that decision and remanded the case for further consideration, relying on Article 6 of Directive 93/13/EEC.

The Supreme Court quashed the appellate decision. That Court did not rely on Article 47 CFREU as a legal basis for accepting the rights of the party (intervener) in the proceedings, but rather as a negative demarcation line in order to support its conclusion that accepting the consumer association's position as an intervener in the proceedings for order of payment was not required. On the basis of the CJEU's judgement C-470/12, the Supreme Court concluded that Article 47 CFREU does not guarantee consumer associations access to court as interveners. Furthermore, not allowing consumer associations to file opposition against an order for payment does not contravene the principle of equivalence. Situations within the scope of EU law are not treated differently in this respect from purely intra-state situations.

*Pending cases before the CJEU*

**C-873/19 (Opinion of the Advocate General)**

*Deutsche Umwelthilfe eV*, an approved environmental association, brought an administrative action against the German EC-type approval authority that had authorized a special software used in vehicles manufactured by Volkswagen AG because it considered that the software was a “defeat device”.

The referring court considered that the association did not have legal standing.

### Preliminary questions referred to the CJEU

- (1) “Whether Article 9(3) of the Aarhus Convention, (3) read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, requires that such an association be entitled to challenge, before the national courts, an administrative decision granting EC type-approval of vehicles in the light of Article 5(2) of Regulation No 715/2007.”
- (2) If the answer to the first question was affirmative, “whether the ‘need’ for a defeat device, within the meaning of Article 5(2) of that regulation, is to be assessed according to the state of the art existing on the date of the EC type-approval of the vehicles concerned and whether account must be taken of other circumstances which may render such a defeat device permissible.”

### Reasoning of the Advocate General

Regarding the possibility of associations to bring claims before the national courts, the Advocate General established the scope of Article 9(3) of the Aarhus Convention to be, in its material side, national law related to the environment, and the concerned regulation is environmental law, and not solely a technical regulation. As for the personal scope, it applies to “members of the public ... who meet the criteria ... laid down by national law”. The *Deutsche Umwelthilfe* is an approved environmental association which is entitled to bring legal proceedings in accordance with national law whose purpose is to contribute to the protection of nature and the environment and also to health- and environment-related consumer protection, consequently it is “the public concerned”, within the meaning of Article 2(5) of the Aarhus Convention.

Regarding the implications of Article 9(3) of the Aarhus Convention read together with Article 47 of the Charter, the Advocate General stated that it imposes on Member States “an obligation to ensure effective judicial protection of the rights conferred by EU law” despite not having a direct effect in EU law. The right to bring procedures established in Article 9(3) would be void of its useful effect if certain categories of the “public concerned” were denied the legal standing to bring proceedings. The objective of the associations is to defend the public interest, and the EU environmental laws are set out in the public interest; therefore, those associations cannot be denied the right to bring proceedings. Limitation on the exercise of rights should respect the essential content of freedoms, only be made when necessary, and meet objectives of general interest. Denying standing to the association does not meet those objectives.

## **4.4. Representative actions by consumer protection associations and interaction with unfair commercial practices**

### **Relevant CJEU case**

- Judgement of the Court (Third Chamber), 28 April 2022, *Meta Platforms Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände*, C-319/20, (“**Meta**”)

Question 1 Can a consumer protection association bring an action based on the prohibition of unfair commercial practices and liable to affect personal data protection rights,

in the absence of a mandate granted to it for that purpose and independently of the infringement of specific rights of the data subjects?

Regulation (EU) 2016/679 (the 'GDPR')

Article 80 of the GDPR, entitled 'Representation of data subjects', is worded as follows:

"1. The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.

2. Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing."

Article 82 of that regulation, headed 'Right to compensation and liability', provides, in paragraph 1 thereof:

"Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered."

Directive 2005/29/EC

Article 11(1) of that Directive, entitled 'Enforcement', provides:

"Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.

Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may:

(a) take legal action against such unfair commercial practices;

and/or

(b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established

means of dealing with complaints, including those referred to in Article 10. These facilities shall be available regardless of whether the consumers affected are in the territory of the Member State where the trader is located or in another Member State. [...]"

#### Directive 2009/22/EC

Article 7 of Directive 2009/22, entitled 'Provisions for wider action', is worded as follows:

"This Directive shall not prevent Member States from adopting or maintaining in force provisions designed to grant qualified entities and any other person concerned more extensive rights to bring action at national level."

#### Directive (EU) 2020/1828

Article 2 of that Directive, headed 'Scope', provides, in paragraph 1 thereof:

"This Directive applies to representative actions brought against infringements by traders of the provisions of Union law referred to in Annex I, including such provisions as transposed into national law, that harm or may harm the collective interests of consumers. This Directive is without prejudice to the provisions of Union law referred to in Annex I. ..."

Annex I to Directive 2020/1828, which contains the list of provisions of EU law referred to in Article 2(1) thereof, refers to the GDPR in point 56 thereof.

### **National level**

#### **Germany**

##### Law on injunctions

Under Paragraph 2 of the *Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz – UKlaG)* (Law on injunctions against infringements of consumer law and other infringements) of 26 November 2001 (BGBl. 2001 I, p. 3138), in the version applicable to the dispute in the main proceedings ('the Law on Injunctions'):

"(1) Any person who infringes rules in place to protect consumers (consumer protection laws), other than in the application or recommendation of general terms and conditions, may be subject to an order to cease and desist or a prohibition order in the interest of consumer protection. ...

(2) For the purposes of this provision, 'consumer protection laws' means, in particular:

...

11. the rules defining lawfulness

(a) of the collection of personal data of a consumer by an undertaking or

(b) the processing or use of personal data which have been collected by a business in relation to a consumer,

where the data are collected, processed or used for the purposes of publicity, market and opinion research, use by an information agency, a personality and usage profile establishment, of any other data business or for similar commercial purposes.”

#### Law against unfair competition

Paragraph 3(1) of the *Gesetz gegen den unlauteren Wettbewerb* (Law against unfair competition) of 3 July 2004 (BGB1. 2004 I, p. 1414), in the version applicable to the main proceedings (‘the Law against unfair competition’), provides:

“Unfair commercial practices shall be prohibited.”

Paragraph 3a of the Law against unfair competition is worded as follows:

“A person shall be considered to be acting unfairly where he or she infringes a statutory provision that is also intended to regulate market behaviour in the interests of market participants and the infringement is liable to have a significantly adverse effect on the interests of consumers, other market participants or competitors.”

Paragraph 8 of the Law against unfair competition lays down:

“(1) Any commercial practice which is unlawful under Paragraph 3 or Paragraph 7 may give rise to an order to cease and desist and, in the event of recurrence, an order to refrain or a prohibition order. ...

...

(3) Applications for the injunctions referred to in subparagraph (1) may be made:

...

3. by qualified entities which provide evidence that they are included in the list of qualified entities, in accordance with Paragraph 4 of the [Law on injunctions] ...”

#### The case

The German Federal Union of Consumer Organisations and Associations (henceforth the ‘Federal Union’) brought an action against Meta Platforms (Facebook’s mother company) under the German Law against unfair competition, because it considered that the general terms and conditions of Facebook’s App Center, which offers free games from third parties to users, are unfair because they fail to comply with legal requirements applying to the obtention of valid consent for the processing of users’ personal data. The Federal Union brought that action independently of a specific infringement of a data subject’s right to protection of his or her data and without being mandated to do so by such a person.

The *Landgericht Berlin* (Regional Court, Berlin) ruled against Meta Platforms, which brought an appeal before the *Kammergericht Berlin* (Higher Regional Court, Berlin), which was dismissed. Meta Platforms then brought an appeal on a point of law before the *Bundesgerichtshof* (Federal Court of Justice – the referring court) against the dismissal decision of the *Kammergericht Berlin*.

However, the *Bundesgerichtshof* made the preliminary referral because it had doubts as to the admissibility of the action brought by the Federal Union. It considered that it could not be excluded that the Federal Union, which indeed had standing to bring proceedings on the date on which it brought the action (based on the Law against unfair competition), lost that status during the proceedings, following the entry into force of the GDPR and, in particular Article 80(2) thereof. If this were the case, the referring court would have to uphold the appeal on a point of law brought by Meta Platforms and dismiss the action of the Federal Union, since, under German procedural law, standing to bring proceedings must endure until the end of the proceedings at last instance.

The case is relevant in regard to the interaction between the legal frameworks for the prohibition of unfair commercial practices and for the protection of personal data, in relation to the issue of representative actions.

“Do the rules in Chapter VIII, in particular in Article 80(1) and (2) and Article 84(1), of [the GDPR] preclude national rules which – alongside the powers of intervention of the supervisory authorities responsible for monitoring and enforcing the Regulation and the options for legal redress for data subjects – empower, on the one hand, competitors and, on the other, associations, entities and chambers entitled under national law, to bring proceedings for breaches of [the GDPR], independently of the infringement of specific rights of individual data subjects and without being mandated to do so by a data subject, against [the person responsible for that infringement] before the civil courts on the basis of the prohibition of unfair commercial practices or breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions?”

The CJEU first recalled that the GDPR seeks, *inter alia*, to ensure consistent and homogeneous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data throughout the European Union and to remove obstacles to flows of personal data within the European Union. In principle, the Regulation seeks to ensure full harmonisation of national legislation on the protection of personal data.

Although Member States have a certain margin of discretion in their implementation of Article 80(2) GDPR, they must legislate in a way that will not undermine the content and objectives of that regulation. In this case, Germany did not adopt specific rules to implement that article.

With regard to the *personal* scope of the representative action of Article 80(2) GDPR, in this case, a consumer protection association like the Federal Union may fall within the scope of that article, as it fulfills the criteria that it sets. Importantly, the Court held that the infringement of consumer protection rules (here, unfair commercial practices) may be related to the infringement of the rules on the protection of personal data of those consumers.

With regard to the *material* scope of the representative action of Article 80(2) GDPR, the Court also considered that the Federal Union could lawfully bring an action in this case, for three main reasons, as follows.

First, such an entity cannot be required to carry out a prior individual identification of the person specifically concerned by data processing that is allegedly contrary to the provisions of the GDPR.

Second, the bringing of a representative action is also not subject to the existence of a specific infringement of the rights which a person derives from the data protection rules. The consumer association does not have to prove an actual harm – it is sufficient to claim that the data processing concerned is liable to affect the rights which identified or identifiable natural persons derive from the GDPR. Importantly, the CJEU mentioned the preventive function of representative actions – which would not be guaranteed if the action provided in Article 80(2) GDPR allowed only the infringement of the rights of a person individually and specifically affected by the infringement.

Third, as the infringement of a rule relating to personal data protection may at the same time give rise to an infringement of rules on consumer protection or unfair commercial practices, Article 80(2) GDPR does not preclude Member States from allowing consumer protection associations to act against infringements of GDPR rights through rules intending to protect consumers or combat unfair commercial practices. The CJEU held that this finding is supported by Directive (EU) 2020/1828 on representative actions, which replaces and repeals Directive 2009/22/EU as of 25 June 2023 (see Section 4.5 below). Although its transposition period has not passed, it allows representative actions for infringements of the GDPR.

Article 80(2) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), must be interpreted as not precluding national legislation which allows a consumer protection association to bring legal proceedings, in the absence of a mandate conferred on it for that purpose and independently of the infringement of specific rights of the data subjects, against the person allegedly responsible for an infringement of the laws protecting personal data, on the basis of the infringement of the prohibition of unfair commercial practices, a breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions, where the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that regulation.

#### **4.5. Legislative reform of representative actions for the protection of the collective interests of consumers: Directive (EU) 2020/1828**

In December 2020, Directive (EU) 2020/1828<sup>23</sup> on representative actions was published in the Official Journal of the EU. The European Commission had published a legislative proposal in April 2018, as part of its New Deal for Consumers package. This new Directive repealed

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<sup>23</sup> Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance), OJ L 409, 4.12.2020, p. 1–27.



Directive (EU) 2009/22/EC on injunctions (the Injunctions Directive)<sup>24</sup>, which had a more limited scope, from 25 June 2023. The new Directive entered into force on 24 December 2020 and needs to be transposed into national laws by 25 June 2023.

### Origin of the proposal

The Commission published this proposal in the aftermath of the Dieseltgate scandal, an exemplary case in which an EU-wide collective redress mechanism would have allowed consumers to claim compensation or other remedies collectively. This case, which concerned the use by car manufacturers of misleading advertising, has been repeatedly mentioned in legislative documents and by consumer-protection associations to illustrate the need for an EU-wide collective redress mechanism which extends further than injunctions alone.

The proposal also explains that the risks of infringement of EU law affecting the collective interests of consumers is increasingly due to economic globalisation and digitalisation. The intensification of cross-border trade makes it increasingly common for such infringements to affect consumers in several Member States.

### State of play of collective redress at national and EU levels

**At the EU level**, there was no harmonised framework to obtain injunctive or redress measures in consumer cases through representative actions before the adoption of this new Directive. The Injunctions Directive was the only scheme that allowed consumers to obtain *injunctive* relief at the EU level.

**At the national level**, as many as 19 Member States had adopted legislation providing for some kind of collective redress mechanism. However, according to the European Consumer Organisation (BEUC), only 6 of them had a functioning, efficient collective redress system (Belgium, France, Italy, Portugal, Spain, and Sweden).<sup>25</sup> The schemes established in the other 13 countries were either flawed or had been introduced too recently, which made them difficult to evaluate. According to the BEUC report (see footnote 27), it was still impossible to launch a class action in 9 Member States.

### Main features of the proposal

First, the proposal explicitly mentioned **Article 47 of the Charter**, which states that Member States shall ensure that consumers and traders have the right to an effective remedy before a court or tribunal, against any administrative decision taken pursuant to national provisions transposing the Directive. This shall include the possibility for the parties to obtain a decision granting suspension of enforcement of the disputed administrative decision, in accordance with national law.<sup>26</sup> The Directive obliges Member States to ensure that the submission of a

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<sup>24</sup> Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110/30, 1.5.2009.

<sup>25</sup> BEUC, *Why we need collective redress at EU level: a compelling collection of cases*, October 2019, accessible at: [https://www.beuc.eu/publications/beuc-x-2019-062\\_why\\_we\\_need\\_collective\\_redress\\_at\\_eu\\_level.pdf](https://www.beuc.eu/publications/beuc-x-2019-062_why_we_need_collective_redress_at_eu_level.pdf).

<sup>26</sup> See Recital 19 of the Directive.

representative action shall have the effect of suspending or interrupting limitation periods applicable to any redress actions for the consumers concerned.<sup>27</sup>

In terms of **scope**, the new Directive is intended to apply more broadly than the Injunctions Directive, because it would apply to actions brought against infringements by traders of a wider range of EU instruments in different economic sectors such as financial services, travel and tourism, energy, health, telecommunications and data protection.<sup>28</sup>

Building on the approach taken in the Injunctions Directive, the proposal requires that representative actions be carried out by **qualified entities**.<sup>29</sup> Entities bringing representative actions will need to be qualified in accordance with national law. The Directive provides specific requirements for qualified entities bringing cross-border representative actions: (i) they must be properly established according to national law; (ii) demonstrate 12 months of actual public activity in the protection of consumer interests prior to their request for designation; (iii) be non-profit-making and have a legitimate interest in ensuring compliance with consumer protection and a stable financial situation; (iv) they are independent and not influenced by persons other than consumers who have an economic interest in the bringing of any representative action, in particular by market operators). Member States may use these criteria to designate qualified entities or designate ad hoc entities to bring domestic representative actions.

These qualified entities will be able to seek **injunctions**<sup>30</sup> and **redress**<sup>31</sup> **measures** aimed at eliminating the continuing effects of the infringement, and which are broadly defined. Injunctive measures may be provisional or definitive and include the prohibition of a practice that constitutes an infringement or prohibit an imminent one. The notion of ‘redress measures’ seems to be a broad one and includes compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under EU or national law.

**Final decisions of a court or an administrative authority** of any Member State concerning the existence of an infringement harming collective interests of consumers can be used by all parties as evidence in the context of any other action before their national courts or administrative authorities to seek redress measures against the same trader for the same practice.<sup>32</sup>

#### 4.1.4. The guidelines for judges that emerge from the analysis

1. The mechanisms of collective redress in consumer contracts ought to be applied with clear regard to the fundamental rights sphere. In all cases, they should maintain a proper balance between the effectiveness of consumer protection and the requirements arising from the overall fundamental standards and guarantees existing in the legal system. In particular, they should

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<sup>27</sup> See Article 16 of the Directive.

<sup>28</sup> See Article 2 and Annex 1 of the Directive.

<sup>29</sup> See Article 4 of the Directive.

<sup>30</sup> See Article 8 of the Directive.

<sup>31</sup> See Article 9 of the Directive.

<sup>32</sup> See Article 15 of the Directive.

comply with the proper level of procedural guarantees, safeguarding for every party to judicial or administrative proceedings its right to effective remedy against the decision/judgment that has been based upon collective redress mechanisms (Article 47 section 1 CFR).

2. The foregoing requirement applies especially to decisions or judgements that aim to protect collective consumers' interests, by imposing penalties on a broad array of business parties for committing a deed that has been previously prohibited in the proceedings and that involves one particular business party or an industrial organisation. In all these cases, the domestic courts should be aware of the fundamental rights perspective, especially of the guarantees derived from Article 47 section 1 CFREU (accordingly to the *Biuro Podróży Partner* case, C-119/15), also with regard to professionals.

3. Both judgements (*Biuro Podróży Partner* case, C-119/15 and *Invitel*, C-472/10) also substantially tackled the problem of *res indicata* in the context of unfair terms review. As has been found by the CJEU, a declaration of unfairness may enjoy extended scope of *res indicata*, reaching beyond the relation between the parties to the particular proceedings. From the perspective of consumers, when a general injunction is issued (in the manner provided for by Polish and Hungarian law), they can refer to it directly, without a need to initiate a separate proceeding to review a clause in their contract.

In other words, an abstract judgement, once made, determines the unfairness of a clause for any other procedure – both judicial and administrative (especially the public penalization of infringing the injunction). This extension of *res indicata* is, in principle, unlimited. However, accordingly to the *Biuro Podróży Partner* decision (C-119/15), professionals must be vested with effective remedies which guarantee a review of whether a particular clause is actually identical with the clause mentioned in the injunction. The extended *res indicata*, introduced in favour of a consumer, should be thereby balanced with the guarantees of a right to defence in administrative and judicial proceedings.

4. Bearing the aforesaid in mind, it is possible to distinguish among some situations that may occur against the background of the *Invitel* (C-472/10) and *Biuro Podróży Partner* (C-119/15) decisions:

#### **a) past and future contracting**

According to the standpoint adopted by the CJEU in both decisions (*Invitel*, C-472/10, *Biuro Podróży Partner* C-119/15), the (*in abstracto*) declaration of unfairness has an *erga omnes* effect in favour of all the consumers contracting with the professional who was involved in the reviewing procedure and some of the other professionals (so long as the requirements set forth in *Biuro Podróży Partner*, C-119/15 are satisfied). This effect applies to all those consumers who concluded a contract including a clause that has been declared abusive – regardless of the time of that conclusion. As a result, consumers can benefit from the injunction (e.g. seeking repayment or damages) in any case in which the contracts contain a particular clause. This possibility is limited only by the requirement to provide professionals with a right to an effective remedy, as specified in the *Biuro Podróży Partner* decision (C-119/15).

#### **b) collective vs. individual redress**

Generally speaking, the relationship between collective and individual redress is regulated by Member States, in accordance with the principle of procedural autonomy, on the conditions that

the provided rules are not less favourable than those governing similar situations subject to domestic law (principle of equivalence) and that they do not make it impossible or excessively difficult to exercise the rights conferred by EU law on consumer protection associations (principle of effectiveness).

According to the *Sales Sinués* case (381/14 and C-385/14), the principle of effectiveness of consumer protection requires that, when there is both a collective and an individual action concerning the unfairness of the same clause, national courts cannot automatically suspend the individual action, without the relevance of such a suspension from the point of view of the protection of the consumer who brought the individual action being able to be taken into consideration and without that consumer being able to decide to dissociate him/herself from the collective action.

### c) *in abstracto* vs. *in concreto* review

The extended effects of *in abstracto* review, determined jointly in the *Invitel* (C-472/10) and *Biuro Podróży Partner* (C-119/15) cases, is closely interrelated with *in concreto* scrutiny – carried out with respect to the specific contract that contains a particular clause. A review of this kind is usually conducted as a side-issue of the other claim – e.g. if a professional sues a consumer for payment, the defendant can claim unfairness of a clause that determined the due sum (e.g. specifying the interest rate) and refuse payment totally or in part. The court will then make its own assessment, using criteria similar to those that might have been used for *in abstracto* examination of the same clause (this review can be also carried out *ex officio*, without any claim by a consumer; see Chapter 1.2, in this Casebook).

As follows from the concept of extended effects, expressed in the *Invitel* (C-472/10) and *Biuro Podróży Partner* (C-119/15) decisions, the judgement declaring a clause abusive *in abstracto* can pre-determine the effects of the *in concreto* control. To be noted is that the CJEU's decisions rest on the careful balancing of the principles of effectiveness and of proportionality also with respect to the professional right to effective judicial remedies; and this careful analysis of both principles should also be applied in national cases related to similar concerns. More specifically, while ensuring consumers' protection in accordance with the broad range of remedies available under EU law, domestic courts should always ensure that the professional against whom an injunction may be enforced has access to an effective remedy in order to question the identity or equivalence of the two clauses or the legitimacy of that enforcement.

5. With regard to the **intervention of a consumer-protection association in a proceeding concerning an individual consumer**, according to *Photovost*' (C-470/12) and *EOS KSI* (C-448/17), neither Article 38 CFR nor Article 47 CFR can, as such, impose an interpretation of Directive 1993/13 which gives consumer-protection associations the right to intervene in individual disputes involving consumers. However, national procedural rules must comply with the principle of equivalence, which precludes national legislation which subjects the intervention by consumer-protection organizations in disputes falling within the scope of EU law to conditions less favourable than those applicable in disputes which fall exclusively within the scope of national law.

## 5. Effective, proportionate and dissuasive remedies.

This chapter analyses the influence on consumers' remedies of general principles of EU law and of the Charter of Fundamental Rights of the European Union. This matter is particularly topical, considering the approach of the *New Deal for Consumers* (COM/2018/0183 final), according to which “*effective enforcement is a top priority*” of the European Commission. The focus will be on private enforcement and, more particularly, on individual redress, whereas the impact of the Charter on administrative enforcement and collective redress has been examined respectively in Chapters 3 and 4 of this Casebook.

### 5.1. Unfair terms and individual redress: invalidity and moderation/replacement of invalid terms.

#### Relevant CJEU cases in this cluster

- Judgement of the Court (First Chamber) of 14 June 2012, *Banco Español de Crédito SA v Joaquín Calderón Camino*, Case C-618/10 (“**Banco Español de Crédito**”)
- Judgement of the Court (First Chamber) of 30 May 2013, *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, Case C-488/11 (“**Asbeek**”) - [link](#) to the database for the analysis of the lifecycle of the case
- Judgement of the Court (Fourth Chamber) of 30 April 2014, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, Case C-26/13 (“**Kásler**”)
- Judgement of the Court (First Chamber) of 21 January 2015, *Unicaja Banco, SA v José Hidalgo Rueda et al.* (C-482/13), and *Caixabank SA v Manuel María Rueda Ledesma* (C-484/13) et al., Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13, (“**Unicaja**”)
- Judgement of the Court (Third Chamber) of 14 March 2019, *Zsuzsanna Dunai v ERSTE Bank Hungary Zrt.* Case C-118/17 (“**Dunai**”)
- Judgement of the Court (Grand Chamber) of 26 March 2019 *Abanca Corporación Bancaria SA v Alberto García Salamanca Santos* (C-70/17) and *Bankia SA v Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez* (C-179/17), Joined Cases C-70/17 and C-179/17 (“**Abanca**”)
- Judgement of the Court (Third Chamber) of 3 October 2019, *Kamil Dziubak and Justyna Dziubak v Raiffeisen Bank International AG, prowadzący działalność w Polsce w formie oddziału pod nazwą Raiffeisen Bank International AG Oddział w Polsce, anciennement Raiffeisen Bank Polska SA*, Case C-260/18 (“**Dziubak**”)
- Judgement of the Court (Fifth Chamber) of 7 November 2019, *Nationale Maatschappij der Belgische Spoorwegen (NMBS) v Mbutuku Kanyebe and Others*, Joined Cases C-349/18 to C-351/18 (“**Kanyebe**”)
- Judgement of the Court (Fourth Chamber) 9 July 2020, *XZ v Ibercaja Banco*, Case C-452/18, (“**Ibercaja Banco**”)

- Judgement of the Court (First Chamber) of 27 January 2021, *Dexia Nederland BV v XXX and Z.*, Joined Cases C-229/19 and C-289/19 (“**Dexia Nederland**”)
- Judgement of the Court (Seventh Chamber) of 29 April 2021, *IW, RW v Bank BPH S.A.*, Case C-19/20 (“**Bank BPH**”)

**Within this cluster, the main case presented as a reference point for the judicial dialogue within the CJEU and between EU and national courts is the *Kásler* case (C-26/13).**

Main questions addressed:

Question 1      Must Article 6(1) of Directive 93/13 be interpreted as meaning that it precludes a national law which authorizes the national court to remedy the invalidity of an unfair term by substituting a supplementary provision of national law in a situation in which a contract concluded between a seller or supplier and a consumer may not continue to exist after the deletion of the unfair term?

**5.1.1. Question 1 – Substitution of unfair terms**

Must Article 6(1) of Directive 93/13 be interpreted as meaning that it precludes a national law which authorizes the national court to remedy the invalidity of an unfair term by substituting a supplementary provision of national law in a situation in which a contract concluded between a seller or supplier and a consumer may not continue to exist after the deletion of the unfair term?

Legal sources

**EU level:**

Article 6(1) of Directive 93/13:

“Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.”

Article 7(1) of Directive 93/13:

“Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.”

Article 8b of Directive 1993/13 as modified by Directive 2019/2161 on the better enforcement and modernisation of Union consumer protection rules, approved by the EU Parliament and the Council.

“1. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

2. Member States may restrict such penalties to situations where the contractual terms are expressly defined as unfair in all circumstances in national law or where a seller or supplier continues to use contractual terms that have been found to be unfair in a final decision taken in accordance with Article 7(2).

3. Member States shall ensure that the following non-exhaustive and indicative criteria are taken into account for the imposition of penalties, where appropriate:

(a) the nature, gravity, scale and duration of the infringement;

(b) any action taken by the seller or supplier to mitigate or remedy the damage suffered by consumers;

(c) any previous infringements by the seller or supplier.

(d) the financial benefits gained or losses avoided by the seller or supplier due to the infringement, if the relevant data are available.

(e) penalties imposed on the seller or supplier for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council (\*1);

(f) any other aggravating or mitigating factors applicable to the circumstances of the case.

4. Without prejudice to paragraph 2 of this Article, Member States shall ensure that, when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4 % of the seller's or supplier's annual turnover in the Member State or Member States concerned.

5. For cases where a fine is to be imposed in accordance with paragraph 4, but information on the seller's or supplier's annual turnover is not available, Member States shall introduce the possibility to impose fines, the maximum amount of which shall be at least EUR 2 million.

6. Member States shall, by 28 November 2021, notify the Commission of the rules and measures referred to in paragraph 1 and shall notify it, without delay, of any subsequent amendment affecting them.”

#### **National level:**

##### Section 237 of the Hungarian Civil Code:

“1. In the event of ineffectiveness of the contract, the situation existing before it was entered into must be restored.

2. If it is impossible to restore the situation existing before the conclusion of the contract, the court may declare the contract applicable until it has adjudicated. An ineffective contract may be declared valid if it is possible to eliminate the cause of ineffectiveness, particularly in the case of disproportion between the performances required of each party in a usurious contract, by eliminating the disproportionate advantage. In such cases, it will be necessary to order the restitution of any performance outstanding, if need be without consideration”.

Section 239 of the Hungarian Civil Code:

“1. In the event of partial ineffectiveness of the contract, the contract will fail in its entirety only if the contracting parties would not have concluded it without the ineffective part. Provisions to the contrary may be laid down by legislation.

2. In the event of partial ineffectiveness of a contract concluded with a consumer, the contract shall fail in its entirety only if it is impossible to perform it without the ineffective part”.

Section 239/A(1) of the Hungarian Civil Code:

“The parties may institute proceedings seeking a declaration of ineffectiveness of the contract or of any term of the contract (partial ineffectiveness) without having at the same time to request application of the consequences of the ineffectiveness”.

The case

On 29 May 2008, two Hungarian borrowers concluded an agreement for a mortgage loan to the amount of 14,400,000 HUF, denominated in foreign currency and secured by a guarantee *in rem* (mortgage). Under clause I/1, the amount of the loan in foreign currency advanced to the borrowers was to be determined at the buying rate for the foreign currency applied by the bank on the date of transfer of the loan, whereas the interest, administration fee, default interest rate, and other charges would be determined in the foregoing currency. Accordingly, the loan amount was fixed at 94240.84 Swiss francs (CHF). The borrowers were to repay this amount over 25 years, in monthly instalments. Under clause III/2, the lender was to determine the amount in HUF of each monthly instalment by reference to the selling rate of exchange of the foreign currency applied by the bank on the day before the due date of payment.

The borrowers brought an action against Jelzálogbank claiming that Clause III/2 was unfair. They alleged that the clause authorized Jelzálogbank to calculate the monthly due repayment instalments on the basis of the selling rate of exchange for the currency applied by the bank, whereas the amount of the loan advanced was determined by the latter on the basis of the buying rate of exchange that it applied for that currency, which conferred an unjustified benefit on Jelzálogbank within the meaning of Section 209 of the Civil Code.

The court of first instance upheld that action, and the judgement was then upheld on appeal. The second-instance court (Szeged Court of Appeal) held, in particular, that in a loan transaction like the one at issue in the dispute before it, Jelzálogbank did not provide any mercantile financial



services relating to the buying or selling of foreign currency. Accordingly, it was not entitled to apply an exchange rate for the repayment of the loan different from the one used on the date of advance of the sum borrowed, and no payment could be required for a notional provision of services. The court also held that Clause III/2 was not drafted in plain and intelligible language, given that it was impossible to determine the basis for the difference in the method of calculating the amount of the sum lent and the amount of the repayment instalments.

Jelzálogbank then brought an appeal in cassation before the *Kúria* (the referring court) against the judgement of the court of second instance. It argued, in particular, that Clause III/2, in so far as it enabled the bank to obtain income representing the consideration payable in respect of the loan in foreign currency obtained by the borrowers – and because it covered the expenses incurred by the credit institution in purchasing foreign currency on the market – fell within the ambit of the exception under Article 209(4) of the Civil Code, for which reason there could be no review of whether it was unfair under Article 209(1) of the Civil Code. Article 209 (4) exempts from unfairness control the main subject matter of the contract.

*Preliminary question:*

Must Article 6(1) of Directive 93/13 be interpreted as meaning that it precludes a national law which authorizes the national court to remedy the invalidity of the unfair term by substituting a supplementary provision of national law in a situation in which a contract concluded between a seller or supplier and a consumer may not continue in existence after the deletion of the unfair term?

The question referred to the CJEU concerned terms of the exchange rate mechanisms of consumer loans contracted in national currency and denominated in foreign currency (CHF) that, if declared unfair and void, would have made the entire contract void. Having declared the terms unfair and void, in line with the ruling of the CJEU in *Banco Español de Crédito* (C-618/10), the national court should not replace the unfair terms. However, leaving voided terms out of the contract without replacement would have led to the termination of thousands of contracts by the credit institutions owing to the essential role of the unfair terms in determining the core aspects of the transactions. As a consequence, the consumers would have been obliged under the contract to repay the loans with costs and charges, whereas most of them were in serious payment difficulties, being over-indebted. Such a solution would have caused serious economic and social consequences in Hungary.

This is why the *Kúria*, in search of a solution on how to keep such contracts in force, saw in the default rules of the Civil Code the only way to remedy the nullity of the terms on the exchange rate mechanism. It should be noted that, at that time, there were no special legal provisions in place on how to render the financial consequences between the contracting parties of declaring the terms on the exchange mechanism void. Both the *Kúria* and the Constitutional Court were of the opinion that it is not the task of the judiciary to find innovative solutions to restore the contractual balance in such cases; rather, it is for the legislator to intervene by mandatory rules. Thus, the Hungarian referring court was seeking justification from the CJEU for the only solution at hand before 2014 to provide justice to consumers.

### Reasoning of the CJEU:

The CJEU first recalled from its earlier ruling in *Banco Español de Crédito* (C-618/10, paragraph 68) that, given the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness *vis-à-vis* sellers or suppliers, Directive 93/13 requires Member States to provide **adequate and effective means** “to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers” (paragraph 78). It also emphasised (in paragraph 79) that, if it were open to the national court to revise the content of unfair terms included in such contracts, such a power would contribute to eliminating the **dissuasive effect** for sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be adjusted (*Banco Español de Crédito*, C-618/10, paragraph 69).

Then the CJEU established that, **if the lack of substitution of the unfair term leads to the termination of the entire contract and such termination causes particularly detrimental consequences for the consumer, then the substitution of an unfair term for a supplementary provision of national law is consistent with the objective of Article 6(1) of Directive 93/13**. Indeed, “according to settled case-law, that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them, not to annul all contracts containing unfair terms”.

In the CJEU’s opinion, by requiring the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that **the dissuasive effect** resulting from the annulment of the contract could well be jeopardized (paragraph 83), since in general the consequence of an annulment is that the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the consumer’s financial capacities and, as a result, tends to penalize the consumer rather than the lender, who, as a consequence, **may not be dissuaded** from inserting such terms into its contracts (paragraph 84).

### Conclusion of the CJEU:

Article 6(1) of Directive 93/13 must be interpreted as meaning that, in a situation such as the one at issue in the main proceedings, in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, that provision does not preclude a rule of national law enabling the national court to remedy the invalidity of that term by substituting it with a supplementary provision of national law.

### Impact on the follow-up case:

Decision: Gfv. VII.30.160/2014/5 of the Kúria, rendered on June 3, 2014.

According to the *Kúria*’s understanding of paragraph 86 of the *Kásler* ruling (C-26/13), if the contract cannot be performed in the absence of the unfair term, it is not incompatible with EU law to substitute the unfair term with the default statutory rules of the national law “as a remedy for invalidity”. Accordingly, in the case at hand, which gave rise to the preliminary questions

referred to the CJEU, the *Kúria* declared the terms of the exchange rate mechanism unfair. It applied Article 231 (2) of the (old) Civil Code, which stipulates that debt determined in a currency other than the national one must be calculated on the basis of the exchange rate at the place and time of payment, and that this is not the exchange rate of the credit institution concerned for a currency sale or a currency purchase or an average rate; rather, it is that of the National Bank of Hungary. It further established that the amount of the debt should be fixed at the official exchange rate of the National Bank of Hungary on the date when it was transferred to the debtor, whereas the value in HUF of the reimbursement instalments should be calculated at the official exchange rate of the day before the due date of payment. In support of this solution the *Kúria* cited Article 205 (2) of the (old) Civil Code, which states that, in questions rendered by law, the agreement of the parties is not necessary.

Very shortly after the *Kásler* ruling (C-26/13), the *Kúria* issued a law unification decision (which under Hungarian law is compulsory and **binding on the judiciary**) establishing the applicable default rules of the Civil Code, under which unfair contractual terms on exchange rate mechanisms should be replaced with ones referring to the official exchange rate of the National Bank of Hungary, and also advancing the enactment of a mandatory law on this issue in the future.

*Kúria*, Decision no. 2/2014 of June 16, 2014 (law unification decision) states:

In consumer loan agreements denominated in foreign currency, instead of the clauses on purchase and selling exchange rates, the official exchange rate of the National Bank of Hungary will become part of the contract, according to the default rules of § 231 (2) Civil Code, until it is replaced by mandatory rules.

Furthermore, in the summer of 2014, a new law ‘codified’ the law unification decision (mentioned above) and also the earlier (2012) highest-court case law on the criterion for establishing the unfairness of terms allowing banks to unilaterally amend consumer loan agreements. Law XXXVIII of July 18, 2014 on clarification of the decision by the *Kúria* concerning consumer loan agreements concluded by financial institutions (entered into force on July 26, 2014) states:

3. § (1) In consumer loan agreements – not individually negotiated – the term under which the financial institution applies for the transfer of the loan is the purchase exchange rate, whereas for the reimbursement of the loan it is the selling exchange rate, or another exchange rate different from that established when the loan was transferred to the debtor, will be void.
- (2) In place of void terms on the exchange rate concerning the transfer of the loan, reimbursement, charges and commission, the official exchange rate of the National Bank of Hungary will apply.
- (3) In the case of contracts which have applied the exchange rates stipulated in special laws (Section 200/A of Law CXII of 1996, or Htp. Section 267), or if these rules have been applied on reimbursement of the loans, the official exchange rate will apply only for the transfer of the loan.

[...]

(6) The financial institution will settle the contractual relationship according to the special law provision (introduced by Law XL of 2014 in force as of 15 November, 2014).

Moreover, the Hungarian legislature, pursuant to Law XL of 2014, provided the courts with the legal instrument of sharing between the parties the financial consequences of finding the terms on the exchange mechanism unfair. Law XL of 2014 on the financial settlement stipulated in Law XXXVIII of 2014 on the law unification decision of the *Kúria* on consumer loan contracts states:

“3. § (1) Loans calculated under terms declared void by Article 3 of Law XVIII of 2014 and reimbursement instalments calculated under such terms are over-payments in favour of the consumer.

(2) The financial institution must recalculate the loan transferred to the consumer and the paid reimbursement instalments at the official exchange rate of the National Bank of Hungary applicable on the day of the transfer. If a specific day is established in the contract, the official exchange rate of that day should apply.

(3) If the exchange rate established in special laws has been applied, then the official exchange rate of the National Bank of Hungary should not apply”.

Elements of judicial dialogue:

The **horizontal dialogue** within the CJEU is of great importance. The *Kásler* ruling (C-26/13) elaborates on its previous case law (*Banco Español de Crédito*, C-618/10, *Asbeek*, C-488/11) in the sense that it refines the policy beyond the power conferred on the national courts by Article 6(1) of Directive 93/13 to render the consequences of unfairness under national law.

Firstly, in *Kásler* (C-26/13) the CJEU did not depart from its earlier approach established in *Banco Español de Crédito* (C-618/10, paragraph 65), concerning a “floor” clause in a mortgage loan and later reinforced in *Asbeek* (C-488/11, paragraph 57), concerning a clause of a tenancy agreement that national courts are required to exclude the application of an unfair contractual term in order that this term may not produce binding effects with regard to the consumer, without being empowered to revise the content of that term, and that such contracts must continue to exist without any amendments other than those resulting from the deletion of the unfair terms, in so far as such continuity of the contracts is legally possible under the applicable national law.

In *Banco Español de Crédito* (C-618/10), the CJEU ruled that the national court could not modify a contract by revising the content of an unfair term under Article 83 of Legislative Decree 1/2007, which provided for, as a consequence of unfairness, the modification of a contract in accordance with the principle of good faith and the provisions of Article 1258 of the Civil Code: “Contracts are concluded by simple consent and from that point are binding, not only as to the performance of the matters expressly agreed, but also as to all consequences which, by their nature, are in accordance with good faith, custom and the law.” (paragraphs 22-23)

*Asbeek* (C-488/11) denied the power of a national court allowed under national law to adjust the penalty clause in consumer contracts (paragraph 60).

Secondly, the *Kásler* ruling (C-26/13) provided the national courts with a new perspective in their search for solutions to remedy contract terms declared unfair **only for cases in which the contract could not be kept in force without the unfair terms being declared void**. It only allowed the courts to substitute such unfair terms with the provisions of the national default rules, but not to establish what would be fairer terms, or to remedy the nullity by judicial means. The CJEU also emphasized that **the policy behind** this power of the court was **to protect the consumer from the disadvantageous consequences of declaring the contract void**, which would also diminish **the dissuasive effect** of Article 6(1) of Directive 93/13, since the consequence of having declared the contract void would generally be termination of the contract by the consumer and *restitutio in integrum*.

These two cumulative conditions – (a) the existence of a contract being endangered by an unfair term and (b) the termination of such contract would cause significant disadvantage to the consumer – of the power of the national courts to replace an unfair term with the default rules of the applicable national law, **were important** also in the *Unicaja* case (Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13), and the in the other decisions **subsequent to the Kásler case (C-26/13)**.

In the *Unicaja* case (Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13), the CJEU dealt with a Spanish law allowing the mortgage enforcement judge to adjust a default rate exceeding a given threshold in a loan contract (not necessarily a consumer contract) and concluded that such law was not precluded by Article 6, Unfair Terms Directive to the extent that, in a consumer contract, the judge may assess a term's fairness regardless of the legal threshold and 'remove' it without adjustment. In fact, but only in the case of consumer contracts, although the CJEU recalled the technique of conform interpretation, it called for disapplication.

It is important to note that, similarly to *Kásler* (C-26/13), *Unicaja* (Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13) makes the power of the national court to substitute unfair terms, where existing, subject to mandatory default rules under national law.

Although *Kásler* (C-26/13) solved the problem of the referring Hungarian court, it did not provide guidance to other national courts on how to proceed if, under their national law, there were no default rules by which the nullity of the unfair term could be remedied.

With regard to other cases subsequent to *Kásler* (C-26/13), in the ***Dunai* case (C-118/17)** national provisions classified certain terms related to the exchange difference included in loan contracts as unfair and void; they replaced, with retroactive effect, those terms with ones applying the official exchange rate fixed by the National Bank of Hungary for the corresponding currency; and they converted, with prospective effect, the outstanding amount of the loan into a loan denominated in the national currency. That legislation was introduced after the *Kásler* judgement (C-26/13, see the paragraph "impact on the follow up case"). The three questions referred to the CJEU related, not to the contractual terms included *a posteriori* as such by that legislation in loan contracts (which do not fall within the scope of Directive 93/13, since that Directive does

not apply, in accordance with Article 1(2) thereof) but to the impact of that legislation on the protection guarantees resulting from Article 6(1) of Directive 93/13 in relation to the term concerning the exchange difference initially included in the loan contracts at issue. The CJEU considered that the objective of safeguarding the validity of loan contracts was coherent with the aims of Directive 1993/13. With regard to the replacement of the unfair clauses made by means of legislation, the CJEU stated that this legislative choice cannot have the result of weakening the protection guaranteed to consumers (paragraph 43). In this respect, the Court stated that provisions which prevent consumers from not being bound by the unfair term concerned, where appropriate, by means of the cancellation of the contract at issue in its entirety if that contract cannot continue in existence without that term, violate Article 6(1) of Directive 93/13. The CJEU recalled also the *Kásler* judgment (C-26/13), considering that the application of supplementary provisions is not possible in the specific case considered, because the continuation of the contract would be contrary to the interests of the consumer.

In the *Abanca* case (Joined Cases C-70/17 and C-179/17), a new issue was addressed: the role of procedural rules (execution proceedings in this case) in deciding if an unfair clause can be modified or replaced after its non-bindingness declaration. In particular, the referring courts asked if the modification of the unfair clause or the application of a supplementary provision could be justified when it allowed the continuation of a proceeding, and if the impossibility of availing of that proceeding could be contrary to consumers' interests.

With regard to **modification of the clause** declared unfair, relying on its previous case law, **the CJEU ruled that national courts cannot revise the content of an unfair term.** In the CJEU's view, such a power would be likely to compromise attainment of the long-term objective of Article 7 of Directive 93/13, because it would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.

With regard to the **replacement of the unfair clause with a supplementary provision**, the CJEU distinguished between two scenarios:

a) **cases in which the contract is not capable of continuing in existence following the removal of an unfair term.**

Relying on its previous case law, the CJEU stated that in principle national courts should not modify unfair clauses or maintain them in part, because this power of a court would contribute to eliminating the dissuasive effect on professionals. Nevertheless, a national court can remove an unfair term and replace it with a supplementary provision of national law in a situation where

- a contract concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term, i.e. in cases where the invalidity of the unfair term would require the court to annul the contract in its entirety

**AND**

- the annulment of the contract would expose the consumer to particularly unfavourable consequences. The **Abanca** base is particularly important in this regard, because for the first time the CJEU stated that assessment related to the existence of unfavourable consequences for the consumer of the termination of the contract includes applicable procedural rules. In the specific case, the procedure applicable in the case of the annulment of the contract is considered by the Spanish Supreme Court as less favourable for the consumer. The specific procedure for enforcing the mortgage against the debtor's habitual residence, applicable if the contract is valid, is characterized by the possibility for the debtor to release the mortgaged property until the date of auctioning by depositing the amounts outstanding, by the possibility of obtaining a partial reduction of the debt, and by the guarantee that the mortgaged property will not be sold at a price lower than 75% of its estimated value.

**b) cases in which the contracts concerned are capable of continuing in existence without the unfair terms at issue in the main proceedings.**

In these cases, the unfair clauses should not be applied, **unless the consumer objects**. For example, the consumer may object if s/he considers that enforcement of the mortgage carried out on the basis of an unfair clause would be more favourable to him/her than the ordinary enforcement procedure. The CJEU **stated that the contract must continue in existence, in principle, without any amendment other than that resulting from the removal of the unfair terms, in so far as, in accordance with the rules of national law, such continuity of the contract is legally possible.**

In summary, applying these principles, the CJEU stated that:

- i) a national court cannot maintain in part an accelerated repayment clause of a mortgage loan contract, with the elements which make it unfair removed, if the removal of those elements would be tantamount to revising the content of that clause by altering its substance;
- ii) a national court can remedy the invalidity of an unfair term by replacing it with the legislative provision on which it was based provided that the mortgage loan contract in question cannot continue in existence if that unfair term is removed, and that the annulment of the contract in its entirety would expose the consumer to particularly unfavourable consequences.

The **Dziubak** case (C-260/18) is particularly important in relation to three issues:

- the criteria that should be adopted in order to evaluate if the contract is capable of continuing in existence following the removal of an unfair term;
- the criteria to be used in order to evaluate the particularly unfavourable consequences to which the consumer would be exposed by termination of the contract;
- the features of the norms that can substitute an unfair clause declared not binding.

With regard to the first issue, the CJEU stated that an **objective perspective** should be adopted by national judges **in determining the criteria with which to evaluate whether a contract is capable of continuing in existence following the removal of an unfair term** (paragraph 39). According to this point of view, the situation of a contracting party cannot be regarded as the decisive criterion determining the fate of a contract. Furthermore, the CJEU stated that a national court, after finding that certain terms of a loan contract indexed in a foreign currency and

associated with an interest rate directly linked to the interbank rate of the currency concerned are unfair, can state, in accordance with its national law, that such a contract cannot exist without those terms on the ground that their elimination would change the nature of the main subject-matter of that contract.

With regard to **the particularly unfavourable consequences to which the consumer would be exposed by termination of the contract**, the CJEU stated that these consequences should be evaluated with account taken of the circumstances existing or foreseeable at the time of the dispute. This solution was based on the argument that the possibility of substituting an unfair term with a supplementary provision is justified by the objective of consumer protection, which requires consideration of the consumer's actual and real interest. The principle of effective consumer protection, though not expressly mentioned here, supports this conclusion.

Therefore, according to the *Dziubak* judgement (C-260/18), if a national court considers that, pursuant to the relevant provisions of its national law, it is not possible to maintain a contract without the terms declared unfair, Article 6(1) of Directive 93/13 does not preclude, in principle, the contract being declared invalid (paragraph 43). Furthermore, the CJEU clarified that the possibility of application of a supplementary provision after the declaration of non-bindingness of an unfair clause is limited to cases in which the elimination of that unfair clause would oblige the court to declare that contract invalid in its entirety, thereby exposing the consumer to particularly detrimental consequences, with the result that s/he would be penalized (paragraph 48).

According to the CJEU's reasoning, the consumer must *a fortiori* have the right to oppose protection against the harmful consequences caused by the invalidation of the contract as a whole if s/he does not wish to rely on that protection. Therefore, the consequences for the consumer of the invalidity of a contract in its entirety must be assessed in light of the circumstances existing or foreseeable at the time of the dispute. Moreover, the consumer's acceptance of that assessment is decisive for its purposes. The CJEU's reasoning was based on its previous case law (*Banif Plus*, C-472/11, 21 February 2013), according to which the judge should not declare the unfair clause not binding if the consumer, after having been informed of the unfairness of the clause by the court, expresses a free and informed consent declaring that s/he does not intend to assert the unfairness of the clause and its non-binding status.

It is important to consider that the consumer may oppose the non-bindingness of an unfair term or, if applicable, annulment of the entire contract (including the unfair term), whereas s/he may not oppose the latter without opposing the former. In other words, it is for the judge to *objectively* assess whether the case is one of partial or total invalidity, while the consumer may only waive the protection that is available in the given case, this being either partial or total non-bindingness. In the latter case, when the contract may not exist without the term declared unfair, the only way to remedy the term's unfairness without voiding the entire contract is to substitute the unfair term with a legislative provision suited to balancing the positions of the parties in the given case, thereby providing the consumer with effective protection. However, this substitution may only be made if total invalidity would expose the consumer to particularly detrimental consequences. Moreover, not all legislative provisions are suitable for term substitution.



Indeed, with regard to the **features of the norms that can substitute an unfair clause declared non-binding**, the CJEU stated that the possibility of substitution is to be considered an exception to the general rule that the contract in question remains binding on the parties only if it can exist without the unfair terms contained in it, and that only provisions of national law of a supplementary nature or applicable in the event of an agreement between the parties can substitute the unfair term. Furthermore, the CJEU recalled that the possibility of substitution is based on the presumption that these norms do not contain unfair terms. **Therefore, the CJEU affirmed that it is not possible to substitute an unfair term declared non-binding with national provisions of a general nature which provide for the supplementing of the effects expressed in a legal act** by means, in particular, of the effects resulting from the principle of fairness or custom, provisions which are neither of a supplementary nature nor applicable in the event of agreement between the parties to the contract.

The CJEU has recently answered several questions pertaining to novation agreements. Consumers may enter into a novation agreement the subject of which is a potentially unfair contract term – again provided they do so with a free and informed consent which involves their awareness of the non-binding character of an unfair term and the consequences of waiving that effect (*Ibercaja Banco*, C-452/18). In *Bank BPH* (C-19/20), the CJEU ruled that Article 6(1) of Directive 93/13, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is for the national court, finding that a term in a contract concluded between a seller or supplier and a consumer is unfair, to inform the consumer, in the context of the national procedural rules after both parties have been heard, of the legal consequences entailed by annulment of the contract, irrespective of whether the consumer is represented by a professional representative. Unlike in *Dzjubak*, it was not obvious in this case that the consumer would gain from the contract's overall invalidation.

The CJEU held in *Kanyeba* that Directive 93/13 does not, however, seek to harmonise non-contractual liability. It therefore seems that the Directive does not pre-empt claims in torts by the seller concerning the same circumstances to which the penalty clause would have applied. However, a national court cannot decide, *ex officio* so to speak, to grant damages on the basis of supplementary rules of general contract law rules to a party seeking to enforce an unfair term. This was confirmed in the *Dexia* case (C-229/19 and C-289/19).

[Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU](#)

## **The Netherlands**

Follow up judgement of the *Asbeek* case (C-488/11):

Court of Appeal Amsterdam, 29 July 2014 no. 200.055.552/01

The Court of Appeal in Amsterdam found that the contractual penalty clause fell within the scope of the Directive and should be considered unfair in light of Article 1(5) of the Annex to the Directive, which indicates that terms may be unfair when they “have the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in

compensation”. The Court of Appeal considered that the contractual penalty was unfair because it stipulated a fixed interest rate that was considerably higher than statutory interest and market interest in the Netherlands (judgement of 21 January 2014 and final judgement of 29 July 2014). Finally, the Court awarded the claim for the rent that was still due plus statutory interest and rejected all other claims.

The *Dexia* case (C-229/19 and C-289/19) has had a profound impact on Dutch case law: the professional party whose penalty clause has been voided by the court cannot claim the statutory compensation provided for by a supplementary provision of national law which would have been applicable in the absence of that term when the contract is capable of continuing in existence without that term. See for example the District Court of Amsterdam in ECLI:NL:RBAMS:2021:2583:

The case was follows. A landlord claimed damages for illegal subletting by a tenant. The landlord did not invoke the penalty clauses in the lease and only relied on its statutory right to claim a profit transfer from the tenant pursuant to Article 6:104 of the DCC. The lease and the general conditions could continue to exist without the penalty clauses in question. The court considered that the objective and the purpose of Directive 93/13/EEC is not to prevent unfair terms from being invoked in court, but to ensure that unfair terms are removed from contracts concluded with consumers and that professionals are encouraged to do so. In this respect, the penalty for the use of unfair terms must be effective, proportionate and dissuasive.

By virtue of Article 1.4 of the General Provisions, the lessor could claim additional damages to the extent that those damages exceeded the penalty, thus deviating from the statutory system, and the lessee had to pay the profit on the basis of the clause (pursuant to Article 6:104 of the Civil Code). Both penalty clauses are without a maximum. Besides payment of the profit and the loss of his property, the tenant would also have been faced with an unlimited penalty. In contrast to the penalty clauses for the consumer, there is no penalty clause for the landlord. The balance between the parties was significantly disturbed. The fact that the landlord had a strong interest in effectively combating subletting is evident, but that does not mean that an unlimited penalty would not have upset the balance. Now that the terms are deemed unfair and are being disappplied, the lessor cannot invoke Article 6:104 of the DCC either, based on the judgement of the CJEU of 27 January 2021, ECLI:EU:C:2021:68, (*Dexia*). Resorting to the law would seriously reduce the deterrent character of the Directive. If an unfair term is replaced by statutory damages, professionals have no incentive to remove unfair terms from contracts with consumers. This is true for a contract between a consumer and *Dexia*, as well as for a rental agreement. Hence, according to the Court, the judgement of 27 January 2021 had a broader scope.

## **Finland**

Finland, Supreme Court, 15 September 2015 S2014/652 (KKO 2015:60)

As to the consequences of unfairness, the Supreme Court, in a case in which the contract can continue in existence after the removal of the unfair term, stated that a national court is required only to exclude the application of an unfair contractual term in order that it does not produce binding effects with regard to the consumer, without being authorised to revise its content (*Banco*

*Español de Crédito* paragraph 65, C-618/10 and *Asbeek Brusse de Man Garabito C-488/11* paragraph 57). The provisions of the Finnish Consumer Protection Act (Chapter 4 Section 2) should be interpreted in conformity with this requirement in spite of its wording, which allows the adjustment of the terms.

## Romania

ÎCCJ, Decision no. 84/2016 issued on 26 January, 2016

On the issue of the power of a national court to remedy the unfairness of a term concerning the method of calculation of a variable interest rate in a case in which the contract could not continue in the absence of the unfair term, the Romanian highest court established the following:

“Neither Law 193/2000 or Directive 93/13, on one hand, nor the general provisions of the old Code Civil of 1864, on the other hand, allow the courts to intervene in the agreement of the parties, the judge being competent only to establish the nullity of the term, not to modify it.

The impossibility of the courts to amend the contract has been established by the CJEU in *Banco Español de Crédito* (C-618/10). Hence the only derogation allowed by the CJEU is the substitution of the void term with a dispositive rule of the national law as established in *Kásler* (C-26/13). **Such a default rule does not exist in the matter in the case before the court** and this makes [it] impossible to remedy the void term by court.

In this situation, the defendant is obliged to amend the void term in respect of the calculation of the variable interest rate on the basis of agreement reached with the debtors upon real and effective negotiation and subsequent to such amendment to issue a new reimbursement graphic.

Thus, the judgment on appeal was correct in rejecting the claim to establish as the applicable interest rate the fixed interest rate in force at the moment of contract conclusion [...]

The fact that upon the nullity of the term concerning the calculation of the variable interest rate the contract remains without an indicator to calculate the interests, does not justify the amendment of the contract by replacement of the variable interest rate with a fixed rate; this situation does not cause disadvantage to the bank, it only obliges the parties to the contract to negotiate in order to supplement their agreement by establishing a new formula for the calculation of the variable interest rate, **this being their exclusive competence, not of the court.**

As consequence [...] the contract may continue with the consent of the consumer, or in case when, upon elimination of the term the contract cannot be upheld, the consumer is entitled to terminate the contract and claim damages, if the case may be.

The contract cannot stay in force without interest, since **the parties are obliged to negotiate another term on variable interest rate** on the basis of **verifiable, objective criteria**, a term which fulfils the requirement of being **plain and intelligible** [...].”

ÎCCJ, Decision no. 886/2016 of May 18, 2016

In this case, the ÎCCJ first recalled its earlier case law (presented above), in which it had established that when, under Romanian law, default rules for the case at hand are void, it is impossible for the court to remedy the nullity of the term in line with the ruling of the CJEU in *Kásler* (C-26/13). It also recalled the interpretation of the CJEU in *Banco Español de Crédito* (C-618/10) establishing that the judge cannot replace the unfair term. **The ÎCCJ also remained consistent with its earlier position that, in the absence of default rules, the creditor is obliged to modify the term declared void on the basis of real and effective negotiation with the debtor.**

However, the ÎCCJ rejected the claim of the plaintiff to order enforcement penalties in the case of refusal by the financial institution to modify the term, and it considered applicable Article 580(3) of the Civil Procedural Code, which in the case of refusal of an obligation to do so, provides civil law penalties from 20 to 50 RON for each day of non-execution to the benefit of the state.

The ÎCCJ further established that, although on the basis of the principle of *restitutio in integrum* the plaintiff would be entitled to the amount of interest paid to the creditor under the unfair terms, the court was not in the situation at the moment of the judgement to establish the exact amount payable, because it had “no reference elements” for the amount of interest, and on the period for which the modification of the term operated. Hence, it could not determine whether undue payments were charged and in what amount. By deciding thus, the ÎCCJ considered itself bound by the provision of Article 379 of the Civil Procedural Code which states that enforcement may take place only for due, certain and liquid debt, whereas in the case at hand the debt was neither certain nor liquid.

ÎCCJ, Resolution of 8 November 2016

The Appeal Court of Bucharest asked the ÎCCJ to refer three questions to the CJEU, one of which was the following:

“Should Article 6 (1) of Directive 93/13/EC be interpreted [to mean] that in a situation when a loan agreement cannot be in principle kept in force upon the elimination of the terms declared void, as opposing the application of a norm of the national law such as Article 3 of the Civil Code of 1864 or the principle of law according to which in case the contract is only partially valid, its void terms are replaced by law with legal provisions that allow the national court to remedy the nullity of the respective terms by law provisions (Article 9<sup>3</sup> of Government Ordinance no. 21/1992, as amended by Article 2 (d) and (h) and Article 4 (1) (a) of Law 363/2007 or Article 37 (d) of Government Emergency Ordinance no. 50/2007)?”

The ÎCCJ established that there was no connection between Article 6 (1) and Article 3 of the old Civil Code, which stated that “the judge who refuses to judge for the reason that the law does not provide a solution, or is not clear or sufficient, may be held liable for not providing justice” and considered that the plaintiffs did not indicate the legal provision under the principle to which they referred. In the opinion of the ÎCCJ, the question framed by the Appeal Court of Bucharest

raised an issue regarding Article 6 (1) of the Directive, which had been clarified by the CJEU in *Kásler* (C-26/13), and for this reason refused to refer the question to the CJEU.

Nevertheless, although it did not indicate the applicable rule, the ÎCCJ seems to have had a wider understanding of the ruling of the CJEU in *Kásler* (C-26/13) than it had before, concerning the type of national provisions which may substitute a void term: “it follows from Article 6 (1) of Directive 93/13 that it does not forbid the use of the norms of the national law that allow the national court to remedy the nullity of the term by replacing with a provision of the national law”. It did not specify, as in previous decisions, that the power of the national courts is limited to the default rules of national law.

## France

The rule by which excessive default interest terms may not be replaced by statutory default interest terms has been applied in several decisions by French courts, e.g.: *Tribunal d'instance Thiers*, 13 January 2009, no. 08-147; *Tribunal d'instance Aurillac*, 11 December 2009, no. 09-32; *Tribunal d'instance Montluçon*, 8 February 2011, no. 11-365. The opposite view supporting the application of statutory default interests had been previously held by *Cour de Cassation*, 1re civ., 18 mars 2003, in *Recueil Dalloz*, 2003, 1036.

The Court of Cassation delivered a particularly interesting ruling on 13 March 2019 (no. 17-23.169). The dispute concerned a loan in foreign currency subject to consumer legislation. The appeal invited the Court of Cassation to take a position in regard to the CJEU ruling of 30 April 2014 (to which it was implicitly referring). The appeal considered that the Court of Appeal could not substitute the statutory interest rate for the conventional rate considered unfair because the conditions set out in the *Kásler* judgement (C-26/13) had not been verified (in particular “the case where the invalidation of the unfair term would entail consequences for the consumer such that he would be deterred from acting”).

The French Court of Cassation seems to have applied the CJEU’s case-law strictly. It stated that:

"But whereas having noted that the stipulation of an interest characterized the loan contract granted on 13 August 2008, the Court of Appeal highlighted the impossibility of providing for its gratuitousness under penalty of causing its cancellation and imposing the immediate return of the borrowed capital, from which it deduced exactly that the statutory interest rate should be substituted for the contractual interest rate, as a provision of national law of a supplementary nature”.

## Italy

The CJEU’s above-described decisions have partially influenced Italian case law concerning the consequences of the invalidity of unfair terms for default interest in consumer credit contracts. Different outcomes may be observed depending upon whether the terms on interest violated general contract law or consumer contract law. A third, intermediate, case concerns terms trespassing the usury thresholds imposed by law and enforced through criminal law as well.

In the area of general contract law (e.g. breach of the prohibition of interest capitalization as a mandatory rule in banking law), the *Corte di Cassazione* has allowed replacement of the invalid term by means of application of default rules enabling a re-assessment of the due amount (Cass. 10 September 2013, no. 20688). The Court recalled its previous case law – specifically the decision 8 March 2012, 3649, where the court stated that in case of nullity of the clause which provides for interest capitalisation, the judge should redetermine the interest that the debtor must pay.

By contrast, in the area of unfair terms under the 93/13 Directive, Italian first-instance courts have followed the *Banco Español de Crédito* (C-618/10) rule excluding the replacement of unfair terms by means of applications of default statutory interest in substitution of unfair excessive default interest (Trib. Genova, 14.2.2013; Trib. Nola, 19.9.2011). A similar application has been developed in the different domain of penalty clauses, where, consistently with the *Asbeek* decision (C-488/11) by the CJEU, the courts have excluded the possibility to apply article 1384, It. C.c., which, in general contract law, allows the court to moderate an excessive penalty clause (see, e.g. Court of Appeal of Milan, 23.7.2004, Soc. Studio Opera C. G.S.; Tribunal of Milan, 19/07/2016; Tribunal of Nocera Inferiore, 03/04/2014 and, with regard to application of penalty clauses provisions to default interest clauses, Court of Cassation, decision no. 888/2014 and decision no. 23273/2010, and Tribunal of Milan, 28 March 2019).

A less unequivocal approach has been taken by the Banking and Financial Arbitration Committee (*Arbitro Bancario e Finanziario*) in the case of unfair terms providing for excessive default interest: in one case, the Committee of Rome fully adopted the *Banco Español de Crédito* (C-618/10) rule and the principle of dissuasiveness to exclude the possibility of replacing the contractual term on default interest through application of the statutory default rule, which calls for the application of compensatory interest when default interest is not distinctively specified by the parties: see Article 1224, It. Civ. Code (BFA Committee of Rome, 23.5.2014, no. 3415; BFA Coordination Committee decision no. 1875 of 28 March 2014; decision n. 2666 of 30 April 2014). By contrast, a subsequent decision by the BFA Coordinating Committee considered the application of Article 1224, It. Civ. Code to be sufficiently dissuasive, also in light of the CJEU's decisions (BFA Coordinating Committee, 24.6.2014, no. 3955).

In accordance with the proportionality principle, the national case law should be recalled in cases where default interest terms violate the usury thresholds. In this regard, Article 1815 c.c., as modified by Law no. 108/1996 on usury, already provides that usurious interest terms are void and may not be replaced by any default interest rule (the loan becomes gratuitous as a civil penalty for the crime). The threshold above which the default interest is void is periodically determined by a Ministry decree in regard to the type of loan. The validity of the term shall be assessed with respect to the time of stipulation, not the one of payment. However, on the basis of a new law in this area (l. 106/2011), it is held that, although the law on usury thresholds only provides for the future and hence does not apply to contracts concluded previously, and although for this reason a supervening usury threshold may not subsequently make invalid a flat-rate interest term which was valid at the time of stipulation, statutory default interest terms shall be applied in substitution of contractual terms if, at the time of payment, the contractual rate exceeds the legal threshold (see Cass. 11.1.2013, n. 602). Then in these cases contractual interest moderation shall be provided.

Some decisions by the Banking and Financial Arbitration Committee (ABF) are relevant. The ABF in its decision 24 June 2014, no. 3955, addressed the question of whether, in the case of unfairness of the clause defining the amount of default interest, that interest is “always due pursuant to Article 1224, paragraph 1, of the Italian Civil Code”, according to which, if before the delay in payment, the parties agreed an interest rate due which was higher than the rate provided by the law, default interest shall be due at the same rate. The ABF considered that on the one hand the effectiveness of the Unfair Terms Directive and of consumer protection must be guaranteed and that, on the other hand, it is also necessary to consider the role played by the discipline on default interest, which has “the essential function of discouraging default in pecuniary obligations”, and is functional to the stability of the credit system, being an incentive to pay debts. The ABF confirmed its previous decisions, according to which the clause with which default interest is conventionally agreed is to be considered a penalty clause with consequent application of Directive 1993/13 and the consumer code implementing it. Then, “in the case of contracts with consumers, the non-negotiated clauses that entail the provision of manifestly excessive default interest are null and void” because they are unfair. In such cases, the judge is not allowed to avoid or mitigate invalidity by applying Article 1384 of the Italian Civil Code, which enables the judge to moderate the amount to be paid. The ABF states that, after the declaration of voidness of the clause, “there are no obstacles to the application to the case in question of the rules set forth in Article 1224 of the Italian Civil Code”, which is a supplementary provision. Therefore, default interests are due to the same extent as any interest agreed upon. The ABF’s reasoning was based on the argument that the application of Article 1224 c.c. does not undermine the principle of dissuasiveness, because the interest rate applicable according to Article 1224 c.c. will be lower than the interest rate due on applying the penalty clause.

## Spain

Generally speaking, the rules by which excessive default interest terms may not be replaced by statutory default interest terms are applied in Spanish case law (e.g. *Tribunal Supremo*, 3 June 2016, no. 364, in [www.poderjudicial.es](http://www.poderjudicial.es); *Tribunal Supremo*, 18 February 2016, no. 79; *Tribunal Supremo*, 22 April 2015).

It is particularly interesting to consider the follow-up judgements of the **Abanca** case (Joined Cases C-70/17 and C-179/17). It is so also because, with regard to two issues, the Spanish referring courts interpreted national laws providing a different solution to the case, although both courts applied the CJEU judgement. The divergent interpretations regarded:

- a) the question of whether a contract can continue in existence following the removal of an unfair term;
- b) the existence of unfavourable consequences of the application of the normal execution proceeding instead of a specific mortgage proceeding.

The two judgements will be considered with these two issues taken into account.

*Tribunal Supremo*, N°. de recurso: 1752/2014; n° de resolution: 463/2019, 26 March 2019.

**a) With regard to the question of whether a contract is capable of continuing in existence following the removal of an unfair term**, the Tribunal Supremo, relying on its previous case law (judgements of the full court 46/2019 , 47/2019, 48/2019 and 49/2019, all of 23 January) considered that, under Spanish law, although a mortgage loan contract includes two different legal figures – the loan (contract) and the mortgage (right *in rem*) – both are essential and form a unitary institution. Therefore, the Tribunal Supremo recalled its judgement 1331/2007, according to which “the credit guaranteed by mortgage (mortgage credit) is not an ordinary credit, since it is subsumed in a real mortgage right, and therefore it is treated legally in a different way”. On this basis, the Tribunal Supremo stated that, although in the Spanish legal system the nullity of the early maturity clause does not imply the complete disappearance of the faculties of the mortgagee, it is evident that it entails the restriction of the essential faculties of the mortgage right, which is the one that attributes to the creditor the power to force the sale of the mortgaged thing in order to satisfy with its price the amount due. In particular, in a long-term mortgage loan contract, the guarantee loses its meaning. Therefore, the Tribunal Supremo stated that, under the consideration of the mortgage loan contract as a unitary or complex legal transaction, the basis for the conclusion of the contract for both parties is the obtaining of cheaper credit (consumer) in exchange for an effective guarantee in the event of non-payment (bank).

**These arguments led the Tribunal Supremo to declare (a) that a long-term mortgage loan contract cannot survive if enforcement of the guarantee is illusory or extremely difficult, and (b) that**, considering that the contract is a complex legal business of lending with a mortgage guarantee, the deletion of the unfair clause affects the guarantee and therefore the economy of the contract and its substance.

**b) with regard to identification of unfavourable consequences if the contract does not continue in existence**, the court identified as unfavourable consequences the obligation to repay the entire amount of the loan, the loss of the advantages legally provided for in the case of foreclosure, and the risk of the execution of a judgement estimating an action for termination of the contract brought by the lender, with the consequent full claim for the loan.

On these bases, the Tribunal Supremo affirmed the possibility of application of Article 693(2) LEC (version subsequent to the signing of the contract at issue).

Furthermore, the Tribunal Supremo, recalling the CJEU cases *Dunai* (C-118/17) and *Banco Santander* (C-96/16; C-94/17) provided some guidelines for the interpretation of unfairness within Directive 1993/13, relying also on its previous case law. The guidance is to be applied to ongoing foreclosure proceedings where the possession has not yet been transferred to the acquirer. The most important guidelines are the following:

a. Proceedings in which, prior to the entry into force of Law 1/2013, the contract was terminated early by application of a contractual clause deemed null and void, should be terminated without further action;



b. Proceedings in which, after the entry into force of Law 1/2013, the loan expired due to the application of a contractual clause deemed null and void, and the debtor's default does not meet the requirements of gravity and proportionality set forth above, should also be dismissed.

c. The processes referred to in the previous section, in which the debtor's breach is of the gravity provided for in the LCCI, may continue to be processed.

d. The dismissal orders issued in accordance with paragraphs (a) and (b) above shall not have the effect of *res judicata* in respect of a new enforceable claim based, not on anticipated expiration due to contractual provision, but on the application of legal provisions (CJEU of 3 July 2019, Case C-486/16).

Court of First Instance No 1, Barcelona, Spain, decision of 15 May 2019

**a) With regard to the question of whether a contract is capable of continuing in existence following the removal of an unfair term**, the first-instance court, recalling the CJEU case law, affirmed that the criterion of the possibility of existence of the contract should be interpreted objectively, taking into account:

- the objectively appreciable real possibility of subsequent application of the contract, considering whether excessive contractual loopholes are created;
- disappearance of the substance of the contract or modification of its purpose or nature.

In the specific case the first-instance court of Barcelona affirmed that the accelerated repayment clause is not necessary for the existence of the contract.

**b)** the court of first instance of Barcelona stated that, in order to evaluate if the termination of the contract implies **unfavourable consequences for the consumer**, the comparison should be made between the actual situation of the consumer and the one which will ensue from the termination of the contract. In particular, the court stated that in both cases of application and non-application of the supplementary provision, the legal effect is the termination of the contract, and the entire amount of the debt can be obtained by the creditor.

Moreover, the court questioned whether the consequences are more unfavourable in the case of application of one execution procedure. The court analysed all the procedural differences between the execution proceeding applicable in the case of application of the supplementary provision (the special proceeding of *ejecución hipotecaria*) and in the case of declaration of the unfairness of the clauses (the dismissal of the execution proceeding of *ejecución hipotecaria* and the possible commencement of a new proceeding based on a judgement of declaratory nature and on a standard execution proceeding). The first-instance court estimated that the consumer in the case of termination of the contract does not suffer particularly unfavourable consequences.

On these bases, the first-instance court considered not applicable the legal provision which substitutes the unfair clause, because the contract is capable of continuing in existence after the removal of an unfair term, and the consumer will not suffer particularly unfavourable consequences from the declaration of the clause's unfairness.

Therefore, the first-instance court declared the unfairness of the early maturity clause and denied the judicial order which is necessary to start execution proceedings

## Slovenia

The Ljubljana Higher Court referred to the *Kásler* case (C-26/13) in its decision no. III Cp 2452/2016 of 1 January 2017, in which the plaintiffs sought the declaration of nullity and voidness of a credit contract. The court stated that it is true that in the *Kásler* case (C-26/13) the CJEU had urged the greater transparency of credit conditions to the benefit of consumers. However, the court explained that, in the present case, the concrete credit contract did not include unfair terms. Besides, the plaintiffs had only claimed the existence of unfair contract terms for the first time in the complaint, which made this objection inadmissible. Although the court completely accepted the interpretation of EU law given in *Kásler* (C-26/13), it concluded that the *Kásler* decision (C-26/13) could not be applied in the present case (for the reasons mentioned above).

### *The replacement of unfair terms in the European Commission's Guidance on the interpretation and application of Council Directive 93/13/EEC*

On 22 July 2019, the European Commission adopted the “Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts”, which considers the CJEU case law until 31 May 2019, in order to clarify certain aspects of the Unfair Terms Directive. It should be noted that the document does not have legal force, and only aims at providing guidance for interpreting Directive 1993/93 in light of the CJEU case law.

The Commission addressed the issue of the consequences of a clause's unfairness for the contract, also with regard to the substitution of unfair terms. Particularly interesting is the Commission's view on the possibility to partially maintain a clause which is considered unfair. In this regard, according to the Guidance:

“- what matters for the severability of contract terms is the content or function of particular stipulations rather than the way in which they are presented in a given contract and that

- a partial deletion is not possible where two parts of a contract term are linked in such a way that the removal of one part would affect the substance of the remaining contract term.”

Furthermore, the Commission pointed out that the notion of “supplementary provision of national law” is not defined by Directive 1993/13, and that this concept could be clarified. To be noted in this regard is that the *Dzjubač* case (C-260/18) contributed to clarifying which national norms can be considered “supplementary provisions”.

## 5.2. Unfair terms and individual redress: limitation periods

### Relevant CJEU cases

- Judgement of the Court (Fifth Chamber) of 21 November 2002. *Cofidis SA v Jean-Louis Fredout*, Case C-473/00 (“**Cofidis**”)

- Judgement of the Court (Second Chamber) of 5 March 2020, *OPR-Finance s.r.o. v GK*, Case C-679/18 (“**OPR-Finance**”)
- Judgement of the Court (Fourth Chamber) of 9 July 2020, *SC Raiffeisen Bank SA and BRD Groupe Société Générale SA v JB and KC*, Joined Cases C-698/18 and C-699/18 (“**Raiffeisen Bank and Société Générale**”)
- Judgement of the Court (Fourth Chamber) of 16 July 2020, *CY and Others v Caixabank SA and Banco Bilbao Vizcaya Argentaria SA*, Joined Cases C-224/19 and C-259/19 (“**Caixabank**”)
- Judgement of the Court (First Chamber) of 22 April 2021, *LH v Profi Credit Slovakia s.r.o.*, Case C-485/19 (“**Profi Credit Slovakia**”)
- Judgement of the Court (First Chamber) of 10 June 2021, *VB and Others v BNP Paribas Personal Finance SA and AV and Others v BNP Paribas Personal Finance SA and Procureur de la République*, Joined Cases C-776/19 to C-782/19 (“**BNP Paribas II**”)

**Within this cluster, the main case which can be presented as a reference point for the judicial dialogue within the CJEU and between EU and national courts is *Profi Credit Slovakia*.**

#### Main question addressed

Question 1                      Whether application of a limitation period to claims brought by consumers in order to assert their rights under Directive 93/13 is compatible with the principle of effectiveness.

#### Relevant legal sources

##### **EU level**

##### Article 6(1) of Directive 93/13

“Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.”

##### Article 7(1) of Directive 93/13

“Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.”

##### **National legal sources**

##### Article 107 of the Slovak Civil Code

“(1)     The right to claim restitution on the grounds of unjust enrichment shall be time-barred within two years from the time when the person concerned becomes aware of unjust enrichment and discovers who has enriched himself or herself to his or her detriment.

(2) The right to restitution on the grounds of unjust enrichment shall lapse at the latest within 3 years, and within 10 years in the case of intentional unjust enrichment, from the day on which the unjust enrichment occurred.”

### 5.2.1 Question 1 - Applicability of a limitation period to claims brought by consumers

Is the application of a limitation period to claims brought by consumers in order to assert their rights under Directive 93/13 compatible with the principle of effectiveness?

#### The case

LH (the applicant) took out a consumer credit loan (€1500) with Profi Credit Slovakia (the defendant) at an interest rate of 70% and an annual percentage rate of charge of 66.31%. The applicant did not receive €1500, but €1132.51, due to a commission of €367.47 charged because of the possibility of deferring repayments. When the agreement had been concluded, the applicant had received no information about the annual percentage rate of charge. Nor were the instalments detailed in the contract, contrary to the relevant provision of national law that required detailed statements that, as a result of another Court case (*Home Credit Slovakia*, C-42/15), were compliant with Directive 2008/48. The applicant repaid the loan, but it was later brought to his attention that the failure to disclose the annual percentage rate of charge constituted an unfair term. The applicant subsequently claimed repayment of the commission.

#### Preliminary questions referred to the CJEU

“(1) Must Article 47 of the [Charter] and, by implication, the consumer’s right to an effective legal remedy, be interpreted as precluding national legislation, such as Article 107(2) of the *Občianský zákonník* (Civil Code of Slovakia) on the limitation of the consumer’s right by a statutory three-year limitation period, in accordance with which the consumer’s right to reimbursement which arises from an unfair contractual term may become time-barred even where the consumer is not in a position to evaluate the unfair contractual term and the limitation period starts even without the consumer being aware that the contractual term is unfair?

(2) In the event that, despite a lack of awareness on the part of the consumer, the legislation which imposes a statutory limitation period of three years on the consumer’s right is consistent with Article 47 of the Charter and the principle of effectiveness, the national court then asks the following:

Is a national practice contrary to Article 47 of the Charter and the principle of effectiveness if, in accordance with that practice, the burden of proof falls on the consumer, who must prove in legal proceedings that the persons acting on behalf of the creditor were aware of the fact that the creditor was infringing the consumer’s rights, in the present case that awareness consisting in the knowledge that, by failing to indicate the precise [APR], the creditor was infringing a legal provision, and must also prove awareness of the fact that, in such circumstances, the loan was

non-interest bearing and, by receiving payments of interest, the creditor obtained unjust enrichment?”

### Reasoning of the CJEU

The questions were deemed admissible. Although they did not refer to any act of Union law other than the Charter, it was clear from the grounds set out in the order for reference that there is a clear and sufficient link between the limitation rules laid down in Article 107(2) of the Civil Code, which are applicable to an action brought by a consumer, such as the applicant in the main proceedings, and the provisions of secondary Union law, which are intended to ensure consumer protection. More specifically, the national court was asking whether those national rules are likely not only to affect the right to an effective remedy enshrined in Article 47 of the Charter, but also to undermine the full effect of the provisions on unfair terms contained in Directive 93/13 and the provisions on consumer credit contained in Directive 2008/48. In other words, as the Advocate General indicated in points 31 to 33 and 52 of his Opinion, by its first two questions, that court had sought clarification in order to be able to rule on the conformity with Directives 93/13 and 2008/48 of provisions of Slovak law concerning limitation periods which are applicable to legal proceedings brought in the field of consumer contracts. The CJEU made it clear that the obligation of Member States to lay down detailed procedural rules to ensure respect for the rights which individuals derive from Directive 93/13 against the use of unfair terms implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter, which applies, in particular, to the detailed procedural rules relating to such actions.

It was clear from the information given by the national court, in particular in the context of its first question, that the three-year period provided for in Article 107(2) of the Civil Code began to run from the date on which the unjust enrichment had occurred and that the limitation period applied even if the consumer was not in a position to assess for himself or herself that a contractual term was unfair or has not been made aware of the unfairness of the contractual term in question. In that connection, it was necessary to take account of the weaker position of consumers *vis-à-vis* sellers or suppliers, as regards both their bargaining power and their level of knowledge, and the fact that it is possible that consumers are not aware of the unfair nature of a term in the agreement concluded with a seller or supplier or do not appreciate the extent of their rights deriving from Directive 93/13 or Directive 2008/48. Credit agreements like the one at issue in the main proceedings were generally executed over long periods of time and, therefore, if the event which triggered the three-year limitation period was any payment made by the borrower, which is for the national court to ascertain, it cannot be ruled out that, at least in respect of some of the payments made, the limitation period will begin to run even before the contract in question comes to an end, so that such a limitation period regime is liable systematically to deprive consumers of the possibility of claiming the return of payments made under terms contrary to those directives.

### Conclusion of the CJEU

The principle of effectiveness must be interpreted as precluding national legislation which provides that an action brought by a consumer for repayment of sums wrongly paid in connection with the performance of a credit agreement may not be brought on the basis of unfair terms,

within the meaning of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, or terms contrary to the requirements of 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, is subject to a limitation period of three years which begins to run from the day on which the unjust enrichment occurred.

#### Elements of judicial dialogue

Earlier case law of the CJEU had revealed that limitation periods as such are *not necessarily incompatible* with the principles of equivalence and effectiveness in EU law. The question, therefore, is under what circumstances a limitation period should be set aside. The CJEU has confirmed that *knowledge or awareness* on the part of consumers of their rights plays a crucial role in the assessment of cases concerning limitation periods. In *Raiffeisen Bank* (C-698/18 and C-699/18), the CJEU reiterated that reasonable time limits for bringing proceedings, laid down in the interests of legal certainty, do not make it practically impossible or excessively difficult as such for consumers to exercise their rights conferred by EU law, if such time limits are sufficient in practical terms to enable consumers to prepare and bring an effective action. Under the rules in place in *Raiffeisen*, however, a three-year limitation period started to run from the time when the credit agreement had been performed in full: that is, when the consumer was presumed to have known of the unfair nature of one or more unfair terms of that agreement. According to the CJEU, it is nevertheless possible that the consumers involved are not aware of this, which means the limitation period is likely to have expired before they can take action. This is at odds with the principle of effectiveness.

The CJEU held in *Caixabank* that if a limitation period would start at the conclusion of the contract, irrespective of consumers' knowledge or awareness of their rights, this could run counter to the principle of effectiveness and the principle of legal certainty. The limitation period for reimbursement claims should not make it *practically impossible or excessively difficult* for consumers to exercise their rights.

#### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

*Rb Amsterdam 17 augustus 2021, ECLI:NL:RBAMS:2021:4510 (Interbank).*

“3. [The applicant claims that the claims are not time-barred. The ECJ has ruled in a number of recent decisions that prescription is not possible when examining an unfair term/determining the unfairness of a term, as the principle of effectiveness precludes this (CJEU 10 June 2021, C-776/19). A consumer may also be unaware of the unfairness of a term (9 July 2020 and 16 July 2020 C Raiffeisen Bank SA vs JBC C-698/18). Even a limitation period of three years starting from the date of full performance of the contract does not then provide effective protection and cannot be accepted. The [plaintiff] bases its claims - in brief - on the fact that it was entitled to assume that the development of the credit remuneration rate in credit agreement 1 would follow an external interest rate (possibly with a liquidity surcharge). In view of the clause (1.2) in conjunction with what is stated in the prospectus, it was entitled to assume this. Only in 2018 did it discover that this was not the case.

12. InterBank invoked the statute of limitations on [plaintiff's] claims. That appeal is rejected. The limitation period for a claim for undue payment is five years. The Directive does not in principle preclude a limitation period for bringing an action seeking to enforce an obligation to make good a loss caused by the invalidity of an unfair term in a consumer contract, in so far as that period is not less favourable than that applicable to similar domestic actions and in so far as the exercise of the rights conferred by the Directive is not rendered practically impossible or excessively difficult (CJEU 9 July 2020, C-698/18 and C-699/18 and CJEU 10 June 2021, C-776/19). The latter conditions imply that the limitation period only commenced from the time when [plaintiff] was/can be aware that she has a claim against InterBank for undue payment. In any case, [plaintiff] has been aware for less than five years that InterBank based the change of interest rate on factors other than the market interest rate. Insofar as InterBank argues that the right to invoke the 'unfairness' of the relevant stipulations as referred to in the Directive has been time-barred, it is not followed. The provisions of the Directive and the requirement that it must offer consumers effective protection preclude the assumption of such a limitation period (cf. inter alia CJEU 21 November 2002, *Cofidis*, C-473/00). The court must also examine, of its own motion - i.e. even if the consumer does not or cannot avail himself of an annulment - whether the terms in question are unfair. And if such an assessment leads to the conclusion that the relevant terms should be annulled, it is only at that moment that a claim for undue payment arises."

### 5.3. Unfair practices and individual redress: the role for contract invalidity.

#### Relevant CJEU cases

- Judgement of the Court (First Chamber) of 15 March 2012, *Jana Pereničová and Vladislav Perenič v SOS financ spol. S r. o.*, Case C-453/10, ("**Pereničová**")
- Judgement of the Court (Fifth Chamber) of 19 September 2018 *Bankia SA v Juan Carlos Marí Merino, Juan Pérez Gavilán, María Concepción Marí Merino*, Case C-109/17 ("**Bankia SA**")

#### Main questions addressed

Question 1 To what extent shall the EU principles of effectiveness, proportionality and dissuasiveness influence the identification of civil remedies against unfair commercial practices (see Articles 11 and 13, Directive 2005/29/CE)? More particularly, to what extent shall these principles influence the possibility to set aside the contract stipulated in relation with or as a consequence of an unfair practice?

#### Relevant legal sources

Article 47, CFREU, Right to an effective remedy and to a fair trial

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. [...]"

Article 6(1), Unfair Terms Directive

Article 11(1), Unfair Commercial Practices Directive

“Enforcement. 1. Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.”

Article 13, Unfair Commercial Practices Directive

“Penalties. Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.”

**5.3.1. Question 1 – Contract nullity as an effective, proportionate, and dissuasive remedy against unfair commercial practices?**

To what extent shall the EU principles of effectiveness, proportionality, and dissuasiveness influence the identification of civil remedies against unfair commercial practices (see Articles 11 and 13, Directive 2005/29/CE)? More particularly, to what extent shall these principles influence the possibility to set aside the contract stipulated in relation with or as a consequence of an unfair practice?

The case

**The issue may be addressed with special regard to the *Pereničová* case (C-453/10).**

A Slovakian lending company (SOS finance spol s.r.o.) granted consumers credit on the basis of standard loan agreements. The agreement indicated a yearly interest rate of 48.63%. However, it did not include the additional cost for granting the credit.

In 2008, a married couple took out a loan of 4,979 euros, which was to be repaid in 32 monthly instalments of ca. 199 euros. The 33rd monthly rate, the last one, was supposed to be equal to the loaned amount, i.e. 4,979 euros. Since the total amount to be repaid was 11,352 euros, according to the court’s calculations the yearly interest rate was equal to 58.76%, and not to 48.63% as contractually stated.

When the couple delayed payment of one of the instalments, the company demanded payment of the penalty. Because the consumers believed that the credit agreement included unfair and non-transparent provisions, they started proceedings to avoid the consumer credit contract. One of the main issues addressed by the court was whether a violation of EU law like the one before it would entitle a consumer to set aside the entire contract (and not just single unfair terms) if this type of protection were economically more advantageous for the consumer.



Preliminary question referred to the CJEU:

The referring court considered that the case should be addressed not only from the perspective of the Unfair Contract Terms Directive but also from that of the Unfair Commercial Practices Directive. This is what specifically matters for the purpose of the present analysis.

With regard to the application of the Unfair Commercial Practices Directive, the court put the following question to the CJEU:

“Are the criteria determining what is an unfair commercial practice in accordance with Directive 2005/29 such as to permit the conclusion that, if a supplier quotes in the contract a lower APR than is in fact the case, it is possible to regard that step by the supplier towards the consumer as an unfair commercial practice? If there is a finding of an unfair commercial practice, does Directive 2005/29 permit there to be any impact on the validity of a credit agreement and on the achievement of the objective in Articles 4(1) and 6(1) of Directive 93/13, if invalidity of the contract is more advantageous for the consumer?”

Indeed, the two Directives may be linked to the extent that an unfair practice may determine the existence of unfair terms. If this is the case, the choice of effective remedies should be made taking the objectives of both Directives into account.

Reasoning of the CJEU:

The reasoning of the Court indeed confirmed the existence of a possible link between the occurrence of an unfair practice and the use of unfair terms. However, this link is not automatic:

**“a finding that a commercial practice is unfair is one element among others on which the competent court may base its assessment of the unfairness of contractual terms under Article 4(1) of Directive 93/13.”** (*Pereničová*, C-453/10, paragraph 43)

In the present case, the fact that the service provider gave the consumer an estimate of a yearly interest rate lower than the real one should be seen as an unfair commercial practice. This element should be considered when assessing unfairness on the basis of Article 4 of the Directive 93/13, according to which all circumstances attending the conclusion of the contract are to be taken into account.

The consequences of this finding under EU law should be drawn on the basis of the Unfair Terms Directive rather than on the basis of the Unfair Commercial Practice Directive. Indeed, the latter applies, as Article 3(2) states, without prejudice to contract law and in particular to the rules on the validity, formation or effect of a contract.

According to Article 6, UCTD, Member States should lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

Therefore, the CJEU held that national courts must, first, use national law principles to assess whether there are unfair contract terms in a consumer contract and, second, assess objectively whether a contract can continue without its unfair terms, rather than simply declaring the whole contract invalid.

The latter assessment shall be conducted in ‘objective’ terms, without it being possible merely to consider that the invalidity of the whole contract would result in a more beneficial position for the consumer. Indeed,

“the objective pursued by the European Union legislature in connection with Directive 93/13 consists in restoring the balance between the parties while in principle preserving the validity of the contract as a whole, not in abolishing all contracts containing unfair terms.” (*Pereničová*, C-453/10, paragraph 31)

#### Conclusion of the CJEU:

The CJEU concluded that the occurrence of an unfair practice may influence the assessment of unfair terms in the contract, but no automatic inference may be drawn from the former to the latter. Moreover, remaining within the scope of application of EU Directives, the impact of a single term’s non-bindingness on the whole contract may not be based on the mere and subjective consideration of the single consumer’s advantage in setting aside the whole contract. This conclusion holds true when the unfair term is the result of an unfair practice.

This conclusion is compatible with the possibility that national legislation provides validity rules applicable to contracts concluded as a consequence of unfair practices. In this respect, the new reform of Directive 2005/29 is relevant. See § p. 176.

#### Elements of judicial dialogue:

In the ***Bankia*** case (C-109/2017, 19 September 2018) the CJEU addressed the question of whether, in accordance with Directive 2005/29, national legislations on mortgage enforcement should provide for the review by the courts, of their own motion or at the request of one of the parties, of unfair commercial practices, in order to ensure the review by the courts of contracts or acts which may contain unfair commercial practices.

The CJEU considered that it is settled case law that Directive 2005/29 leaves the Member States a margin of discretion as to the choice of national measures intended, in accordance with Articles 11 and 13 of that Directive, to combat unfair commercial practices, provided that they are adequate and effective and that the penalties thus laid down are effective, proportionate and dissuasive. Furthermore, the Court stated that, pursuant to recital 9 of Directive 2005/29, that Directive is without prejudice to, in particular, individual actions brought by persons who have been harmed by an unfair commercial practice and without prejudice to EU and national rules on contract law, including the rules on the validity, formation, or effect of a contract. In this respect, the Court stated that:

“a contract being used as an enforceable instrument cannot be declared invalid solely on the ground that it contains terms that are contrary to the general prohibition of unfair commercial practices laid down in Article 5(1) of that

directive. It follows that it is not necessary for Member States to authorize the court hearing mortgage enforcement proceedings to review, whether of its own motion or at the request of the parties, the validity of the enforceable instrument in light of the existence of unfair commercial practices in order to give useful effect to Directive 2005/29”.

The CJEU’s conclusions were the following:

“Article 11 of Directive 2005/29/EC (...) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prohibits the court hearing mortgage enforcement proceedings from reviewing, of its own motion or at the request of the parties, the validity of the enforceable instrument in light of the existence of unfair commercial practices and, in any event, prohibits the court having jurisdiction to rule on the substance regarding the existence of those practices from adopting any interim measures, such as staying the mortgage enforcement proceedings”.

*Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

As stated above, the conclusion reached by the CJEU is compatible with the possibility that national legislation provides validity rules applicable to contracts concluded as a consequence of unfair practices and with the wording of the new Directive 2019/6121 (see p. 176). Indeed, in some Member States, like France, the Netherlands, Luxembourg, and the UK, the consumer has been enabled to set aside a contract concluded on the basis of unfair commercial practices by different means (voidness, voidability, unwinding). Without providing a specific remedy concerning the effectiveness or validity of the contract, Article VI.38 of the Belgian Code of Economic Law establishes that, when a consumer concludes a contract in relation with an unfair practice, he or she is entitled either to claim reimbursement of the amount paid, or to refuse payment without a duty to return the goods or to compensate the services provided.

Lacking a specific remedy, the ordinary rules on vices of consent may apply. This is the case of Italy, for example. These rules normally require proof (to be provided by the consumer) of a specific link between the factual circumstances causing the vice of consent and the formation of the contractual consent as materially affected by those circumstances and unfair practices. This restriction may prevent the provision of an effective remedy to the consumer.

### **Italy**

As observed above, without a specific validity rule provided by Italian legislation in relation to the occurrence of unfair practices, ordinary rules on vices of consent would apply. This conclusion remains in place even in light of the restrictive approach taken by the *Corte di Cassazione* which excludes the application of nullity as a remedy for violation of information duties and pre-contractual unfairness (Cass., United Chambers, no. 26725/2007). This latter important decision states that, although nullity may not act as a general remedy in these cases, voidability may do so, if legal requirements are met. In practice, the use of voidability is critical as well, since

the consumer should provide evidence of the specific impact determined by the unfair practice or information breach in the decision-making process (Cass. No. 21600/2013).

Despite these limitations, some lower-instance courts have applied the general contract law rules on vices of consent to unfair practices litigation (see: Trib. Terni 6.7.2004; Pret. Bologna 8.4.1997; Trib. Parma 14.7.2003; Trib. Bologna 28.9.2009). In particular, a recent decision of the Bologna Tribunal (no. 358 of 2 February 2018) stated that once the NCA has ascertained the unfairness of a practice, a contract concluded due to such practice can be annulled according to the contract law rules on vices. As far as the burden of proof is concerned, the Tribunal stated that once the consumer has brought the NCA decision before the Court, it is for the professional or producer to prove that there are no grounds to recognize the occurrence of vices of consent, or that the unfair practice bore no causal link to the consumer's consent, during the conclusion of the contract. Nevertheless, it should be considered that, in other decisions, the Italian Courts have upheld strict rules concerning the proof of vices of consent.

With regard to fraud, the Court of Cassation pointed out that such fraud, in order to justify the annulment, must have been such that the consumer would not have consented to the contract without it (Decision no. 14628/2009). On the other hand, with regard to mistake, the Court of Cassation stated that it is the party asking for an annulment that should bear the burden of proof, without any legal presumption (Decision no. 21600/2013). To summarize, Italian case law appears to gravitate between two points of reference: on the one hand, the general rules concerning vices of consent and their proof; on the other, the value of the ascertainment of the unfair practice in the NCA decision, in light of the effective judicial protection of consumers.

## **Poland**

In Poland, under Article 12 section 1 point 4 of the Unfair Commercial Practices Act of 2007, a consumer that has been affected by an unfair practice can claim invalidation of the relevant contract as well as damages. However, the legislative design of this sanction seems rather unclear, because – according to the most convincing interpretation – it is based upon a consumer's claim to make a contract invalid. In other words, the invalidity in question does not occur *ex lege*, without a consumer making a statement of intent.

The main problem addressed in the *Pereničová* decision (C-453/10) was not dealt with directly by Polish courts. References to this judgement have been made only to establish the general idea of the review of the fairness of clauses in B2C dealings (like the District Court of Łódź in several similar judgements – e.g. of 17 November 2016, III Ca 1427/15), inadvertently with stronger emphasis on the principle of *ex officio* review (judgement of the Regional Court in Kamienna Góra of 27 January 2017, I C 1040/16). In the first group of judgements, the District Court of Łódź ascertained only – with reference to the *Pereničová* decision (C-453/10) – that the application of rules on unfair terms does not always have to lead to the invalidity of the entire contract.

[Directive 2019/2161 amending Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernization of EU consumer protection rules](#)

Directive 2019/1261 amending Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernization of EU consumer protection rules provides new rules on the impact of unfair practices on consumer contracts.

There are two amendments to Directive 2005/29 that are particularly important for our purposes:

- Paragraph 5 of Article 3, which in the new wording states:

“This Directive does not prevent Member States from adopting provisions to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer’s home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers. Such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection”.

- The introduction of a new Article 11a, which in the new wording states:

**“Consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies.** Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.

Those remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law.”

Furthermore, **some amendments to Directive 2011/83** are to be considered. In the new wording of Article 16 of that Directive, the following paragraph was added:

“Member States may derogate from the exceptions from the right of withdrawal set out in points (a), (b), (c) and (e) of the first paragraph for contracts concluded in the context of unsolicited visits by a trader to a consumer’s home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers for the purpose of protecting the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices. **Such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection.**”

## 5.4. Unfair terms and individual redress: invalidity, interim relief and restitution remedies.

### Relevant CJEU cases in this cluster

- Judgement of the Court (First Chamber) of 14 March 2013, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, Case C-415/11 (“**Aziz**”)
- Judgement of the Court (Third Chamber) of 10 September 2014, *Monika Kušionová v SMART Capital a.s.*, Case C-34/13. (“**Kušionová**”)
- Judgement of the Court (Grand Chamber) of 21 December 2016, *Francisco Gutiérrez Naranjo v Cajasur Banco SAU* (C-154/15), *Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA)* (C-307/15), *Banco Popular Español, SA v Emilio Irlés López Teresa Torres Andreu* (C-308/15), Joined Cases C-154/15, C-307/15 and C-308/15 (“**Naranjo**”) - [link](#) to the database for analysis of the lifecycle of the case
- Judgement of the Court (Second Chamber) of 31 May 2018, *Zsolt Sziber v ERSTE Bank Hungary Zrt.*, Case C-483/16, (“**Sziber**”)
- Judgement of the Court (Third Chamber) of 14 March 2019, *Zsuzsanna Dunai v ERSTE Bank Hungary Zrt.* Case C-118/17 (“**Dunai**”)

### Main questions addressed

- Question 1 Is the declaration of the non-bindingness of an unfair term an effective remedy as such or, in order to provide an effective consumer protection, should the judge provide additional and consequential measures concerning the non-bindingness of terms: for instance, in the case of credit contracts, **interim measures** which suspend/interrupt the executive procedure on the consumer's home?
- Question 2 Is the declaration of non-bindingness of an unfair term an effective remedy as such or, in order to provide effective consumer protection, should the judge provide additional and consequential measures, such as an order of **restitution** of any sum unduly paid by the consumer?
- a. If so, does the principle of effectiveness require that this restitution cover all payments made under a non-binding clause (*ex tunc* effects of non-bindingness) or could the judge apply a national rule, if it exists, which limits such restitution to the sums unduly paid after the time when the non-bindingness was declared by the judge (*ex nunc* effects of non-bindingness)?

### Relevant legal sources

#### Article 47, CFREU, Right to an effective remedy and to a fair trial

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. [...]”

#### Article 6(1), Unfair Terms Directive

#### Article 7(1), Unfair Terms Directive

### 5.4.1. Question 1 – Non-bindingness of unfair terms and interim relief in foreclosure proceedings

1. Is the declaration of non-bindingness of an unfair term an effective remedy as such or, in order to provide effective consumer protection, should the judge provide additional and consequential measures, linked with terms' non-bindingness, such as, in the case of credit contracts, interim measures which suspend/interrupt the executive procedure on the consumer's home?

#### The cases

The above question has been addressed by the CJEU in several decisions. We focus on the *Aziz* and *Kušionová* cases (C-34/13), as those in which the application of the principle of effectiveness has had an important role.

In both cases, a consumer's home was subject (or could have been subject) to a mortgage enforcement procedure based on credit contract terms, these being allegedly unfair.

In the *Aziz* case, the Spanish law applicable at the time of the proceedings only allowed for limited grounds of opposition to the enforcement proceedings. It excluded ascertainment of unfair contract terms. Nor did it enable the different judge in charge of ascertainment of a term's unfairness in the declaratory proceedings to suspend the parallel mortgage enforcement procedure.

Differently, in the *Kušionová* case (C-34/13), the consumer brought an action before the court for the assessment of a credit contract which included a clause enabling home foreclosure through an extrajudicial procedure – as in fact allowed by statutory provisions of Slovak law. However, it was determined during the preliminary reference proceedings before the CJEU that the Slovak legislation allowed (and allows) a court to adopt interim measures, including the suspension of the extrajudicial procedure and the declaration of voidness of the sale of the seized home whenever the mortgage is based on an invalid clause.

#### Preliminary question referred to the CJEU

For the purposes of the present chapter, we will not consider here the questions – though addressed by the CJEU – concerning the *ex officio* power of the judge to ascertain the unfairness of terms in consumer contracts (see Chapter 1). Instead, we shall focus on the issue of available remedies/measures different from the mere declaration of a term's unfairness as a necessary complement to effective consumer protection against the use of unfair terms. More specifically, we will focus on the role of interim measures applicable to enforcement procedures which are linked, or may be linked, with declaratory proceedings in which the unfairness of terms is or may be assessed.

In the *Aziz* case, the relevant question was formulated as follows:

“By its first question, the referring court wishes to know, essentially, whether Directive 93/13 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a clause contained in a contract between a consumer and a seller or supplier, does not allow the court before which declaratory proceedings have been brought, which does have jurisdiction to assess whether such a clause is unfair, to grant interim relief in order to guarantee the full effectiveness of its final decision” (*Aziz*, paragraph 43).

In the *Kušionová* case (C-34/13) the referring court asked whether the national legislation, which enables a creditor to recover sums paid on the basis of a contract’s unfair terms by enforcing a charge against a consumer’s immovable property, without any assessment of the contract’s terms by a court, and despite there being a dispute as to whether the contract term at issue is unfair, is precluded by Directive 93/13 and Directive 2005/29, in light of Article 38 of the Charter. As shown below, the CJEU’s built on the existence of procedural and substantive safeguards in Slovak legislation that provide for the adoption of interim measures, invalidity rules, and restitutionary remedies.

#### Reasoning of the CJEU

It is exactly in the CJEU’s reasoning that the availability of interim measures is held to be an important complement of effective consumer protection.

Indeed, in the *Aziz* case, the CJEU considered the effectiveness of consumer protection to be impaired by the lack of availability of interim measures within the declaratory proceeding in respect of the enforcement proceeding (paragraph 52). More particularly:

“such procedural rules impair the protection sought by the directive, in so far as they render it impossible for the court hearing the declaratory proceedings – before which the consumer has brought proceedings claiming that the contractual term on which the right to seek enforcement is based is unfair – to grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of its final decision (see, to that effect, Case C-432/05 *Unibet* 2007 ECR I-2271, paragraph 77).” (*Aziz*, paragraph 59)

Following an argument proposed by the AG, the CJEU also dealt with the issues of whether alternative remedies could provide an effective protection for the consumer, namely the damages that the consumer could claim once his/her home has been irreversibly seized. Clearly, due to the specific nature of the affected interest, involving the consumer’s family home, damages are not considered an effective remedial alternative.

“As also observed by the Advocate General in point 50 of her Opinion, without that possibility, where, as in the main proceedings, enforcement in respect of the mortgaged immovable property took place before the judgment of the court in the declaratory proceedings declaring unfair the contractual term on which the



mortgage is based and annulling the enforcement proceedings, that judgment would enable that consumer to obtain only subsequent protection of a purely compensatory nature, which would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13.

That applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling.” (*Aziz*, paras. 60-61)

These arguments may be perfectly compared with those adopted in the *Kušionová* case (C-34/13), where, by contrast, the CJEU found that the Slovak legislation was not precluded by EU law interpreted in accordance with the principles of **effectiveness** and **dissuasiveness**. What is decisive is exactly the power of the judge in charge of the declaratory procedure to stay the enforcement procedure or to declare the nullity of the sale concluded on the basis of such procedure if based on contract terms which are found unfair. Restitution in kind is not expressly mentioned but it is clearly connected with the invalidity of the auction sale.

“With regard to the requirement that the penalty should be effective and dissuasive, first, the written observations submitted to the Court by the Slovak Government state that, during such a procedure for the extrajudicial enforcement of a charge, the national court with jurisdiction may, under Paragraphs 74(1) and 76(1) of the Code of Civil Procedure, adopt any interim measure to prevent such a sale from going ahead.

Secondly, as stated in paragraphs 31 and 32 of the present judgment, it appears that Law No 106/2014 Z.z. of 1 April 2014, which entered into force on 1 June 2014 and is applicable to all charge agreements in the process of being enforced as of that date, amended the procedural rules applicable to a term such as that at issue in the main proceedings. In particular, Paragraph 21(2) of the Law on Voluntary Sale by Auction, in the version in force, allows the court, where the validity of the term providing for the charge is challenged, to declare the sale void, which, retrospectively, places the consumer in a situation almost identical to his original situation and does not therefore limit the compensation for the harm caused to him, where the sale is unlawful, to mere monetary compensation” (*Kušionová*, C-34/13, paras. 60-61).

Moreover, the nature of the consumer’s right as also linked with another fundamental right (the right to a family home) is specifically addressed by the CJEU through the lens of the principle of proportionality. The Court seems to acknowledge that interim measures and nullity coupled with restitution are ‘strong’ remedies, but their strength is totally *proportional* to the affected right. It also refers to the ECHR jurisprudence and puts it in relation to Article 7, CFREU. The *Aziz* decision is conclusively cited.

“With regard to the proportionality of the penalty, it is necessary to give particular attention to the fact that the property at which the procedure for the extrajudicial enforcement of the charge at issue in the main proceedings is directed is the immovable property forming the consumer’s family home.

The loss of a family home is not only such as to seriously undermine consumer rights (the judgment in *Aziz*, EU:C:2013:164, paragraph 61), but it also places the family of the consumer concerned in a particularly vulnerable position (see, to that effect, the Order of the President of the Court in *Sánchez Morcillo and Abril García*, EU:C:2014:1388, paragraph 11).

In that regard, the **European Court of Human Rights** has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home and, secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed (see the judgments of the European Court of Human Rights in *McCann v United Kingdom*, application No 19009/04, paragraph 50, ECHR 2008, and *Rousk v Sweden*, application No 27183/04, paragraph 137).

Under EU law, the right to accommodation is a fundamental right guaranteed under **Article 7 of the Charter** that the referring court must take into consideration when implementing Directive 93/13.

With regard in particular to the consequences of the eviction of the consumer and his family from the accommodation forming their principal family home, the Court has already emphasised the importance, for the national court, to provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated where the grant of such measures proves necessary in order to ensure the effectiveness of the protection intended by Directive 93/13” (see, to this effect, the judgement in *Aziz*, EU:C:2013:164, paragraph 59) (*Kušionová*, C-34/13, paras. 62 seq).”

### Conclusion of the CJEU

Mainly on the basis of the **principle of effectiveness**, the CJEU concluded that the lack of interim measures within a declaratory proceeding in respect of an enforcement proceeding makes impossible (effective) consumer protection against the use of unfair terms on which the enforcement proceedings are based:

“the directive must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not permit the court before which declaratory proceedings have been brought, which does have jurisdiction to assess the unfairness of such a term, to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the

grant of such relief is necessary to guarantee the full effectiveness of its final decision” (*Aziz*, paragraph 64).

Comparatively, in *Kušionová* (C-34/13):

“In the present case, the fact that it is possible for the competent national court to adopt any interim measure, such as that described in paragraph 60 of the present judgment, would suggest that adequate and effective means exist to prevent the continued use of unfair terms, which is a matter for the referring court to determine.”

In both cases the application of the principle of effectiveness is decisive. Dissuasiveness and proportionality, though recalled in *Kušionová* (C-34/13), remain in the background.

#### *Impact on the follow-up case<sup>33</sup>:*

Immediately after the *Aziz* decision of the CJEU, Spanish lower courts started to implement its reasoning in their decisions. In particular, the *Juzgado de Primera Instancia* no. 13 of Madrid, on 15 March 2013, granted the suspensive effect of executory proceeding if the consumer started a declaratory proceeding, implicitly disapplying the provision of Article 698 CCP.

The Spanish legislator then directly intervened, amending the procedural law with Ley 1/2013 of 14 May 2013. As mentioned above, when the CJEU decided the *Aziz* case it opened up two possible solutions for the Spanish legislator in order to make the procedural system compliant with the Directive 93/13/EEC: (1) including a new ground of objection based on the unfairness of the contractual terms in the foreclosure proceedings; or (2) giving the judge in the declaratory proceeding the possibility to adopt as a precautionary measure the suspension of the foreclosure proceedings. The Ley 1/2013 adopted the first solution, including a new ground of objection based on the unfairness of contractual terms within those contained in Article 695.1 CCP.

#### *Elements of judicial dialogue:*

##### *Vertical judicial dialogue*

The national commercial courts of first instance and of appeal sought to overcome the problems generated by the financial crisis for the mortgage sector through dialogue with the national constitutional court.

Because the constitutional court refrained from assuming the role of legislator, the national courts had to choose between a direct disapplication of the national provision upon the basis of conflict with EU law, or the possibility of requesting a preliminary reference. Given the willingness of Spanish courts to engage in a constructive dialogue with CJEU, where the latter granted a high level of protection for the consumer, the national court presented the preliminary reference in order to receive guidance from the CJEU on how to apply national law consistently.

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<sup>33</sup> This section is extracted from a section of the CJC Database authored by Federica Casarosa (<http://judcoop.eui.eu/data/?p=data&fold=6&subfold=6.7&idPermanent=325>).

Through interpretation consistent with the CJEU decision, the national courts immediately disapplied the national provision.

Furthermore, the decision of the CJEU eventually triggered the reaction of the legislator on the specific issue, allowing a reform of the procedural provisions.

*Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

## **Poland**

The *Aziż* judgment has been referred to in a number of decisions by Polish courts of the first and second instance. The main emphasis in this respect has been placed on the criterion for reviewing the clauses set forth in p. 68 and 69 of this judgement – i.e. the requirement to verify if a professional could reasonably expect that the particular clause would be accepted by the consumer, if individually negotiated (see e.g. judgments: of the Court of Appeal in Katowice, I Aca 1104/16 and of the District Court in Warsaw of 22 December 2016, XX

VII Ca 3010/16). In the judgement of the Regional Court in Siemianowice Śląskie of 12 December 2016 (I C 741/16), the *Aziż* decision was referred to as an argument for the procedural autonomy of EU law.

To date, the problem of interim measures as a consequence of declaring a clause unfair has not been addressed directly in Polish case law. In principle, Polish procedural law does not allow for the awarding of such measures *ex officio* – however, there are no particular examples as to whether these rules can be interpreted in an EU-conforming way.

The *Naranjo* decision (Joined Cases C-154/15, C-307/15 and C-308/15) was referred to in the judgement of the Supreme Court of 14 July 2017 (II CSK 803/16), although without deep analysis of its impact on the case. The court presented this decision only as an example of a resolution that sets forth the principle of the *ex tunc* effect of the non-binding nature of unfair terms.

## **Slovenia**

The problem of providing additional and consequential measures, such as interim measures including the result of declaring a contract null, was dealt with in the decision of the Ljubljana Higher Court no. II Cp 2109/2015 of July 27, 2015 and similarly also in the decision of the Koper Higher Court no. Cp 1043/2008 of November 18, 2005. In neither of these decisions did the Court explicitly refer to the principle of effectiveness as applied in the *Aziż* case, the *Naranjo* case (Joined Cases C-154/15, C-307/15 and C-308/15), or the *Kušionova* case. In general, according to Slovenian procedural law, courts do not have the power to decide on interim measures *ex officio*.

The Ljubljana Higher court in its decision no. I Cp 517/2017 referred to the *Kušionova* case. However, the reference did not concern interim measures ensuing from the declaration of a clause as unfair; rather, it concerned the interpretation of Article 1, paragraph 2 of Directive 93/13.

## 5.4.2. Question 2 – Non-bindingness of unfair terms and restitutionary remedies

2. Is the declaration of the non-bindingness of an unfair term an effective remedy as such or, in order to provide effective consumer protection, should the judge provide additional and consequential measures, such as the order of restitution of any sum unduly paid by the consumer?

2.a. If so, does the principle of effectiveness require that this restitution covers all payments made under a non-binding clause (*ex tunc* effects of non-bindingness), or could the judge apply an existing national rule, limiting such restitution with regard to the sums unduly paid after the time in which the non-bindingness has been declared by the judge (*ex nunc* effects of non-bindingness)?

### The cases

**These questions have recently been addressed by the CJEU in *Naranjo* (Joined Cases C-154/15, C-307/15 and C-308/15).**

All three cases were initiated by consumers who concluded a mortgage loan containing a ‘floor clause’ with a bank. ‘Floor clauses’ establish a minimum rate below which the variable interest rate cannot fall. These clauses were widely used by Spanish banks and affected many consumers. In all three cases, the consumers brought proceedings against the bank after the judgement of the Spanish Supreme Court – *Tribunal Supremo* (henceforth ‘TS’) – of 9 May 2013 regarding the unfairness of floor clauses. They all sought (i) a declaration that the floor clauses in their contracts were null and void, and (ii) restitution of the amounts overpaid on the basis of those clauses from the date when the contract was concluded.

However, the TS limited the retroactive effect of the declaration of nullity. It held that only the amounts overpaid after the date of its judgement had to be repaid, thus limiting the consumers’ right to full restitution in time. The judgement of 9 May 2013 concerned a collective action, but on 25 March 2015 the TS extended the temporal limitation to individual actions.

This temporal limitation was highly controversial in Spain, and gave rise to questions about, in short, (i) compatibility with the requirement of Article 6(1) Directive 93/13/EEC that unfair terms be ‘not binding’, (ii) the reasoning of the TS as to why a temporal limitation was justified (i.e. a risk of serious economic repercussions), and (iii) the relation between individual and collective actions.

### Preliminary questions referred to the CJEU

The questions referred to the CJEU in the three proceedings were quite similar, though not totally equivalent. For the sake of clarity, we refer here to the questions referred to in the *Naranjo* case (Joined Cases C-154/15, C-307/15 and C-308/15).

The questions were addressed by the referring courts from three different perspectives.

From the perspective of **nullity**, the issue was whether the UCTD and particularly Article 6 were compatible with a temporal limitation on the non-bindingness of terms so that these, though unfair, may be considered effective until they are declared unfair by the court. This was the formulation used by the referring court:

“In such cases, is an interpretation [,] according to which an unfair term declared void nonetheless produces effects until that declaration is made[,] compatible with the interpretation of “non-binding” in Article 6(1) of Directive 93/13/EEC? Therefore, even though the term has been declared void, will the effects produced by that term while it was in force be considered not to be invalidated or ineffective?”

A second perspective, closely connected with the former one, dealt with **injunctions**: although an injunction normally refers to future action or inaction, it may be coupled with a declaration of nullity (so that a question similar to the one seen above arises):

“Is an injunction that may be issued to desist from using a particular term (in accordance with Articles 6(1) and 7(1)) in an individual action brought by a consumer when such a declaration is made compatible with a limitation of the effects of a declaration of nullity?”

The core issue concerned **restitution**. If non-bindingness could be related to the time of declaration rather than stipulation, then restitution could be limited to sums unduly paid after this time rather than since stipulation. Was this compatible with effective consumer protection? This is the question addressed by the Spanish court in *Naranjo* (Joined Cases C-154/15, C-307/15 and C-308/15):

“May (the courts) alter the reimbursement of any sums paid by the consumer — which the seller or supplier is obliged to reimburse — under the term subsequently declared void *ex tunc*, for want of information and/or of transparency?”

#### Reasoning of the CJEU:

The CJEU started by stating that the assessment of the unfairness of a clause relating to the main subject-matter of a contract falls within the scope of Directive 93/13, where the consumer did not have, before the conclusion of that contract, the necessary information as to the contractual conditions and the consequences of entering into that contract (cf. Article 4(2) of Directive 93/13/EEC).

The CJEU continued by affirming that it follows from its previous case law that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. The determination by a court that a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that s/he would have been in if that term had not existed. The obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding ‘restitutory effect’ in respect of those same amounts.

The Member States can, by means of their national legislation, define the detailed rules under which (i) the unfairness of a contractual clause is established, and (ii) the actual legal effects of that finding are produced. However, national law may not alter the scope and substance of the protection guaranteed to consumers by Directive 93/13/EEC. It is for the CJEU alone to decide upon the temporal limitations to be placed on the interpretation of (the effects of) a rule of EU law.

The analysis was based on both the principles of effectiveness and dissuasiveness.

With regard to **effectiveness**, the CJEU argued that the temporal limitation at stake:

“ensures only limited protection for consumers who have concluded a mortgage loan contract containing a ‘floor clause’ before the date of the judgment in which the finding of unfairness was made. Such protection is, therefore, incomplete and insufficient and does not constitute either an adequate or effective means of preventing the continued use of that type of term, contrary to Article 7(1) of Directive 93/13 (see, to that effect, judgment of 14 March 2013, *Aziz*, C 415/11, EU:C:2013:164, paragraph 60).” (*Naranjo*, Joined Cases C-154/15, C-307/15 and C-308/15, paragraph 73)

With regard to **dissuasiveness**, the CJEU argued that

“The absence of such restitutory effect would be liable to call into question the dissuasive effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) of that directive, is designed to attach to a finding of unfairness in respect of terms in contracts concluded between consumers and sellers or suppliers” (*Naranjo*, Joined Cases C-154/15, C-307/15 and C-308/15, paragraph 63).

#### Conclusion of the CJEU

The CJEU concluded by stating that:

“the referring courts, being bound for the purposes of the decisions to be given in the main proceedings by the interpretation of EU law given by the Court, must disapply, of their own motion, the temporal limitation which the *Tribunal Supremo* (Supreme Court) applied in its judgment of 9 May 2013, because that limitation does not appear to be compatible with that law.”

Hence, on the basis of the above arguments, the CJEU considered the temporal dimension of nullity and restitution to be an intrinsic aspect of effective consumer protection: only if nullity and therefore restitution extend to the entire time-span of the contractual relation since the time of limitation is such protection effective and dissuasive.

#### Impact on the follow-up case:

The judgement of the CJEU gave rise to several follow-up questions relating to the right of access to justice and the right to an effective remedy.

First, the most urgent question for the Spanish government was how to deal with the massive number of claims. Thousands of consumers were affected, with an estimated damage of 3 to 5 billion euros (source: *El País*). The government therefore issued Royal Decree 1/2017 (see below), obliging financial institutions whose floor clauses have been declared unfair to set up an extrajudicial mechanism for the settlement of claims.

Second, the question was the extent to which the CJEU's judgement affected consumers and financial institutions that were not parties to the collective action leading to TS 9 May 2013. The CJEU did not answer the preliminary question about this particular issue (on this point see the specific comments under Chapter 3 above). On 24 February 2017, the TS held that its previous judgement of 9 May 2013 did not affect consumers who were not explicitly addressed in that judgment, i.e. consumers who had not joined the collective action. The defendant bank, BBVA, was nevertheless bound by the *res judicata* effect of TS 9 May 2013 because it had been involved in the collective proceedings.

It should be noted that Spanish banks have responded in different ways to the CJEU's judgment. Many banks have announced that they will consider individual claims on a case-by-case basis, which means that consumers will not automatically get their money back. The TS appears to condone this approach. In a judgement of 9 March 2017, it held that, in the individual case at hand, the consumer had been sufficiently informed by the civil notary about the economic consequences of the floor clause.

Third, the question is what should happen if consumers have already brought individual proceedings, which have resulted in a final and binding judgment. The CJEU seems to have recognized the principle of *res judicata* as a possible limitation to consumer protection. On 5 April 2017, the TS held that judgements rendered before 21 December 2016 are not affected, even if they violate EU law. Those judgements cannot be revised, and the proceedings cannot be reopened.

Consumers are therefore effectively 'punished' for bringing their claims swiftly. Not all courts were ready to suspend the proceedings while awaiting the outcome of the preliminary rulings. The *Tribunal Constitucional* ruled that there was no obligation to stay or suspend, with a view to individual rights protection (judgement of 19 September 2016).

#### Elements of judicial dialogue:

##### **Vertical dialogue**

The preliminary reference procedure was used by the referring courts to resolve a conflict between the Spanish TS and several lower courts about the required level of consumer protection under Directive 93/13/EEC.

The TS judgement of 9 May 2013, concerning a collective action, affirmed that a floor clause could be unfair due to a lack of transparency if the consumer was unable to foresee the economic risks and the legal obligations ensuing from the clause. If a floor clause is unfair, it is *de jure* null and void, triggering a right to full restitution (including interest). The TS nevertheless used the CJEU's judgment in *RWE Vertrieb* (C-92/11) to conclude that, because the banks had acted in



good faith, and because of a risk of serious economic repercussions, a temporal limitation was justified until the date of its judgement.

Numerous lower courts had nevertheless continued to apply the full retroactive effect of a declaration of nullity in individual actions. They granted consumers their right to full restitution of amounts overpaid on the basis of floor clauses, from the moment when the contract had been entered into.

After the temporal limitation was extended to individual actions by the TS in its judgement of 25 March 2015, several lower courts resorted to the preliminary reference procedure to question the TS's approach.

### **Horizontal dialogue within the CJEU**

The CJEU has dealt with the role of restitution as an effective and necessary complement of the non-bindingness of unfair terms in other cases since *Naranjo* (Joined Cases C-154/15, C-307/15 and C-308/15). In particular, the ***Sziber case*** (C-483/16) should be recalled in this regard. In this judgement, the referring court asked whether Article 7 of Directive 93/13 must be interpreted as precluding national legislation which lays down specific procedural requirements for actions brought by consumers who have concluded loan agreements denominated in a foreign currency which contain a term concerning the difference in exchange rates and/or a term concerning the power to make unilateral amendments. The CJEU, recalling the *Naranjo* case (Joined Cases C-154/15, C-307/15 and C-308/15) and **the right to effective judicial protection** affirmed that, while it is for the Member States to define the detailed rules under which the unfairness of a contractual clause is established and the actual legal effects of that finding are produced, **national provisions must allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed, by, inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier on the basis of that unfair term (paragraphs 34 and 53).**

Furthermore, the CJEU affirmed that the procedures which apply for the assessment of an allegedly unfair contractual term are a matter for the national legal order, **provided that they are not less favourable than those governing similar situations subject to domestic law (principle of equivalence) and that they afford effective judicial protection, as provided for in Article 47 of the Charter.**

The same principle has been applied by the CJEU in another Hungarian case (*Dunai*, C- case), where a similar conclusion was reached, with explicit reference to the *Sziber case* (C-483/16): “in so far as the action brought by Mrs Dunai is based on the term relating to exchange difference which was included initially in the loan contract concluded with the bank, it is for the referring court to ascertain **whether the national legislation, which declared terms of that nature to be unfair, allowed the legal and factual situation in which Mrs Dunai would have been in the absence of such an unfair term to be restored, in particular by giving rise to a right to restitution of advantages wrongly obtained,** to her detriment, by the seller or supplier on

the basis of that unfair term (see, to that effect, judgment of 31 May 2018, Sziber, C 483/16, EU:C:2018:367, paragraph 53)”.

*Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

## Italy

The principle according to which a contract shall be declared null having regard to the time of stipulation, so that no legal effect can be attached to the contract at any point in time throughout the contractual relation, is well-rooted in the Italian legal tradition. In case law, it has been recently applied in the area of credit contracts (regardless of whether these are consumer credit contracts) whose default interest exceeds the usury thresholds under law no. 108/1996 (see *Corte di Cassazione*, 11 January 2013, no. 602 and 603). In other words, it is the judicial declaration of nullity with its effects that must follow the time of contract stipulation and not the legal force of the contract that adapts to the time of judicial declaration. **The consequence is that all interest unduly paid since the time of stipulation has to be returned. In this respect, one can observe a certain degree of coherence between this Italian case law and the *Naranjo* decision** (Joined Cases C-154/15, C-307/15 and C-308/15).

The impact analysis can be taken even further. Indeed, in Italy, judges and scholars discuss what remedy may be applied if the clause on default interest (determined in accordance with a flat rate) was not null at the time of stipulation, but the flat rate subsequently exceeds the usury threshold during the contractual relationship; indeed, the usury threshold changes over time. In this case, although the issue is still rather open to discussion, a recent decision of the Banking and Financial Arbitration Committee has stated that, if the legal threshold subsequently falls below the contractual interest rate which was valid at the time of stipulation, the clause remains valid (being the time of stipulation the one controlling for nullity assessment), but contractual rules should be adapted by means of an integration of statutory default rates in accordance with the general principle of good faith (*Arbitro Bancario Finanziario sez. collegio di coordinamento*, 10.1.2014, n. 77).

With regard to the inclusion of some insurance policy costs within the actual interest threshold applied in the contract, the Coordination Committee of the Banking and Financial Arbitration Committee, with decision no. 10621 of 12 September 2017, applied the remedial scheme of ‘nullity + substitution’ of the invalid clause, following its own previous case law (see, for instance, the Rome Committee’s decision no. 3020 of 20 March 2017; the Palermo Committee’s decision no. 4649 of 3 May 2017). The rule of replacement of contractual default interest in accordance with new usury thresholds is also applied both by Italian lower courts (see Messina Tribunal, decision no. 858/2015) and by the *Corte di Cassazione* (though without reference to the good faith principle) in application of the provisions on partial invalidity (Article 1419, It. C.c.), despite acknowledgement of the validity of the contract term as assessed at the time of stipulation (Cass. 11.1.2013, n. 602).

No distinction is made by this case law between consumer credit and ordinary credit. Moreover, it is apparent that the debtor subject to the effects of usury is by definition a weak party, somehow comparable to a consumer. One could therefore ask whether the ‘Italian rule’ on replacement of

default interest subsequently exceeding usury thresholds could ever represent an evolution of the *Naranjo* (Joined Cases C-154/15, C-307/15 and C-308/15) rule based on the principle of effectiveness: not only may the weak party not be deprived of money unduly paid under the (null) force of an invalid clause, as later so-declared by a court, but that weak party may also enjoy a similar protection when money is paid under the legal force of a valid clause whose effects become not executable and the due performance not payable (“*non esigibile*”) due to a supervening change in the legal framework as interpreted in the light of good faith.

## Poland

The unfairness of a clause occurs *ex lege* and has an *ex tunc* effect, which has been referred to in numerous examples of case law (see e.g. judgements: of the Supreme Court of 30 May 2014, III CSK 204/13 and of 14 May 2015, II CSK 768/14, of the District Court of Gdansk of 19 June 2015, III Ca 970/14, of the Regional Court of Warsaw-Śródmieście of 19 July 2016, VIII C 2064/15). This issue was recently reaffirmed in the resolution issued by a panel of seven judges of the Supreme Court on 20 June 2018, III CZP 29/17. Since the declaration of unfairness of a contract term and its non-binding nature is made with regard to the time when the contract is concluded, it is a natural consequence that this provision is declared ineffective from the very beginning. Therefore, on this assumption, the professional is obliged to refund to the consumer everything that s/he had paid on the basis of that provision.

The issue regarding the legal nature of a consumer’s claim to obtain full compensation has not been thoroughly analysed by Polish case law. In its judgement of 14 May 2015 (II CSK 768/14), the Supreme Court, hearing a collective action brought by a group of consumers, refused to adopt the interpretation maintained by the District Court and Court of Appeal of Warsaw whereby the bank had breached the contract by setting the amount of interest on the basis of an unfair term. The main reasoning behind this argument was that there is no such thing as a contractual obligation not to use unfair terms in contracts concluded with consumers, as stated by the merit courts. Furthermore, it was noted that the courts did not properly delete the unfair term from the contract. The Supreme Court pointed out that removing such a term cannot result in altering the nature of the contract. As a result, the lower courts improperly ascertained the rights and obligations of the parties. This may suggest that the Supreme Court did not intend to establish a general interpretation that did not allow using a breach of contract as a legal cause of action in such cases.

The second option concerns the general rules on restitution and undue consideration (one of the unjustified enrichment provisions). A declaration of the abusiveness of a clause – leading to its non-bindingness – should, in principle, allow consumers to obtain full compensation. However, a consumer must commence judicial action within the legal time limit applicable to the case. This is identified on a case by case basis, such as, for example, in the resolution of 10 August 2018 (III CZP 20/18), where the Supreme Court held that a consumer’s claim for the payment of the surrender value of a life insurance contract with an insurance capital fund (ICF), derived from a declaration on the grounds of the abusiveness of a clause, is time-barred according to the general

rule specified in Article 118 of the Civil Code (until 9 July 2018, this period was 10 years, currently it is 6 years).

## Slovenia

In its decision no. I Cp 1218/2017 of December 12, 2017, the Ljubljana higher court declared the consumer credit contract null and void. In its decision, the Court stated that one of the consequences of declaring the nullity of the contract is that each contracting party must return to the other party everything that was received on the basis of the contract (paragraph 1, Article 87 of the Slovenian Obligations Code). In the case under analysis, the plaintiffs themselves claimed to pay the sum of 19,419.30 euros to the defendant. The sum represented the difference between the money received in line with the consumer credit contract and the money already returned in instalments as agreed upon in the consumer credit contract. The Court satisfied the claim by the plaintiffs, and decided that they had to pay 19,419.30 euros to the defendant. The court stressed that the defendant had opposed the amount of money in the civil procedure but had not lodged a counterclaim. The Court did not refer explicitly to the *Naranjo* case (Joined Cases C-154/15, C-307/15 and C-308/15); however, one can observe a certain degree of coherence between this case and the *Naranjo* case (Joined Cases C-154/15, C-307/15 and C-308/15).

## 5.5 Delivery of defective goods in consumer sales and the remedies under Article 3, Consumer Sales Directive.

### Relevant CJEU cases in this cluster

- Judgement of the Court (First Chamber) of 16 June 2011, *Gebr. Weber GmbH v Jürgen Wittmer* (C-65/09, “**Weber**”) and *Ingrid Putz v Medianess Electronics GmbH* (C-87/09, “**Putz**”), Joined Cases C-65/09 and C-87/09 (“**Weber and Putz**”) - [link](#) to the database for analysis of the lifecycle of the case
- Judgement of the Court (First Chamber) of 4 June 2015, *Froukje Faber v Autobedrijf Hazet Ochten BV.*, Case C-497/13 (“**Faber**”)
- Judgement of the Court (First Chamber) of 23 May 2019, *Christian Füllä v Toolport GmbH*. C-52/18, (“**Füllä**”) - [link](#) to the database for analysis of the lifecycle of the case
- Judgement of the Court (Fifth Chamber) of 13 July 2017 *Christian Ferenschild v JPC Motor SA*, C-133/16, (“**Ferenschild**”) - [link](#) to the database for analysis of the lifecycle of the case

Within this cluster, the main cases which can be presented as reference points for the judicial dialogue within the CJEU and between EU and national courts are: *Weber and Putz* (Joined Cases C-65/09 and C-87/09), for questions nos. 1, 2 and 3, *Füllä* (C-52/18) for question no. 4, *Faber* (C-497/13) for question no. 5, and *Ferenschild* (C-133/16) for question no. 6.

### Main questions addressed

- Question 1 What is the relation between effectiveness and proportionality in making a choice between repair and replacement in consumer sales contracts?
- Question 2 Does the principle of proportionality allow for the sharing of the costs of replacement of a non-conforming good between a consumer and a seller? If so, can a consumer refuse to have the good replaced?
- Question 3 Is it possible to deny enforcement of a remedy in consumer sales – if only one out of many options is available – solely because it entails disproportionate costs for the seller?
- Question 4 In light of the effectiveness and proportionality principles, should the seller be considered obliged to advance to the consumer the transport costs of defective goods, where the transport serves to bring them into conformity?
- Question 5 What is the allocation of the burden of proof while claiming non-conformity of a consumer good? How is it affected by the principle of effectiveness?
- Question 6 Is a national provision compatible with Directive 1999/44 if it provides a limitation period for action by the consumer shorter than two years from the time of delivery of the goods where the seller and consumer have agreed, according to national law, on a period of liability of the seller of less than two years (a one-year period), for the second-hand goods concerned?

### **Main case for questions 1, 2 and 3**

- Judgement of the Court (First Chamber) of 16 June 2011, *Gebr. Weber GmbH v Jürgen Wittmer* (C-65/09, “**Weber**”) and *Ingrid Putz v Medianess Electronics GmbH* (C-87/09, “**Putz**”), Joined Cases C-65/09 and C-87/09 (“**Weber and Putz**”)

### Relevant legal sources

#### **EU level**

1999/44/EC Directive (especially recital 11 of the preamble and Article 3 sections 2 and 3)

Charter of Fundamental Rights of the EU (especially Article 47)

#### Article 3 Directive 1999–44 - Rights of the consumer

“1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.

2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.

3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate. A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account: - the value the goods would have if there were no lack of conformity, - the significance of the lack

of conformity, –nd - whether the alternative remedy could be completed without significant inconvenience to the consumer. Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

4. The terms "free of charge" in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.

5. The consumer may require an appropriate reduction of the price or have the contract rescinded: - if the consumer is entitled to neither repair nor replacement, - or - if the seller has not completed the remedy within a reasonable time, - or - if the seller has not completed the remedy without significant inconvenience to the consumer.

6. The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.”

### **National level (Germany)**

§ 437 of the German Civil Code (*Bürgerliches Gesetzbuch* – hereinafter: BGB). This provision determines remedies for the non-conformity of consumer goods and belongs among the regulations that transpose the 1999/44/EC Directive. The provision sets forth a general framework of remedies, referring to other provisions that specify particular remedies and premises under which consumers may claim this protection. Among them:

§ 439 BGB refers to the replacement of a non-conforming good, stating that:

- “1. By way of subsequent performance, the purchaser may require the repair of the defect or the delivery of goods which are free from defect, according to his preference.
2. The seller shall bear the costs necessary for the purposes of subsequent performance, in particular the costs of transport, carriage, labour and materials.
3. The seller may [...] refuse the type of subsequent performance chosen by the purchaser if it is possible only at disproportionate cost. In that regard, account must be taken in particular of the value of the goods in the non-defective state, the significance of the defect, and whether the alternative type of subsequent performance could be resorted to without significant disadvantage for the purchaser. In such a case the right of the purchaser shall be limited to the alternative type of subsequent performance; this is without prejudice to the right of the seller also to refuse the alternative remedy, subject to the conditions laid down in the first sentence.”

#### **5.5.1 Question 1 – Effectiveness vs. proportionality in selection of remedies**

What is the role of the principle of proportionality in making choices between repair and replacement, and price reduction and rescission, in consumer sales contracts?

### The case

In *Weber*, the dispute originated from a consumer sales contract on polished tiles purchased to be laid on the floor of the buyer's house. After the tiles had been fixed to the floor, it became apparent that they were defective (because the polish had visible shading). After claiming non-conformity, the buyer was notified that repair of the tiles would not be technically possible and that the only way to remedy the non-conformity would be to remove the tiles and replace them with new ones. Therefore, the buyer's claim for repair was rejected by the seller. Taking the requisite construction work into account, the cost of replacing the tiles was estimated by an expert at 5,830.57 euros (the tiles having been originally purchased for 1,382.27 euros). Having his claim rejected, the buyer sued the seller for 5,830.57 euros for removing the tiles and for delivery of non-defective ones. In the first instance, the court awarded only a price reduction of 273.10 euros. However, after the consumer's appeal, the court of second instance awarded a payment of 2,122.37 euros and the delivery of other tiles, free of defects. The judgement was challenged by the seller before the German Federal Court (*Bundesgerichtshof*), which referred the above question to the CJEU.

In *Putz*, the case originated from the sales contract regarding a dishwasher acquired by a consumer for 367.00 euros. The delivery costs were ascertained at 9.52 euros. After the machine had been installed in the consumer's house, it proved to be defective and could not function properly. The parties agreed on replacement; however, the buyer demanded that the seller uninstall the device and install the new one (or, alternatively, that the seller cover the costs of these services). After having this claim rejected, the buyer sued the seller, demanding reimbursement of the price that she had paid for the machine. After courts decided the case in two instances (which endorsed the consumer's claim in its entirety), the seller made recourse to the German Federal Court (*Bundesgerichtshof*), which referred a preliminary question to the CJEU.

### Preliminary question referred to the CJEU:

The crux of the legal issues addressed in both cases was the question of the precise meaning of the 'disproportionate cost' criterion set forth in § 439, sections 3 BGB. The national court therefore referred to the CJEU to establish more detailed criteria for the assessment of the adequacy of costs of repair and replacement. By means of this inquiry, the court also wanted to ascertain under which precise circumstances it was possible to set aside remedies from the first 'sequence' described by the 1999/44/EC Directive (i.e. repair or replacement) and apply remedies from the second 'sequence' (i.e. price reduction and termination of a contract).

On these grounds, the German Federal Court (henceforth the BGH) referred two preliminary questions to the CJEU. They addressed in parallel the same problem of criteria for comparison between the value of a consumer good and the costs of repair or replacement – in order to establish whether they should be assessed in a relative or absolute way.

The question in the *Weber* case (Joined Cases C-65/09 and C-87/09) was:

“Are the provisions of the first and second subparagraphs of Article 3(3) of [the Directive] to be interpreted as precluding a national statutory provision under which, in the event of a lack of conformity of the consumer goods delivered, the seller may refuse

the type of remedy required by the consumer when the remedy would result in the seller incurring costs which, compared with the value the consumer goods would have if there were no lack of conformity, and with the significance of the lack of conformity, would be unreasonable (absolutely disproportionate)?”

The question in the *Putz* case was:

“Are the provisions of Article 3(2) and the third subparagraph of Article 3(3) of [the Directive] to be interpreted as precluding a national statutory provision under which the seller, in the event that he has brought consumer goods into conformity with the contract by way of replacement, does not have to bear the cost of installing the subsequently delivered consumer goods into a thing into which the consumer has, in a manner consistent with their nature and purpose, incorporated the consumer goods not in conformity, if installation was not originally a contractual requirement?”

#### Reasoning of the CJEU:

Explaining the grounds for its decision, the CJEU based its reasoning on an attempt to balance **two opposing values: effectiveness of consumer protection** under the 1999/44/EC Directive (and domestic transposing provisions) and **preventing sellers from incurring unreasonably excessive costs** of restoring conformity to a good, applying the **principle of proportionality**. The domestic provision (§ 439 BGB) allowed sellers to refuse replacement (if under the particular circumstances of a case repair was not available), provided that the cost of this operation would be **disproportionate regarding the price of a good**.

According to the CJEU, to understand this rule it is necessary to take the following issues into consideration:

1) From an economic point of view, the remedies in the first ‘sequence’ are the ones most convenient for consumers, because they allow them to directly fulfil the economic goals that drove them to conclude a contract. The remedies from the second ‘sequence’ provide only protection of buyers’ financial interests – assuming, however, that they will remain with a defective good (in the case of price reduction) or will have to conclude another contract (if the original one has been rescinded). In other words, as the CJEU emphasised (p. 72),

“the Directive favours, in the interest of both parties to the contract, **the performance thereof by means of the two remedies provided for in the first place, rather than cancellation of the contract or reduction in the selling price.**”

Furthermore, this approach has been founded on the assumption that

“**generally, those two last alternative remedies do not ensure the same level of protection for consumers as the bringing into conformity of the goods.**”

2) On making these observations, **the CJEU referred implicitly to the effectiveness of protection of a consumer’s economic interest** embedded in the sales contract, which should allow selection of the remedy that provides the most convenient way to cure non-conformity and



is adequate to the actual needs and aims of the buyer. This includes specific performances (in particular, replacement of a defective good with a conforming one). Therefore, it seems justified to apply repair or replacement first – which, according to the CJEU, can be advantageous for both parties.

3) At the same time, however, the CJEU noted that **the preference for the remedies in question is not absolute**. The 1999/44/EC Directive lists two exceptions in this regard: **impossibility and disproportionality**. The second of them **allows sellers to avoid remedies that would be excessively costly for them**. In other words, while providing protective measures for consumers, Article 3 section 3 of the Directive also assumes, according to the CJEU, **“effective protection of the legitimate financial interests of the seller”** (p. 73).

4) The CJEU thus clearly stated that, under Article 3 section 3 of the Directive, it is necessary to **maintain a balance** between the protection of buyers’ and sellers’ economic interests. In other words, **while selecting among the remedies available in the case of non-conformity**, the court must assess whether any of them – even if convenient for consumers – **create unreasonably excessive economic burdens for professionals**. According to the CJEU, this mechanism of proportionality is intrinsic to the remedies set forth in Article 3 of the Directive. As pointed out (p. 75), the provision

“aims to establish **a fair balance between the interests of the consumer and the seller**, by guaranteeing the consumer, as the weak party to the contract, complete and effective protection from faulty performance by the seller of his contractual obligations, while enabling account to be taken of economic considerations advanced by the seller.”

5) The CJEU established a more precise understanding of proportionality by referring to two provisions of the 1999/44/EC Directive. Firstly, it pointed out that **Article 3 section 3 of the 1999/44/EC Directive refers to two separate meanings of (dis)proportionality:**

- (a) **absolute disproportionality** (in first subsection of this provision) and
- (b) **relative disproportionality** (in the second subsection).

Whilst the first expression refers merely to a lack of proportionality in the costs of repair and substitution assessed in economic terms, the second one assumes **comparison between two remedies that can be enforced alternatively: repair or substitution of a good**. Secondly, the CJEU also considered **recital 11 of the Directive’s preamble**, which provides further explanation regarding the concept of proportionality in the selection of remedies. The provision in question also refers to the relative view of proportionality, obliging a court to compare the costs of two alternative remedies. Consequently, a **disproportionate remedy** is one that entails **unreasonable costs** – which means that the costs of applying one remedy are **substantially higher** than those of employing the other remedy available.

With regard to the cost of replacement of the good, the CJEU stated that Article 3 of the Directive must be interpreted as meaning that the seller is in fact obliged to bear the cost of removing the goods not in conformity and installing the replacement goods. Otherwise the ‘free

of charge' requirement provided by Directive 1999/44 would not be fulfilled, thereby undermining **the high level of consumer protection** intended by the Directive. Furthermore, the duty for the seller to pay is also justified by the fact that the seller, by not delivering the goods free of defects, has not completely fulfilled its contractual obligations.

#### Conclusion of the CJEU:

Relying on these arguments, the CJEU stated that, when consumer goods not in conformity with the contract which were installed in good faith by the consumer in a manner consistent with their nature and purpose before the defect became apparent are restored to conformity by way of replacement, **the seller is obliged either to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and the installation of the replacement goods.** That obligation on the seller exists regardless of whether he was obliged under the contract of sale to install the consumer goods originally purchased.

#### Impact on the follow-up case:

The CJEU's decision was directly followed by two judgements of the German Federal Court (BGH), deciding upon the two cases that were the basis for referral of the preliminary questions:

- (a) judgement of 21 December 2011, VIII ZR 70/08 [*Weber* case, Joined Cases C-65/09 and C-87/09];
- (b) judgement of 17 October 2012, VIII ZR 226/11 [*Putz* case].

Both judgements directly implemented the guidelines provided by the CJEU, adopting the view that both the tiles, and the dishwasher ought to be replaced by the sellers – even though the costs of this operation would have been disproportionately excessive.

#### Elements of judicial dialogue:

The case was based on the vertical judicial dialogue pattern. The German Federal Court (BGH) sought to ascertain an EU-conforming interpretation of domestic provisions, and therefore put a preliminary question to the CJEU.

#### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU:<sup>34</sup>

##### **Bulgaria**

##### Supreme Administrative Court, 14 December 2012, no. 11172/2012

The case concerned the appeal of a commercial company trading cell phones against the decision of the lower administrative court, which had issued the obligation to replace a cell phone with a new one or to refund the amount paid by the consumer. The decision, although it did not explicitly mention the CJEU decision in *Weber and Putz* (Joined Cases C-65/09 and C-87/09), consistently applied the Court's reasoning as regards the interpretation of Directive 99/44. The Supreme administrative court affirmed that the request of the consumer to replace the

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<sup>34</sup> Information retrieved from: Center for Judicial Cooperation Database: <http://judcoop.eu.europa.eu/data/?p=data&fold=6&subfold=6.7&idPermanent=327>

commodity with a new one, after several failed repairs, was not disproportionate in the light of Article 112, par. 1 of the Bulgarian Consumer Protection Act.

### 5.5.2 Question 2 – Proportionality and division of costs of replacement

Does the principle of proportionality allow for the sharing of the costs of replacement of a non-conforming good between a consumer and a seller? If so, can a consumer refuse to have the good replaced?

#### *Preliminary question referred to the CJEU:*

The problem in question pertained to a more general issue of the **relationship between proportionality and effectiveness in the context of replacement of non-conforming goods**. Although the issue of precise allocation of costs had not been addressed in any of the preliminary questions referred to the CJEU by the German Federal Court (BGH), it directly ensued from the main findings of the CJEU in the *Weber and Putz* cases (Joined Cases C-65/09 and C-87/09). These supplement the general observations as to the interplay between effectiveness and proportionality in assessing the admissibility of replacement of a non-conforming good.

The problem in question may be phrased as follows: if a seller may not refuse to replace a non-conforming good (if repair is impossible) by claiming that doing so would be disproportionate, is the seller obliged to cover the entire costs of replacement? If the costs can be shared between the parties, what are the criteria for such a division? Finally, if the buyer is obliged to incur the costs of replacement, can s/he refuse to have his/her remedy applied, and instead claim one of the remedies from the second sequence?

#### *Reasoning of the CJEU:*

In answering these questions, the CJEU clearly based its reasoning on the observation that Article 3 of the Directive assumes a **balancing between the seller's and the buyer's economic interests**. Consequently, consumers may be entitled to obtain reimbursement of only a part of costs incurred due to the replacement. The threshold set forth in this respect by the CJEU was **proportionality**. Only the costs that meet this requirement may be shifted to the seller – the others have to be borne by the consumer. Especially, as the Court pointed out, the proportionality test must take two criteria into account: **“the value the goods would have if there were no lack of conformity and the significance of the lack of conformity”**. This conclusion applies, in particular, to situations in which (as in the cases decided by the German Federal Court) repair is not possible, and replacement is the only way to restore a good's conformity with a contract.

The Court reached a further conclusion: that in a case in which the costs of replacement are to be divided between the parties, **a consumer has the right to reject having a good replaced and instead claim price reduction or rescission of a contract**. Granting this option was justified in terms of the **principle of effectiveness** (p. 77): “since the fact that a consumer cannot

have the defective goods brought into conformity without having to bear part of these costs constitutes significant inconvenience for the consumer”.

#### Conclusion of the CJEU:

The CJEU concluded that if replacement is the only remedy available to a consumer (because repair is impossible), its costs may be **shared between the parties to a contract**. The criterion of division is the threshold of proportionality, which is ascertained *ad casum* by referring to the **value of the good and the extent of its non-compliance with a contract**. The final assessment of whether particular costs meet the threshold of proportionality should be carried out by a domestic court applying these guidelines to the particular circumstance. In this case, the **consumer may reject replacement (and, consequently, partially incur its costs) and switch to the second ‘sequence’ of remedies – claiming price reduction or the rescission of a sales contract**.

#### Impact on the follow-up case:

The reasoning of the CJEU has been applied in the two judgements of the German Federal Court (BGH) referred to above (under question 1). Taking into account the interpretation provided by the ECJ, the German court decided to divide the costs of replacement between the parties, allocating them in equal halves, 600 euros each. As explained in the judgement, the threshold of proportionality (due to the general point of view of the CJEU) was established accordingly to two criteria: the significance of non-conformity and the value of the good (i.e. the criteria set forth explicitly by the CJEU). Consequently, the seller could eventually claim this sum to the extent to which it has not been previously paid by the buyer.

#### Elements of judicial dialogue:

See above, under question 1.

#### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU:<sup>35</sup>

##### **Netherlands**

Rechtbank Overijssel, 22 January 2014, ECLI:NL:RBOVE:2014:500.

The decision assessed whether the non-conformity of goods – defective swimming pools, in this case – could be recognized and the consequences in terms of allocation of replacement cost could be determined. The district court affirmed that the swimming pools were non-conforming as per the contract. It took into account the timely notifications by the consumers to the sellers about the non-conformity in order to rectify the defect by enabling many attempts to repair the swimming pools. In its assessment of the costs, the district court cited the CJEU’s decision in *Weber and Putz* (Joined Cases C-65/09 and C-87/09) and decided what should be determined as ‘proportional’ limitation of the reimbursement. Although the reasoning seemed to allocate a very strong responsibility to the seller, the district court decided in the end that the consumer had to contribute 75% of the replacement costs, allocating a very large contribution to the consumer.

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<sup>35</sup> Information retrieved from: Center for Judicial Cooperation Database: <http://judcoop.eu.europa.eu/data/?p=data&fold=6&subfold=6.7&idPermanent=327>

### 5.5.3 Question 3 – Effectiveness and allocation of costs of replacement

What is the relevance of the principle of effectiveness for allocation of costs of replacement if a good has been installed by a consumer within its due handling process?

#### *The case and the preliminary question referred to the CJEU*

The issue of the allocation of costs of replacement of a non-conforming good between a seller and a buyer was directly addressed in both of the preliminary questions put to the ECJ by the German Federal Court (BGH). Both of them sought to ascertain whether – in the case of replacing a good – a seller is obliged to bear the costs of removing a good if, in due course of its use, the buyer has installed the good, incorporating it into a more complex structure.

The question in the *Weber* case (Joined Cases C-65/09 and C-87/09) was:

“Are the provisions of Article 3(2) and the third subparagraph of Article 3(3) of [the Directive] to be interpreted as meaning that, where the goods are brought into conformity by replacement, the seller must bear the cost of removing the consumer goods not in conformity from a thing into which, in a manner consistent with their nature and purpose, the consumer has incorporated them?”

The question in the *Putz* case was:

“Are the provisions of Article 3(2) and the third subparagraph of Article 3(3) of [the Directive] to be interpreted as meaning that the seller, in the event that he has brought consumer goods into conformity with the contract by way of replacement, must bear the costs of removing the consumer goods not in conformity from a thing into which the consumer has, in a manner consistent with their nature and purpose, incorporated them?”

#### *Reasoning of the CJEU:*

The main point of reference for the Court was **the principle of effectiveness of consumer protection, derived from the 1999/44/EC Directive** (expressed directly on p. 52), supported by the wording of its Article 3, as well as the materials from the legislative procedure. All of these arguments led to the conclusion that replacement of a non-conforming good must take place **free of charge**. This applies, in particular, to situations in which the seller is not only obliged to deliver a new good, but also to remove the previous one that was installed in accordance with its normal mode of use and without awareness of any defect. The opposite solution – making consumers liable, in principle, for the costs of replacement – could hinder the proper functioning of consumer protection in sales contracts, **and therefore be contrary to the principle of effectiveness**.

The gratuitous nature of remedies in the case of non-conformity applies to the broad array of costs exemplified only in Article 3 section 4 of the 1999/44/EC Directive. As emphasised by the CJEU, the costs mentioned in this provision (i.e. “the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials”) **do not exhaust all the**

**possible options.** It is therefore the responsibility of a domestic court to ascertain if particular costs fall within the scope of this rule and should therefore be borne by the seller.

Conclusion of the CJEU:

According to the CJEU, in the event of non-conformity, the **consumer is not obliged to incur costs of the replacement of a good, including the costs of its removal and re-installation** (provided that the good has been originally installed without awareness of non-conformity and in accordance with its proper rules of usage). Moreover, the obligation of a professional seller to reimburse these costs exists **irrespective of whether the installation of a good was originally agreed upon in the sales contract.**

The problem in question interrelates with the issue addressed above, under question 2. On these premises, the consumer may be required to share a part of the costs of replacement of a good.

Impact on the follow-up case:

The reasoning of the CJEU has been applied in the two judgements of the German Federal Court (BGH) referred to above (under question 1).

Elements of judicial dialogue:

See above, under question 1.

#### 5.5.4 Question 4 - delivery of defective goods in distance contracts

In light of the effectiveness and proportionality principles, should the seller be considered obliged to advance to the consumer the transport costs of defective goods when the transport is aimed at bringing them into conformity?

**Main case:**

- Judgement of the Court (First Chamber) of 23 May 2019, *Christian Füllä v Toolport GmbH*, C-52/18, (“**Füllä**”)

Relevant legal sources

**EU level**

Recitals 1 and 10 to 12 Directive 1999/44:

“(1) Whereas Article 153(1) and (3) of the Treaty provides that the Community should contribute to the achievement of a high level of consumer protection by the measures it adopts pursuant to Article 95 thereof

(...)”

“(10) Whereas, in the case of non-conformity of the goods with the contract, consumers should be entitled to have the goods restored to conformity with the contract free of charge, choosing either repair or replacement, or, failing this, to have the price reduced or the contract rescinded;

(11) Whereas the consumer in the first place may require the seller to repair the goods or to replace them unless those remedies are impossible or disproportionate; whereas whether a remedy is disproportionate should be determined objectively; whereas a remedy would be disproportionate if it imposed, in comparison with the other remedy, unreasonable costs; whereas, in order to determine whether the costs are unreasonable, the costs of one remedy should be significantly higher than the costs of the other remedy;

(12) Whereas in cases of a lack of conformity, the seller may always offer the consumer, by way of settlement, any available remedy; whereas it is for the consumer to decide whether to accept or reject this proposal;”

Article 1 ‘Scope and definitions’ Directive 1999/44, paragraph 1

“The purpose of this directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market.”

Article 2 ‘Conformity with the contract’ Directive 1999/44, paragraph 1

“The seller must deliver goods to the consumer which are in conformity with the contract of sale.”

Article 3 of ‘Rights of the consumer’

**National legal sources – German law**

Provisions which transpose Directive 1999/44 in German law:

Article 269 BGB “Place of performance”

“1. Where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made in the place where the obligor had his residence at the time when the obligation arose.

2. If the obligation arose in the commercial undertaking of the obligor, the place of the commercial undertaking takes the place of the residence if the obligor maintained his commercial undertaking at another place.

3. From the sole circumstance that the obligor has assumed the costs of transport it may not be concluded that the place to which shipment is to be made is to be the place of performance.”

Article 439 BGB “Repair”

“1. By way of subsequent performance, the purchaser may require the repair of the defect or the delivery of goods which are free from defect, according to his preference.

2. The seller shall bear the costs necessary for the purposes of subsequent performance, including in particular the costs of transport, carriage, labour and materials.

3. The seller may refuse the manner of subsequent performance chosen by the purchaser if such performance is possible only at disproportionate cost. In that regard, account must be taken in particular of the value that the goods would have if there were no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be applied without significant inconvenience to the purchaser. In such cases the right of the purchaser shall be restricted to the alternative means of subsequent performance; this is without prejudice to the right of the seller also to refuse the alternative remedy, subject to the conditions laid down in the first sentence.

4. Where a seller delivers goods free from defects for the purposes of subsequent performance, he may require the purchaser to return the defective goods pursuant to Paragraphs 346 to 348.”

### The case

On 8 July 2015, Mr. Füllä bought from Toolport, by telephone, a tent. After the tent had been delivered to Mr. Füllä's place of residence, he found that it was not in conformity and thus asked Toolport to bring it into conformity at his residence. Toolport rejected Mr. Füllä's complaints regarding the lack of conformity of the tent, claiming that they were unfounded. At the same time, Toolport failed to inform Mr. Füllä that the tent had to be returned to its place of business and did not offer to advance the cost of that return to him. In those circumstances, Mr. Füllä requested the rescission of the contract and reimbursement of the purchase price of the tent as consideration for his returning the item. Since Toolport failed to comply with that request, Mr. Füllä brought an action before the *Amtsgericht Norderstedt* (Local Court, Norderstedt, Germany). The court referred a preliminary reference to the CJEU.

### Preliminary questions referred to the CJEU

The referring court formulated six preliminary questions:

- Whether the third subparagraph of Article 3 of Directive 1999/44 should be interpreted as meaning that a consumer must, in all cases, offer goods acquired under a distance contract to the seller to enable repair or replacement only at the place **where the goods are located (1)**, or if question 1 is answered in the negative, **(2) at the seller's place of business**

- If also question 2 is answered in the negative, **what criteria can be derived from the third subparagraph of Article 3(3) of Directive 1999/44** as regards how to specify **the place where the consumer must make goods** acquired under a distance contract available to the seller in order to enable repair or replacement **(3)**

- Whether, if **the place** where the consumer must offer goods acquired under a distance contract to the seller for examination and to enable repair is **the seller's place of business**, it is compatible with the first subparagraph of Article 3(3) of Directive 1999/44, in conjunction with Article 3(4) thereof, that the consumer must pay the costs of outward and/or return transport, or if it follows from the requirement 'to repair free of charge' that the seller is required to make an advance payment **(4)**

- Whether, if **the place where the consumer must make goods** acquired under a distance contract available to the professional for examination and to enable repair **is** — in all cases or in this specific case — **the professional's place of business and a requirement for the consumer**



to pay costs in advance, it is compatible with the first subparagraph of Article 3(3) of Directive 1999/44, in conjunction with Article 3(4) thereof; and whether **the third subparagraph of Article 3(3) of that Directive, in conjunction with the second indent of Article 3(5) thereof, should be interpreted as meaning that a consumer who has merely notified a defect to the seller is not entitled to have a contract rescinded without offering to transport the goods to the place where the seller is located (5)**

- Whether, if the place where the consumer must make goods acquired under a distance contract available to the seller for examination and to enable repair is – in all cases or in this specific one – **the sellers’s place of business, and a requirement for the consumer to pay costs in advance is not compatible** with the first subparagraph of Article 3(3) of Directive 1999/44, in conjunction with Article 3(4) thereof; and whether **the third subparagraph of Article 3(3) of that Directive, in conjunction with the second indent of Article 3(5) thereof, should be interpreted as meaning that a consumer who has merely notified a defect to the seller without offering to transport the goods to the place where the seller is located is not entitled to have a contract rescinded.**

#### Reasoning of the CJEU

The CJEU, recalling the *Weber and Putz* cases (Joined Cases C-65/09 and C-87/09), ruled that, although Article 3(3) of Directive 1999/44 does not specify the place where goods not in conformity are to be made available to the seller to be repaired or replaced, that provision lays down certain limits. These limits were interpreted by the CJEU as **the expression of the intention of the EU legislature to ensure effective protection for the consumer.** The Court stated that **the place** where goods not in conformity are to be made available to the seller to be repaired or replaced **must be suited to ensuring that they are brought into conformity in compliance with the following conditions, set forth by Directive 1999/44 and interpreted by the CJEU:**

- **The goods should be brought into conformity “free of charge”**

The CJEU considered that in accordance with Article 3(4) of Directive 1999/44, the notion of ‘free of charge’ refers to the necessary cost incurred to bring the goods into conformity (particularly the cost of postage, labour and materials), and that the Directive seeks to strike a balance between the buyer’s interests and economic considerations advanced by the seller. **Relying on these arguments, the CJEU stated that the seller has an obligation to reimburse to the consumer the cost of transporting that property to the seller’s place of business, but not the obligation systematically to advance those costs to the consumer.** Nevertheless, the transport costs paid by consumers do not constitute a burden likely to deter the average consumer from asserting his/her rights. In this regard, when the national court examines whether a burden is such to deter such a consumer from asserting his/her rights, it must take into account the circumstances specific to each individual case, including factors such as the amount of transport costs, the value of the goods not in conformity, or the possibility, in law or fact, that the consumer is entitled to assert his/her rights in the event of non-reimbursement by the seller of the transport costs paid by the consumer.

- **...within a reasonable time**

The concept of ‘reasonable time’ varies according to the place where the consumer is required to make the goods available to the seller for repair.

- **...without significant inconvenience to the consumer.**

A ‘significant inconvenience’ is a burden likely to deter the average consumer from asserting his/her rights. In order to assess whether, in the context of bringing goods into conformity, a situation might be a significant inconvenience for the average consumer, account must be taken of the nature of the goods (*e.g.* size, weight) and the purpose for which the consumer acquired the goods.

With regard to the preliminary questions 5 and 6, the CJEU stated that the consumer, who clearly informed the seller of the existence of a lack of conformity in an item acquired under a distance contract, the transport of which to the place of business of the seller was likely to cause him/her a significant inconvenience, and who made the item available to the seller at his/her home for it to be brought into conformity, without having obtained, in return, any information from the seller regarding the place where the item was to be made available for it to be brought into conformity or any other adequate positive action to that end, and who therefore did not make the item available to the seller in the place in question, satisfied the obligation of diligence imposed on him/her by the first subparagraph of Article 3(3) of Directive 1999/44.

*Conclusion of the CJEU*

The CJEU stated that, according to Directive 1999/44, the Member States are competent to establish the place where the consumer is required to make goods acquired under a distance contract available to the seller, for them to be brought into conformity in accordance with that provision. That place must be suitable for ensuring that the goods can be brought into conformity free of charge, within a reasonable time and without significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer acquired the goods.

Moreover, the consumer’s right to the bringing of goods, acquired under a distance contract, into conformity ‘free of charge’ does not include the seller’s obligation to advance the costs of transporting those goods from the consumer, for the purposes of bringing them into conformity, to the seller’s place of business, unless the fact that the consumer must advance those costs constitutes such a burden as to deter him/her from asserting his/her rights, which it is for the national court to ascertain. On this point, the CJEU stated (paragraph 54):

“the striking of a balance between the interests of the consumer and of the seller which Directive 1999/44 seeks to achieve does not require that the obligation on the seller to bring the goods into conformity free of charge also include, beyond the obligation on the seller to reimburse to the consumer the cost of transporting that property to the seller’s place of business, the obligation systematically to advance those costs to the consumer.”

**Furthermore, the CJEU stated that a consumer is entitled to rescission of the contract as a result of the failure to ensure a remedy for the lack of conformity within a reasonable time if:**

- s/he informed the seller of the non-conformity of goods acquired under a distance contract;
- s/he made the goods available to the seller at his/her home for them to be brought into conformity;
- the transport of the goods to the seller's place of business was likely to cause a significant inconvenience to the consumer;
- the seller failed to take any adequate steps to bring those goods into conformity, including that of informing the consumer of the place where those goods were to be made available so that the seller could bring them into conformity.

It was for the national court, by means of an interpretation in conformity with Directive 1999/44, to ensure the right of that consumer to rescission of the contract.

#### Elements of judicial dialogue

In the *Fülla* case (C-52/18) the CJEU expressly recalled the *Weber* and *Putz* cases (Joined Cases C-65/09 and C-87/09, see questions 1, 2 and 3), and the application of the principle of effective consumer protection made in those judgements with regard to the remedies granted to the consumer in the case of non-conformity (paragraph 32). The CJEU confirmed the interpretation according to which Directive 1999/44 favours, in the interest of both parties to the contract, the performance of that contract by means of the two remedies first provided for (substitution or repairment), rather than the rescission of the contract (§ 61). The CJEU also recalled the *Weber* and *Putz* cases (Joined Cases C-65/09 and C-87/09) in order to highlight that Directive 1999/44 strikes a balance between the position of the consumer and the economic interest of the seller (paragraph 41).

### **5.5.5 Question 5 – Burden of proof and *ex officio* evidence in consumer sales disputes**

**Main case:**

- Judgement of the Court (First Chamber) of 4 June 2015, *Froukje Faber v Autobedrijf Hazet Ochten BV.*, Case C-497/13 (“**Faber**”)

What is the allocation of the burden of proof with respect to the claim of non-conformity of a consumer good? How is it affected by the principle of effectiveness?

#### Relevant legal sources

Article 5 section 3 of the 1999/44/EC Directive:

“Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.”

### The case

Ms. Faber bought a used Range Rover (a car) for 7,002 euros from a company called ‘Hazet’ on the 27th of May 2008. On the 26th of September 2008, the car caught fire on the highway and completely burned out on the side of the road. In response to Ms. Faber’s claim for compensation, the seller pointed out *inter alia* that it had not been proven that the car was non-compliant with the contract (in the meantime the wreck had been scrapped). According to Ms. Faber, the firemen and policemen who arrived at the scene of the incident stated that the vehicle had had a technical failure. The court of the first instance rejected Ms. Faber’s claim. After her recourse, the court of second instance referred a preliminary question to the CJEU.

### Preliminary question referred to the CJEU:

While asking the preliminary question in the *Faber* case (C-497/13), the Dutch court addressed, amongst other problems, the issue of **the general outline of burden of proof in consumer sales cases**.

Firstly (in question 5), the national court inquired **whether it was possible to oblige a consumer to present on his/her own the facts and evidence relevant for claiming remedies for the non-conformity of goods**. The question especially concerned the issue of whether domestic law may oblige consumers to prove that they notified a seller about a lack of conformity within the terms set forth in Article 5 section 2 of the 1999/44/EC Directive. The court intended to establish whether such an obligation is consistent with the **principle of effectiveness**.

Secondly (in question 6), the national court sought to clarify **how precise a claim of the lack of conformity made by a consumer on the grounds of Article 5 section 3 of the 1999/44/EC Directive must be** – and, respectively, how detailed the evidence provided by a buyer ought to be. Also, in this respect, the court asked, in particular, about the relevance of the principle of effectiveness to ascertaining this matter.

Lastly (in question 7), the Dutch court wanted to establish whether the burdens in terms of factual statements and evidence differ if the consumer **receives professional legal assistance in claiming his/her rights concerning non-conformity**.

### Reasoning of the CJEU

Referring to the aforementioned problems, the CJEU observed that the national legislation transposing the 1999/44/EC Directive may oblige consumers to notify the lack of conformity of goods and, further, prove before a court that the notification has been made within the term required by law. The details that have to be communicated by a consumer cannot be excessive nor too far-reaching – rather, it should be sufficient to indicate the lack of conformity with no need to indicate its reasons precisely. The scope of obligations regarding proof that the

notification has been made ought to **comply with the principle of effectiveness**. In particular, the consumer cannot be subjected to unnecessary burdens that would be “capable of making it impossible or excessively difficult for the consumer to exercise the rights which he derives from Directive 1999/44” (p. 64).

Further, as regards the precise allocation of the burden of proof in the case of non-conformity, the Court emphasised that, in principle, the 1999/44/EC Directive reverses this burden if the buyer makes his/her claim within the period of six months, as specified in **Article 5 section 3**. If this requirement is met, **it is presumed that non-conformity existed at the time of delivery of a good**.

However, as the CJEU pointed out, to benefit from this rule, the consumer needs to evidence two facts:

- (a) that the good **does not conform with a contract**; it is not required, however, to prove the origins of non-conformity, nor its cause or the possibility to attribute it to the seller;
- (b) **that there was an apparent non-conformity** within the period of six months, as provided for in Article 5 section 3 of the 1999/44/EC Directive.

If these prerequisites are complied with, the burden of proving the opposite facts – i.e. that non-conformity did not exist at the time of delivery – rests on the seller.

Furthermore, the result in question cannot be altered because the consumer is assisted by a professional lawyer or acts in the proceedings independently (p. 47). As the main point of reference, the CJEU indicated in this respect the principles of equivalence (between the procedural rules regarding EU-law related claims and other claims), as well as **the principle of effectiveness**. The Court ascertained that the scope of these principles ought to be framed in a unified way and should be “independent of the specific circumstances of each case”.

#### *Conclusion of the CJEU:*

With regard to these arguments, the CJEU pointed out that a consumer, while claiming non-conformity of a good with a contract (Article 5 section 2 of the 1999/44/EC Directive), may be subjected to rules on evidencing non-conformity only so long as these do not make it excessively difficult or impossible for the consumer to exercise his/her rights. In such a case, the consumer is not obliged, in particular, to evidence the precise cause of non-conformity. A similar rule also applies to notifying non-conformity within the period of six months as specified in Article 5 section 3 of the 1999/44/EC Directive. The way in which the burden of proof is administered is not altered by the fact that a consumer receives professional legal assistance or acts on his/her own.

#### *Impact on the follow-up case*

Following the CJEU’s judgement, the Court of Appeal invited the parties to a session in which they could reply to the consequences of the CJEU’s decision and to a number of specific questions put by the Court of Appeal regarding the facts surrounding the conclusion of the sales contract.

The case was discontinued.

## **Austria**

There is no express reference to *Faber* (C-497/13) in Austrian case law. The burden of proving the conformity of a good is covered by § 924 of the Austrian Civil Code, amended in 2001 in implementation of Directive 1999/44.

Austrian civil-procedural law envisages the general separation of burden of proof: each party has to furnish and make evident all the facts which are in favour of the party. There are exceptions to this general rule, e.g. the proximity of a party to the evidence. These rules are regarded as an expression of a fair trial (Article 6 ECtHR, Article 47 CFR).

## **Italy**

The *Faber* case (C-497/13) was specifically referred to by a decision taken by the *Consiglio di Stato* (the national appeal court) when assessing the adequacy and proportionality of fines imposed on Apple for unfair practices consisting in offering as a distinct guarantee the repair service after the first six-month period corresponding to the period specified in Article 5 section 3 of the 1999/44/EC Directive in respect of the presumption concerning the occurrence of a defect at the time of delivery (see *Consiglio di Stato* 17.11.2015, no. 5250). Indeed, although this guarantee perfectly overlaps with the guarantee provided by law (for which no additional payment may be charged to the consumer), Apple unfairly induced the consumer to believe that after six months the seller would not be legally obliged to provide any assistance in the case of non-conformity in order to verify the causes of and remedies for such non-conformity. Apple asserted that the burden of proof concerning the existence of non-conformity and its causes was on the consumer. By referring to the CJEU's decision in *Faber* (C-497/13) and the principle of effectiveness therein applied, the Italian court ruled that Apple's conduct was an unfair practice to be sanctioned with effective, proportionate, and dissuasive penalties.

A judgement of the first-instance court of Naples of 9 January 2017 can be considered. In this case, the court dismissed the defendant's line of defence that he was not involved in the manufacture of the good. In particular, the court pointed out that pursuant to the Consumer Code – Article 130 – the seller/retailer is liable for any defect displayed by the goods sold. Moreover, according to Article 5 § 3 of Directive no. 1999/44, if the defect becomes apparent within six months from the good's sale, it is presumed that the defect existed at the moment of the sale. After giving proof that the good is defective and that the defect became apparent within six months from the sale, the consumer has fulfilled his/her burden of proof and it is for the seller to prove that the defect did not exist at the moment of the sale. In order to justify its reasoning in regard to allocation of the burden of proof, the court made explicit reference to the CJEU decision in the *Faber* case (C-497/13), according to which – § 70-73 – the consumer is relieved of “the obligation of establishing that the lack of conformity existed at the time of delivery of the goods” once he/she has “alleged and furnished evidence that the goods sold are not in conformity with the relevant contract” and proved “that the lack of conformity in question

became apparent, that is to say, became physically apparent, within six months of delivery of the goods”.

## **Poland**

The *Faber* judgement (C-497/13) has not been directly referred to by Polish courts. On the general rules on burden of proof and providing evidence that are applicable also to consumer sales, see the comments on Poland under the section above.

## **Estonia**

The same principle embodied in Article 5(3) of Directive 1999/44 as interpreted in the CJEU’s case law is comprised in the Law of Obligations Act (*Võlaõiguseadus*). There are no references to the *Faber* judgement (C-497/13) in Estonian case law.

According to Article 218(2) of the Law of Obligations Act (LOA), in the event of a consumer sale, the seller is liable for any lack of conformity of an item which becomes apparent within two years from the date of delivery of the good to its purchaser. In the event of a consumer sale, it is presumed that any lack of conformity which becomes apparent within six months from the date of delivery of a good to its purchaser already existed before the delivery, unless such presumption is contrary to the nature of the good or to the lack of conformity.. The LOA, including that provision, entered into force on 1 July 2002. This sub-paragraph is based on Article 39(2) of the Convention on Contracts for the International Sale of Goods and Article 4:302(3) of the Principles of European contract law.

The relevant provisions of the LOA in the interests of consumer protection are:

- If a good is delivered to the purchaser by the seller or by a carrier authorised by the seller on the basis of a contract, reimbursement of transport costs may be claimed from the purchaser only if the amount of the costs was communicated to the purchaser not later than upon entry into the contract (Article 215(3) of the LOA);
- A good does not conform to a contract if it does not possess the quality usual for that type of good which the purchaser may have reasonably expected based on the nature of the good and considering the statements made publicly with respect to particular characteristics of the good by the seller, producer or previous seller of the good or by another retailer, in particular in the advertising of the good or on labels (Article 217(6) of the LOA);
- The consumer has to notify the seller of any lack of conformity of a good within two months (in other cases within a reasonable period of time) from becoming aware of the lack of conformity (Article 220(1) of the LOA). A detailed description of the lack of conformity is not required (Article 220(2) of the LOA).
- If a good does not conform to the contract, the purchaser may demand repair of the good or delivery of a substitute item from the seller even if the lack of conformity does not constitute a fundamental breach of contract (Article 222(1)(2) of the LOA);
- Any unreasonable inconvenience caused to the purchaser by the repair or substitution of a good is also deemed to be a fundamental breach of contract by the seller (Article 223(2)

- of the LOA). In this case, the purchaser is not required to determine an additional term and has the right, *inter alia*, to withdraw from the contract (Article 223(3) of the LOA);
- Specifications for warranty against defects in the event of consumer sale (Article 231 of the LOA).
  - Agreements which are related to the legal remedies to be used in the case of a breach of contract and which derogate from the relevant provisions of the LOA to the prejudice of the purchaser are void (Article 237(1) of the LOA).

### 5.5.6 Question 6 – Limitation period

Is compatible with Directive 1999/44 a national provision which provides the limitation period for action by the consumer shorter than two years from the time of delivery of the goods when the seller and consumer have agreed, according to national law, on a period of liability of the seller of less than two years, namely a one-year period, for the second-hand goods concerned?

#### Main case:

- Judgement of the Court (Fifth Chamber) of 13 July 2017 *Christian Ferenschild v JPC Motor SA*, C-133/16, (“**Ferenschild**”)

#### Relevant legal sources

#### EU level

#### Directive 1999/44

Recital 7: “Whereas the goods must, above all, conform with the contractual specifications; whereas the principle of conformity with the contract may be considered as common to the different national legal traditions; whereas in certain national legal traditions it may not be possible to rely solely on this principle to ensure a minimum level of protection for the consumer; whereas under such legal traditions, in particular, additional national provisions may be useful to ensure that the consumer is protected in cases where the parties have agreed no specific contractual terms or where the parties have concluded contractual terms or agreements which directly or indirectly waive or restrict the rights of the consumer and which, to the extent that these rights result from this Directive, are not binding on the consumer”

Recital 16 “Whereas the specific nature of second-hand goods makes it generally impossible to replace them; whereas therefore the consumer’s right of replacement is generally not available for these goods; whereas for such goods, Member States may enable the parties to agree a shortened period of liability”

Recital 17 “Whereas it is appropriate to limit in time the period during which the seller is liable for any lack of conformity which exists at the time of delivery of the goods; whereas Member States may also provide for a limitation on the period during which consumers can exercise their rights, provided such a period does not expire within two years from the time of delivery; whereas where, under national legislation, the time when a limitation period starts is not the time of delivery of the goods, the total duration of the limitation period provided for by national law may not be shorter than two years from the time of delivery”



#### Recital 24

“Whereas Member States should be allowed to adopt or maintain in force more stringent provisions in the field covered by this Directive to ensure an even higher level of consumer protection.”

Article 1(1) “The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market.”

#### Article 3(1) and (2)

See Chapter 1, §1.2.1

#### Article 5(1)

“The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery.”

#### Article 7(1)

“Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller’s attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.

Member States may provide that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in Article 5(1). Such period may not be less than one year.”

#### Article 8

“1. The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability.

2. Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.”

### **National legal sources**

Provisions which transpose Directive 1999/44 in Belgian law:

Article 1649 quater of the Civil Code

“1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered where the lack of conformity becomes apparent within two years of their delivery. (...)

By way of derogation from the first subparagraph, the seller and the consumer may, for second-hand goods, agree on a period shorter than two years; such period may not be less than one year. (...)

3. Actions by the consumer shall be brought within a period of one year from the day on which the consumer detected the lack of conformity; such limitation period may not expire before the end of the two-year period provided for in [paragraph 1]”

### The case

On 21 September 2010, Mr. Ferenschild, a Dutch national residing in Belgium, purchased a second-hand car from JPC Motor. On the 22 of September the registration of the vehicle was refused by the Vehicle Registration Department. On 7 October Mr. Ferenschild notified JPC Motor that the vehicle had a “hidden functional defect”, claiming lack of conformity. He gave formal notice to take the vehicle back and reimburse the sale price. It then became apparent that it was not the vehicle itself but the vehicle’s documents that were defective. Accordingly, the vehicle bought by Mr. Ferenschild was duly registered by DIV on 7 January 2011.

On 21 October 2011, Mr. Ferenschild’s adviser put JPC Motor on formal notice to pay compensation to his client for the damage sustained as a result of the lack of conformity. Since JPC Motor disputed the claim for compensation, contending that it was out of time, Mr. Ferenschild initiated legal proceedings against that company on 12 March 2012 before the *Tribunal de commerce de Mons* (Commercial Court, Mons, Belgium).

By judgement of 9 January 2014 the tribunal dismissed Mr. Ferenschild’s application. On 3 April 2014, Mr. Ferenschild brought an appeal against that judgment before the *Cour d’appel de Mons* (Court of Appeal, Mons, Belgium). On 8 June 2015, the Court found that the vehicle sold lacked conformity within the meaning of Article 1649 bis et seq. of the Civil Code, but that the lack of conformity appeared to have been resolved following registration of the vehicle.

However, the Court ordered, of its own motion, that the hearing be reopened in order to allow the parties to make submissions, inter alia, on whether the action was time barred, the issue being that, according to the agreement of the parties and in accordance with Article 1649 quater of the Civil Code, the limitation period for action by the consumer seemed to have expired before the two-year period from delivery of the second-hand car had elapsed.

The referring Court affirmed that article 1649 could be incompatible with Directive 1999/44, in particular with Article 5(1) and the second subparagraph of Article 7(1). Therefore, the judge decided to stay the proceedings and to refer the question to the Court of Justice for a preliminary ruling.

### Preliminary questions referred to the CJEU

The referring court asked if Article 5(1) of Directive 1999/44 in conjunction with the second subparagraph of Article 7(1) thereof, should be interpreted as precluding a provision of national

law which is interpreted as allowing, for second-hand goods, the limitation period for action by the consumer to expire before the end of the two-year period elapsing from the delivery of goods which are not in conformity with the contract, where the seller and the consumer have agreed on a guarantee period of less than two years.

### Reasoning of the CJEU

In its decision the CJEU clarified the distinction between two types of time limits provided for by Article 5(1) of Directive 1999/44:

- **period of liability of the seller**, which refers to the period during which the seller is liable under Article 3 of the Directive when a lack of conformity of the goods at issue becomes apparent and, accordingly, this gives rise to the rights set out in that article in favour of the consumer. The duration of the period of liability of the seller is, as a rule, two years from the time of delivery of the goods. As an exception set forth in Article 7(1) of the Directive 1999/44, Member States may provide that, in the case of second-hand goods, the seller and consumer may agree a time period for the liability of the seller shorter than that set out in Article 5(1) of the Directive, provided that that period is not less than one year.
- **period of time during which the consumer can actually exercise the rights** that arose in the period of liability of the seller. Whether to impose a limitation period for action by the consumer is a matter for national legislation, but the mandatory minimum duration of that period must always be, as a rule, at least two years from the time of delivery of the goods concerned. The wording of the first subparagraph of Article 7(1) of the Directive, read in light of recital 7 thereof, also confirms the binding nature of that general minimum duration in so far as, under that provision, the parties cannot derogate from it by means of an agreement and Member States must ensure that it is complied with. Accordingly, the possibility for Member States to provide that, in the case of second-hand goods, the parties may reduce the duration of the period of liability of the seller to one year from the time of delivery of the goods does not enable Member States to provide also that the parties may reduce the duration of the limitation period caught by the second sentence of Article 5(1) of the Directive.

A national rule such as that at issue in the main proceedings, which would allow the limitation period afforded to consumers to be shortened as a consequence of the reduction of the period of liability of the seller to one year, would result in a lesser level of consumer protection. The CJEU emphasised that, in that case, the consumer would be deprived of the exercise to the full extent of the legal remedies granted by EU law. The national law provision must, therefore, be interpreted in conformity with the Directive.

Although the principle of effectiveness is not expressly recalled in the judgement, the CJEU's interpretation of the possibility of derogation as an exception, as well as the emphasis on the importance of granting to consumers the possibility to exercise their rights can be seen as an implicit reference to that principle.

### Conclusion of the CJEU

The CJEU stated that Article 5(1) and the second subparagraph of Article 7(1) of Directive 1999/44/EC must be interpreted as precluding a rule of a Member State which allows the limitation period for action by the consumer to be shorter than two years from the time of delivery of the goods when the Member State has made use of the option given by the latter of those two provisions, and the seller and consumer have agreed on a period of liability of the seller of less than two years, namely a one-year period, for the second-hand goods concerned.

### Elements of judicial dialogue

The CJEU mentioned and applied the reasoning of the *Faber* decision (C-497/13, see Question 5), confirming the interpretation according to which the general minimum duration of the limitation period has a binding nature, and that the parties cannot, as a rule, derogate from it by means of an agreement and Member States must ensure that it is complied with.

## **5.5.7 The reform of the consumer sales Directive and the importance of the digital environment: Directive 2019/771 and 2019/770**

**On 20 May 2019, the Directive (EU) 2019/771** on certain aspects concerning contracts for the sale of goods was approved; **it repealed Directive 1999/44/EC**. On the same day, the **Directive (EU) 2019/770** on certain aspects concerning contracts for the supply of digital content and digital services was adopted.

By 1 July 2021, the Directive stated, Member States should adopt and publish the measures necessary to comply with these Directives, and the related national provisions would be applied from 1 January 2022.

It should be noted that the context of the digital environment was taken into account in the new Directives, as shown by the title of Directive 2019/770 and by certain provisions of Directive 2019/771, such as the definitions provided by Article 2 (e.g. “good with digital elements”, “digital content” and “digital service”, “compatibility” with regard both to hardware and software).

The differences between the new Directives and Directive 1999/44 on the aspects referred to above are analysed in the following part of this section, also in order to identify the possible influence of the considered CJEU case law on the interpretation of Directive 2019/770 and 2019/771.

### Effectiveness and proportionality in the selection of remedies (Question 1,2 and 3 above)

Article 13 Directive 2019/771 provides:

“In the event of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in this Article.

2. In order to have the goods brought into conformity, the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or,

compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including:

- (a) the value the goods would have if there were no lack of conformity;
- (b) the significance of the lack of conformity; and
- (c) whether the alternative remedy could be provided without significant inconvenience to the consumer.

3. The seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances including those mentioned in points (a) and (b) of paragraph 2.

4. The consumer shall be entitled to either a proportionate reduction of the price in accordance with Article 15 or termination of the sales contract in accordance with Article 16 in any of the following cases:

- (a) the seller has not completed repair or replacement or, where applicable, has not completed repair or replacement in accordance with Article 14(2) and (3), or the seller has refused to bring the goods into conformity in accordance with paragraph 3 of this Article;
- (b) a lack of conformity appears despite the seller having attempted to bring the goods into conformity;
- (c) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract; or
- (d) the seller has declared, or it is clear from the circumstances, that the seller will not bring the goods into conformity within a reasonable time, or without significant inconvenience for the consumer.

5. The consumer shall not be entitled to terminate the contract if the lack of conformity is only minor. The burden of proof with regard to whether the lack of conformity is minor shall be on the seller.

6. The consumer shall have the right to withhold payment of any outstanding part of the price or a part thereof until the seller has fulfilled the seller's obligations under this Directive. Member States may determine the conditions and modalities for the consumer to exercise the right to withhold the payment.

7. Member States may regulate whether and to what extent a contribution of the consumer to the lack of conformity affects the consumer's right to remedies”.

The new Directive 2019/771 was more specific than Directive 1999/44. The reasoning of the *Weber* and *Putz* cases (Joined Cases C-65/09 and C-87/09) seems to be coherent also with the

new norms, considering that the new Directive contained a specific provision (Article 8), on the incorrect installation of goods. Nevertheless, the hierarchy of remedies in the new Directive (first repair or replacement, and then termination or price reduction) was more flexible than the one provided in Directive 1999/44. For example, the consumer is entitled to either a proportionate reduction of the price or the termination of the contract if the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract. Moreover, in *Weber and Putz* (Joined Cases C-65/09 and C-87/09) the CJEU stated that Directive 1999/44 intended to give the seller the right to refuse repair or replacement of the defective goods only if this is impossible or relatively disproportionate. According to that judgement, if only one of the two remedies is possible, the seller may therefore not refuse the only remedy which allows the goods to be brought into conformity with the contract. The wording of the new Directive 2019/771 could be interpreted as changing this rule, providing that if a remedy – the substitution or the repairment – is disproportionate, and the other one is impossible, the seller can refuse both.

With regard to **Directive 2019/770**, Article 14 states the conditions for exercising the remedies in the case of lack of conformity of a digital content or service. The distinction between that Directive and Directive 2019/771 is closely related to the scope of application of the former Directive, which is to be applied also in some cases where the price is not paid (see Chapter 9 of this Casebook). In those cases, a reduction of price cannot be requested by the consumer.

*The allocation of replacement costs (Questions 2 and 3 above)*

Article 14 of **Directive 2019/771** provides that

“Where a repair requires the removal of goods that had been installed in a manner consistent with their nature and purpose before the lack of conformity became apparent, or where such goods are to be replaced, the obligation to repair or replace the goods shall include the removal of the non-conforming goods, and the installation of replacement goods or repaired goods, or bearing the costs of that removal and installation.”

On comparing this norm with the interpretation of Directive 1999/44 provided by the CJEU, the application of principles of proportionality and effectiveness appears quite different: the new Directive does not expressly provide the possibility, in cases similar to the *Weber and Putz* one, to limit the consumer’s right to reimbursement of the cost of removing the defective goods and of installing the replacement goods, applying the principle of proportionality. Therefore, a future question for discussion could be:

Could Article 14 of the Directive 2019/771 related to the cost of removing the defective goods and of installing the replacement goods be interpreted in light of the application of the proportionality principle made by the CJEU in the *Weber and Putz* case (Joined Cases C-65/09 and C-87/09)?

Burden of proof and ex officio evidence (question 5 above)

The new Article 11 **Directive 2019/771**, entitled “Burden of proof” and Article 10(2) regulating the liability of the seller, can be compared with the interpretation of Directive 1999/44 provided by the CJEU. The reasoning of the Court in the *Faber case* (C-497/13) seems to be important also in interpretation of the new Directive, considering that the most important change is related to the time of the presumption rule in favour of the consumer (one year instead of six months), and not the structure of the system of burden of proof.

It should be considered also that Directive **2019/770**, in relation to the **lack of conformity of a digital content or service**, in Article 12 provides that:

- a) The burden of proof with regard to whether the digital content or digital service was supplied, in accordance with Article 5, shall be on the trader.
- b) In cases in which a contract provides for a single act of supply or a series of individual acts of supply, the burden of proof with regard to whether the supplied digital content or digital service was in conformity at the time of supply shall be on the trader for a lack of conformity which becomes apparent within a period of one year from the time when the digital content or digital service was supplied.
- c) Where the contract provides for continuous supply over a period of time, the burden of proof with regard to whether the digital content or digital service was in conformity within the period of time during which the digital content or digital service is to be supplied under the contract shall be on the trader for a lack of conformity which becomes apparent within that period.

The rules referred to in points b) and c) do not apply if the trader demonstrates that the digital environment of the consumer is not compatible with the technical requirements of the digital content or digital service, and if the trader informed the consumer of such requirements in a clear and comprehensible manner before the conclusion of the contract.

Furthermore, **the consumer shall cooperate with the trader**, to the extent reasonably possible and necessary, to ascertain whether the cause of the lack of conformity of the digital content or digital service at the time specified in letters b) and c), as applicable, lay in the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are least intrusive for the consumer. If the consumer fails to cooperate, and if the trader informed the consumer of such requirement in a clear and comprehensible manner before the conclusion of the contract, the burden of proof with regard to whether the lack of conformity existed at the time referred to in letters a) and b), as applicable, shall be on the consumer.

**The *rationale* of the provisions of Directive 2019/770 seems to be similar to that of Directive 2019/771 and Directive 1999/44.** Nevertheless, the rules provided are quite different, such as the ones referred in letters b) and c) above, or those related to the duty of cooperation of the consumer. The differences may be seen as due to the specificities of the digital environment, where data protection rules are normally at stake. Therefore, a future question for discussion could be:

Could the principle of effectiveness and the right to data protection provided by Article 8 CFREU have an impact on the interpretation of the duty of cooperation for the consumer? More specifically, in light of Article 8 CFREU and of the principle of effectiveness, could the meaning of “least intrusive” means for the consumer be interpreted in light of Regulation UE 2016/679 ?

*Limitation period (Question 6 above)*

**Pursuant to Directive 2019/771, the seller shall be liable** to the consumer for any lack of conformity which exists at the time when the goods were delivered, and which becomes apparent within two years from that time (Article 10 (1)). This rule applies also to goods with digital elements, but it should be coordinated with Article 7(3). In the case of goods with digital elements where the sales contract provides for a continuous supply of the digital content or digital service over a period of time, the seller shall also be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within two years from the time when the goods with digital elements were delivered. Where the contract provides for a continuous supply for more than two years, the seller shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract (Article 10).

Moreover, according to Article 10(3), in the case of goods with digital elements, the seller shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep those goods in conformity, for the period of time:

- a) that the consumer may reasonably expect given the type and purpose of the goods and the digital elements, and taking into account the circumstances and nature of the contract, where the sales contract provides for a single act of supply of the digital content or digital service; or
- b) indicated in Article 10(2) or (5), as applicable, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time.

Furthermore, Member States may provide that, in the case of **second-hand goods**, the seller and the consumer can agree to contractual terms or agreements with a liability or limitation period shorter than the general one, provided that such shorter periods are not less than **one year**.

With regard to the **period of time during which the consumer can actually exercise the rights**, Article 10(5) Directive 2019/771 provides that it is possible for Member States to provide a limitation period for the remedies against the lack of conformity of the good, but this provision must allow the consumer to exercise the remedies for a lack of conformity for which the seller is liable under Article 10(1) and (2).

With regard to Directive **2019/770 on digital contents and services**, its Article 11 (2,3) provides:

“If, under national law, the trader is only liable for a lack of conformity that becomes apparent within a period of time after supply, that period shall not be less than two years from the time of supply, without prejudice to point (b) of Article 8(2).



If, under national law, the [consumer] rights laid down in Article 14 are also subject or only subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 14 for any lack of conformity that exists at the time indicated in the first subparagraph and becomes apparent within the period of time indicated in the second subparagraph.

3. Where the contract provides for continuous supply over a period of time, the trader shall be liable for a lack of conformity (...), that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the contract.

If, under national law, the rights laid down in Article 14 are also subject or only subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 14 for any lack of conformity that occurs or becomes apparent during the period of time referred to in the first subparagraph.”

Taking into account the similarities between the new Directives and Directive 1999/44, the CJEU’s reasoning in the *Ferenschild* case (C-133/16) related to the limitation period’s rules in Directive 1999/44 could be a reference for national legislators in the implementation of Directive 2019/770 and Directive 2019/771 in national legal systems.

## 5.6 Effective, proportionate and dissuasive penalties for breaches of Directive 2008/48

### Relevant CJEU cases in this cluster

- Judgement of the Court (Fourth Chamber), 27 March 2014, LCL *Le Crédit Lyonnais SA v Fesih Kalban*, Case C-565/12, (“**Le Crédit Lyonnais**”)
- Judgement of the Court (Third Chamber) of 9 November 2016, *Home Credit Slovakia a.s. v Klára Bíróová*, Case C-42/15 (“**Home Credit Slovakia**”)
- Judgement of the Court (Second Chamber) of 5 March 2020, *OPR-Finance s.r.o. v GK*. Case C-679/18 (“**OPR-Finance**”)
- Judgement of the Court (Sixth Chamber) of 10 June 2021, (Luxembourg) *S.A. v KM Ultimo Portfolio Investment* (Luxembourg) SA, Case C-303/20 (“**Ultimo Portfolio Investment**”)

**Within this cluster, the main case presented as a reference point for judicial dialogue within the CJEU and between EU and national courts is the *Ultimo Portfolio Investment* (C-303/20).**

### Main questions addressed:

- Question 1 Does the penalty of liability for a minor offence that is imposed in Article 138c(1[a]) of the [Code of minor offences] for a failure to comply with the obligation to assess a consumer’s creditworthiness laid down in Article 8(1) of Directive [2008/48] constitute proper and sufficient implementation of the

requirement, imposed on the Member State in Article 23 of that Directive, to lay down in national law effective, proportionate and dissuasive penalties for a breach by the creditor of the obligation to assess the creditworthiness of a consumer?

### Relevant legal sources

#### **EU level**

##### Recitals 26 and 47 of Directive 2008/48

“(26) ... In the expanding credit market, in particular, it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so. ... creditors should bear the responsibility of checking individually the creditworthiness of the consumer. To that end, they should be allowed to use information provided by the consumer not only during the preparation of the credit agreement in question, but also during a long-standing commercial relationship. The Member States’ authorities could also give appropriate instructions and guidelines to creditors. Consumers should also act with prudence and respect their contractual obligations.

(47) Member States should lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and ensure that they are implemented. While the choice of penalties remains within the discretion of the Member States, the penalties provided for should be effective, proportionate and dissuasive.”

##### Article 8 of Directive 2008/48

“Member States shall ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer’s creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database. Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement.”

##### Article 23 of Directive 2008/48

“Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.”

#### **National legal sources**

##### Article 138c of the code of minor offences

“1a. The same penalty [a fine] shall be imposed on anyone who fails to comply with the obligation to assess creditworthiness when concluding a consumer credit agreement with a consumer.

4. If the trader is not a natural person, the liability provided for in paragraphs 1 to 3 shall be borne by the person in charge of the undertaking or the person authorised to conclude agreements with consumers.”

### 5.6.1 Question 1 – The selection of effective, proportionate and dissuasive penalties based on Article 23 of Directive 2008/48

Should national courts take into account all the available and applicable legal rules under national law when interpreting Article 23 of Directive 2008/48?

#### *The case*

The lender Aasa Polska and the defendant KM concluded a loan agreement. At the date of conclusion of the agreement, KM had commitments under 23 loan and credit agreements (total amount PLN 261 850). At the date of conclusion of the agreement, KM's spouse (AB) had commitments under 24 loan and credit agreements (total amount PLN 457,830). On the date of conclusion of the agreement, KM was employed under an employment contract providing for net wages of PLN 2,300. KM's husband had no income due to illness. Prior to the conclusion of the agreement, the lender failed to make any assessment of KM's assets or of the amounts she owed. The claim under the loan agreement was transferred to Ultimo Portfolio Investment (Luxembourg). The legal successor to the lender requested the referring court to order KM to pay PLN 7,139.76 plus statutory default interest. KM moved for dismissal of the claim in its entirety.

#### *Preliminary questions referred to the CJEU*

The referring court asked whether Article 23 of the Directive must be interpreted to mean that in determining the effectiveness, proportionality, and dissuasiveness of the penalties, courts could only take into account provision(s) of the national law specially adopted to implement Article 23 of the Directive.

#### *Reasoning of the CJEU.*

In its reasoning, the CJEU acknowledged that the low amount of the penalty or the fact that it only applies to natural persons may be indicative of its shortcomings. Referring to its earlier case law, it reiterated that for penalties to be effective and dissuasive, they must remove the economic benefit of the infringement and must have a positive effect on the consumer in question.

However, the CJEU recalled that, under Article 288 TEFU, Directives are legal instruments that are result-oriented. Although binding on the result to be achieved, they leave discretion to the Member States in regard to the form and method of implementation. Consequently, transposition does not necessarily require legislative action. The existence of general principles and general rules may render a legislative action superfluous. It follows that, in order to determine whether a national law adequately implements the obligations resulting from the given Directive, it is important to take into account not only the legislation specifically adopted for the purposes of transposing the Directive but also “all the available and applicable legal rules”. National courts

must therefore consider the whole body of rules of national law and interpret them in light of the wording and purpose of the Directive in order to achieve the outcome that is consistent with the objectives pursued by the Directive.

In the case considered here, the court highlighted that Polish law benefits from a range of civil penalties in addition to those in the Code of Minor Offences. Importantly, the CJEU also stressed that the case at hand would benefit from the penalty applicable for using unfair terms. Thus, Directive 1993/13/EC on unfair contract terms was implemented in Polish law to render excessive charges not binding on consumers.

### Conclusion of the CJEU

The CJEU ruled that in interpreting Article 23 of the Directive, national courts must take into account not only the special national provisions that are adopted to transpose the Directive but also the other provisions of the relevant law that should be interpreted in light of the objectives of the Directive, so that those penalties meet the requirements laid down in Article 23 thereof.

### Elements of judicial dialogue

The CJEU decision should be read in connection with earlier preliminary rulings on the extent to which the EU principles of effectiveness, proportionality, and dissuasiveness influence the identification of penalties for breaches of the Consumer Credit Agreement Directive. It gives useful hints on how to interpret what is effective and dissuasive in the case of a breach of the obligation to assess the creditworthiness of a consumer.

In *Le Crédit Lyonnais* (C-565/12), the CJEU had already clarified the conditions under which application of the forfeiture of entitlement to contractual interest is, as a penalty under French law for a creditor's breach of its pre-contractual obligation to assess a borrower's creditworthiness, compatible with the Directive. This penalty, laid down in Articles L. 311-8 – L. 311-13 *Code de la Consommation*, leads to the credit granted being deemed interest-free and free of charges. As such, it was interpreted restrictively by the *Cour de Cassation*, which only applied the penalty to the contractual interest and not to the statutory rate. According to the CJEU, “if the penalty of forfeiture of entitlement to interest is weakened, or even entirely undermined, by reason of the fact that the application of interest at the increased statutory rate is liable to offset the effects of such a penalty, it necessarily follows that that penalty is not genuinely dissuasive”. In this regard, “the severity of sanctions must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while respecting the general principle of proportionality”.

In its *Home Credit Slovakia*-judgement (C-42/15), the CJEU further elaborated on the latter principle. It held that failure by a lender to include in the credit agreement all the information which, under the Directive, must necessarily be included in such an agreement may be sanctioned by forfeiture of entitlement to interest and charges if failure to provide such information may actually compromise the ability of a consumer to assess the extent of his/her liability. Therefore, “the imposition, in accordance with national law, of such a penalty, having serious consequences for the creditor in the event of failure to include those items of information referred to in Article 10(2) of Directive 2008/48 which, by their nature, cannot have a bearing on the consumer's

ability to assess the extent of his liability, such as, inter alia, the name and address of the competent supervisory authority referred to in Article 10(2)(v) of that directive, cannot be considered to be proportionate”. The proportionality of the sanction hinges on the scope and essential nature of the infringed information duty. If the possibility of the consumer to take an informed decision is a stake, the forfeiture sanction is adequate. If not, the sanction goes further than is necessary to achieve the protection goal of the Directive.

*Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

## **The Netherlands**

The Dutch Supreme Court held that an ‘all-in telephone subscription’ including telecommunication services and a ‘free’ handset could be classified as a consumer credit contract, and that this contract may be partially voidable if no separate price for the handset has been determined by the parties and if the consumer has not been informed about this separate price, since the Consumer Credit Directive mandates this information to be given (ECLI:NL:HR:2016:236). The provider is then obliged to refund the amounts it received for the handset to the consumer. The consumer must return the handset but is in principle not obliged to pay compensation for enjoyment or usage of the handset. By opting for this remedy, the court went further than simply restoring the consumer’s rights and served the general consumer interest of preventing further infringements on the Consumer Credit Directive.

After being invited to do so by the Supreme Court in its preliminary ruling (ECLI:NL:HR:2021:1677, see paragraph 1.3.1), lower courts in the Netherlands have reached a common agreement that, in default payment cases, the price to be paid by a consumer will be (partially) nullified *ex officio* if the professional party has omitted to provide the consumer with essential information laid down in Directive 2011/83/EU (the breach needs to be sufficiently serious). Courts may opt for a price reduction of 25% or 50% depending on there being sufficiently serious breaches of the law. In contrast to the entire contract being voided, there are no restitution duties for the buyer.

## **5.7 Guidelines for judges that emerge from the analysis**

The application of Article 47 CFREU and of the principles of effectiveness, proportionality and dissuasiveness has largely influenced the choice and scope of civil remedies against the breach of consumer protection duties, with special regard to those concerning the use of unfair terms, unfair commercial practices and non-conformity of goods in consumer sales.

The judicial dialogue between the EU and national courts has increasingly assumed a horizontal dimension, enabling courts from different jurisdictions to benefit from or refer to preliminary rulings presented in other Member States. More and more, it has involved legislators, whose attempts to comply with EU law in a way consistent with the CJEU’s jurisprudence often create a further need for clarification and new waves of judicial dialogue. The recent adoption of new consumer directives and the upcoming reform of existing ones pay especial attention to the need

for effective protection through effective, proportionate, and dissuasive remedies. New guidance will be needed to ensure full conformity of interpretation with Article 47 and the principles of effectiveness, proportionality and dissuasiveness.

*Unfair terms and individual redress: invalidity and moderation/ replacement of invalid contractual terms.*

According to the principles of effectiveness and dissuasiveness, the CJEU has limited the possibility of a national court to attempt to remedy the invalidity of an unfair contractual term by substituting it through the application of a supplementary (default) provision of national law. In this respect, the CJEU has stated that the national courts are only required to exclude the application of an unfair contractual term so that it does not produce binding effects with regard to the consumer, without being authorized to revise its content (*Banco Español*, C-618/10). The contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as such continuity of the contract is legally possible. As a general rule, substitution of unfair terms would undermine the dissuasiveness of the non-bindingness provided by the Directive.

Moreover, **according to the *Kásler* case** (C-26/13) concerning a consumer loan agreement, the CJEU, applying the principle of dissuasiveness, stated that in a situation in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, national law may enable the national court to cure the invalidity of that term by substituting it with a supplementary provision of national law.

In the *Abanca* (Joined Cases C-70/17 and C-179/17) and *Dziubak* (C-260/18) judgements, the CJEU provided some clarifications in regard to cases in which the replacement of an unfair clause with a supplementary provision is allowed. **The replacement is possible only if:**

**34) the contract cannot continue in existence after the removal of an unfair term**

This assessment should be performed objectively by national judges.

**and**

**b) the annulment of the contract will expose the consumer to particularly unfavourable consequences, unless the consumer objects.**

The CJEU stated that these consequences should be evaluated with account taken of the circumstances existing or foreseeable at the time of the dispute.

With regard to the **features of the norms that can substitute an unfair clause declared not binding**, the CJEU stated that with regard to the **replacement of unfair clauses made by means of legislation, the legislative choice cannot have the result of weakening the protection guaranteed to consumers** (*Dunai* case, C-118/17). Moreover, when a clause is declared unfair, it is necessary to restore the legal and factual situation in which the consumer would have been in the absence of such an unfair term in particular by giving rise to a right to restitution of advantages wrongly obtained (*Dunai* case, C-118/17).

Furthermore, the CJEU stated that provisions that prevent consumers from being bound by the unfair term concerned, where appropriate, by cancellation of the contract at issue in its entirety

if that contract cannot continue in existence without that term, violate Article 6(1) of Directive 93/13. Therefore, in these cases, annulment of the entire contract may be the effective remedy to be provided.

Moreover, it is not possible to substitute an unfair term declared not binding with national provisions of a general nature which provide that the effects ensuing from a legal transaction are to be supplemented, *inter alia*, by the effects arising from the principle of equity or from established customs, which are neither supplementary provisions nor provisions applicable where the parties to the contract so agree (*Dziubak*, C-260/18). See also *Bank BPH* C-19/20.

#### *Unfair terms and individual redress: invalidity, interim relief and restitution remedies*

In proceedings on the declaration of non-bindingness of an unfair term, in order to provide effective consumer protection, the judge should provide additional and consequential measures linked with the non-bindingness of contractual terms: for example, in the case of credit contracts, interim measures intended to suspend/halt the executive procedure on the consumer's home.

Mainly on the basis of the **principle of effectiveness**, the CJEU, in the *Aziž* and *Kušionová* cases (C-34/13), stated that the lack of interim measures within a declaratory proceeding in respect of an enforcement proceeding precludes (effective) consumer protection against the use of unfair terms on which the enforcement proceedings are based. The above question has been addressed by the CJEU in several decisions. The principles of dissuasiveness and proportionality, though recalled in *Kušionová* (C-34/13), have remained in the background.

#### *Non-bindingness of unfair terms and restitutionary remedies*

With respect to the effectiveness and dissuasiveness of consumer protection, the availability of **restitution** is particularly important. In this regard, in the *Naranjo* case (C-154/15), **the CJEU stated that national case law cannot temporally limit the restitutory effects connected with a finding of unfairness by a court, in respect of a clause contained in B2C contracts, to amounts overpaid under such a clause after issuance of the decision in which a finding of unfairness is made.** The CJEU noted that the absence of such a restitutory effect would be liable to call into question the dissuasive effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) thereof, is designed to attach to a finding of unfairness in respect of terms in contracts concluded between consumers and sellers or suppliers. In short, the CJEU considers the temporal dimension of nullity and restitution to be an intrinsic aspect of effective consumer protection: only if nullity, and therefore restitution, extends to the entire time-span of the contractual relation since the moment of limitation is such protection effective and dissuasive. *Sziber* (C-483/16) and *Dunai* (C-118/17) confirmed this interpretation. They stated that national provisions must allow restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed; and they must do so by, *inter alia*, creating a right to restitution of advantages wrongly obtained by the professional.

To sum up, generally speaking, in cases of a declaration of the non-binding nature of an unfair term, in order to provide effective consumer protection, the judge should be able to provide additional and consequential measures linked with the term's non-binding nature, bearing in mind that:

- the principle of effectiveness requires the availability of interim measures, at least in foreclosure proceedings;
- the principles of effectiveness and dissuasiveness hinder the limitation of the restitutory effects connected with a finding of unfairness by a court;
- in the application of the principles of effectiveness, proportionality and dissuasiveness, fundamental rights are involved, such as the one set out in Article 7 of the CFR and they should be considered.

Whenever applicable law hinders the application of these principles, clarification should be sought through preliminary question procedures.

#### *Unfair practices and individual redress: the role for contract invalidity*

The question arises as to whether the EU principles of effectiveness, proportionality and dissuasiveness can influence the identification of civil remedies for unfair commercial practices. In this regard, according to the *Pereničová* case (C-453/10), the occurrence of an unfair practice may influence the assessment of unfair terms of the related contract; but no automatic inference can be made from the former to the latter.

The conclusion reached by the CJEU is compatible with the possibility that national legislation provides for validity rules applicable to contracts concluded as a consequence of unfair practices. Indeed, in some Member States, consumers have been enabled to set aside contracts concluded on the basis of unfair commercial practices through different means (nullity, voidability, unwinding). If the proposal developed by the EU Commission within the *New Deal for Consumers* (COM (2018) 183 final) is approved, similar remedies would be required under EU law, extending the possible impact of Article 47 CFR on the identification of effective remedies and the conforming interpretation of national law.

#### *Delivery of defective goods in consumer sales and the remedies under Article 3, Consumer Sales Directive*

##### Replacement and reimbursement

The principles of effectiveness and proportionality strongly affect the choice among the remedies against non-conforming goods set out in Article 3 section 3 of Directive 1999/44/EC. In light of these principles, the seller's possibility to deny replacement because of unreasonably high costs is excluded when the consumer – due to the specific nature of the case – cannot claim reimbursement, and replacement is the only available remedy in kind. Indeed, the principle of proportionality is relative: it will be applied by comparing repair and replacement, taking into account the priority of remedies in kind over other remedies (*Weber and Putz*, joined cases C-65/09 and C-87/09). The entry into force of the new Directive 2019/771 will raise the question of the interpretation of the proportionality criteria with regard to the selection of remedies in the new legislative framework. The wording of the new Directive 2019/771 could be interpreted as providing that if one remedy – substitution or repair – is disproportionate, and the other one is impossible, the seller can refuse both.

However, if a national provision on remedies in the case of the non-compliance of a good with a contract does not allow that to be replaced in the circumstances set forth in EU law, the national court is obliged to **interpret it in a Directive-conforming way or not to apply it.**



While deciding any case regarding the **hierarchy of remedies in consumer sales provided by Directive 1999/44** – especially by **making a choice between repair and replacement, and the remedies consisting in price reduction and contract termination** – the national court must observe the general framework of reasoning established by the CJEU in the *Weber* and *Putz* cases (Joined Cases C-65/09 and C-87/09):

- (a) The first and predominant criterion to be taken into account is the **effectiveness of consumer protection** – which underpins all of the choices in the sphere of remedies regarding consumer sales.
- (b) Secondly, the remedies ascertained in this way ought to be balanced with the protection of a seller's interests. As the *Weber* and *Putz* decisions (Joined Cases C-65/09 and C-87/09) clearly indicate, **consumer protection in sales agreements is not absolute** – *i.e.* should be granted only to the extent necessary for protection of the economic interests of a buyer and should not be unreasonably burdensome for a seller. Therefore, domestic courts are obliged to verify **whether any remedy that they apply should not be moderated by way of proportionality**.

#### The allocation of replacement costs

All the costs of replacement should be borne, in principle, by the seller. The list of the respective costs provided in the 1999/44/EC Directive is not exhaustive. Therefore, it is the task of the national court to indicate precisely the costs that the seller should incur – both directly (e.g. by paying another contractor for installation services) or indirectly (reimbursing expenses incurred by the consumer when replacing a defective good). The overriding guideline in this respect ought to be **the principle of effectiveness of consumer protection** – as framed by the CJEU in the *Weber* and *Putz* (joined cases C-65/09 and C-87/09) judgements.

If a national court adjudicates that a consumer good ought to be replaced, **it can nevertheless assess the costs of this operation from the perspective of proportionality**. If the costs of replacing a good are excessively high from the perspective of the seller, **the national court is entitled to share them between the parties**. In this situation, the consumer may be obliged to pay part of the costs of replacing the non-compliant good with a proper one.

If a court makes the aforementioned findings, the **consumer should be granted the possibility to decide** whether to have **a good replaced** (sharing the cost with the seller), or to remain with the non-conforming item but with **a price reduction** – alternatively, to **rescind the contract** and obtain full reimbursement of the price.

#### Delivery of defective goods in distance contracts

The *Füilla* case (C-52/18) could be useful for interpreting the new Article 14 of Directive 2019/771 related to the place where the consumer is required to make defective goods acquired available to the seller, so that they can be brought into conformity. According to *Füilla* (C-52/18), that place must be appropriate for ensuring that the defective goods can be brought into conformity free of charge, within a reasonable time, and without significant inconvenience to the

consumer, taking into account the nature of the goods and the purpose for which the consumer purchased the goods. New Article 14 Directive 2019/771 could be interpreted in light of that case law, considering that it provides that when the lack of conformity is to be remedied by repair or replacement of the goods, the consumer shall make the goods available to the seller.

On the contrary, with regard to the seller's obligation to advance the costs of transporting the goods in order to eliminate the lack of conformity, the new Directive 2019/771 and the CJEU's case law may differ. According to *Fùlla* (C-52/18), the consumer's right to the bringing of defective goods, acquired under a distance contract, into conformity 'free of charge' does not include the seller's obligation to advance the costs of transporting those goods from the consumer, for the purposes of bringing them into conformity, to the seller's place of business, unless the fact that the consumer must advance those costs constitutes such a burden as to deter him/her from asserting his/her rights, which is for the national court to ascertain. The wording of Article 14 of the new Directive 2019/771 may induce the CJEU to make a different interpretation, considering that it states that the seller shall take back the replaced goods at the seller's expense.

#### The rules concerning the burden of proof

The rules on the burden of proof regarding consumer sales ought to be interpreted and applied **with a direct view to the principle of effectiveness of consumer protection** (*Faber* case, C-497/13). This requirement also applies to two types of provisions tackling the issue of evidence:

- (a) the provisions **transposing directly** into domestic orders the 1999/44/EC Directive, and for the future Directive 2019/770 and Directive 2019/771 (i.e. Italian case law);
- (b) the **other provisions on evidence** – especially the general rules of civil procedure that exist (although they are not harmonised directly by EU law, they have to meet the principle of equivalence – i.e. provide the same standard for claims related to provisions originating from EU law and cases without a European element).

In particular, **the principle of effectiveness** requires the array of factual statements, as well as the corresponding evidence, to be limited to **the circumstances that are necessary to establish a claim and ascertain the date when it was made**. With regard to all other statements and evidence, in particular those regarding the nature of non-conformity and the person liable for it, when the burden of proof is on the consumer, domestic courts should, when looking at this distribution of the burden of proof in light of the principle of effectiveness, consider whether it can cause an excessive obstacle in claiming remedies for the lack of conformity.

Those guidelines emerging from the CJEU's case law could be useful also in the application of Directive 2019/771 and 2019/770, considering that those Directives do not provide specific rules which impose an interpretation which is different from the reasoning of *Faber* (C-497/13).

## Limitation period

In interpreting the time limits provided by Article 5(1) of Directive 1999/44, national judges should consider, in accordance with the CJEU's ruling in *Ferenschild* (C-133/16), that there are two different types of time limit:

- **period of liability of the seller**, which refers to the period during which the seller is liable under Article 3 of the Directive when a lack of conformity of the goods at issue becomes apparent and, accordingly, gives rise to the rights set out in that Article in favour of the consumer.
- **period of time during which the consumer can actually exercise the rights** that arose in the period of liability of the seller. Whilst imposing a limitation period for action by the consumer is a matter for national legislation, the mandatory minimum duration of that period must always be, as a rule, at least two years from the time of delivery of the goods concerned.

These guidelines could be useful for interpretation of Article 10 of Directive 2019/771 and Article 11 of Directive 2019/770, which provide that the limitation period eventually provided by the law must allow the consumer to exercise the remedies for any lack of conformity for which the seller is liable according to those Directives. A specific provision in Directive 2019/771 concerns second-hand goods. Article 10 (6) states that Member States may provide that, sellers and consumers can agree to contractual terms or agreements with liability or limitation periods shorter than those established by the Directive, provided that such shorter periods are not less than one year.

## 6. Access to justice and effective and proportionate Alternative Dispute Resolution (ADR) mechanisms.

### Relevant CJEU cases in this cluster

- Judgement of the Court (Fourth Chamber) of 18 March 2010, *Rosalba Alassini v. Telecom Italia SpA and alii*, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, (“**Alassini**”)
- Judgement of the Court (First Chamber) of 14 June 2017, *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare Società Cooperativa*, Case C-75/16 (“**Menini**”) - [link](#) to the database for analysis of the lifecycle of the case
- Judgement of the Court (Fourth Chamber), 12 July 2012. *SC Volksbank România SA v Autoritatea Națională pentru Protecția Consumatorilor — Comisariatul Județean pentru Protecția Consumatorilor Călărași (CJPC)*, Case C-602/10 (“**Volksbank**”)

Within this cluster, the first two cases can be taken as reference points for the judicial dialogue within the CJEU and between EU and national courts.

### Main questions addressed

- Question 1 Is a pre-judicial mandatory out-of-court settlement procedure compatible with the EU Law principles of effective judicial protection (Article 47, CFREU) and of effectiveness (with respect to the rights conferred on individuals, especially under consumer law)? Are there general requirements for such mandatory out-of-court settlement attempts to be considered proportionate and compatible with the principle of effective judicial protection?
- Question 2 Are specific requirements [for compulsory ADR pre-judicial procedures involving consumers] pursuant to Directive 2013/11, with special regard to legal assistance and to the consumer’s right to withdraw from the ADR procedure, compatible with consumers’ right of access to justice?

### Relevant legal sources

#### EU level

In *Alassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08):

Article 34 ‘Out-of-court dispute resolution’ of Directive 2002/22 on Universal Service and users’ rights relating to electronic communications networks and services (Universal Service Directive).

In *Menini* (C-75/16):

Articles 1(2), 3(a), 5(2) of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

Articles 1, 2, 3 (1) and (2), 4 (1)(g), 5(1), (8)(b), 9(2)(a), 20 of Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) no. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)

## National level (Italy)

In *Alassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08):

Legislative Decree no. 259 of 1 August 2003, relating to the Electronic Communications Code (GURI no. 214 of 15 September 2003, p. 3), providing for a pre-judicial mandatory out-of-court settlement procedure in litigation concerning this matter.

In *Menini* (C-75/16):

Articles 5, 8, of Legislative Decree no. 28 of 4 March 2010 implementing Article 60 of Law no. 69 of 18 June 2009 on mediation in civil and commercial matters (*Decreto Legislativo 4 marzo 2010, n. 28, recante attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali*). More particularly, Article 5 provides for a pre-judicial mandatory out-of-court settlement procedure in some civil and commercial matters, including (as relevant for consumer litigation): tort liability in healthcare, insurance, banking and financial contracts.

Article 141 of Legislative Decree no. 206 of 6 September 2005 on the Consumer Code, 'Legislative Decree no. 206/2005' (*Decreto Legislativo 6 settembre 2005, n. 206, 'Codice del consumo'*)

### 6.1. Question 1 – Mandatory ADR mechanisms and access to effective judicial protection.

Is a procedural rule that makes the recourse to an out-of-court settlement procedure mandatory in order to bring an action before a judicial body compatible with the EU Law principles of both effective judicial protection (Article 47 CFREU) and effectiveness (with respect to the rights conferred on individuals, especially under consumer law)? Are there general requirements for such mandatory out-of-court settlement attempts to be considered proportionate and compatible with the principle of effective judicial protection?

#### The case

In the *Alassini* judgement (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), consumers lodging judicial complaints against electronic communications services providers failed to comply with the pre-trial out-of-court settlement procedure which Italian law sets as mandatory in order to bring a complaint to court. With regard to this procedural requirement, the referring judge was doubtful as to whether such a burden was compatible with the rights granted to consumers under Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), and especially with Article 34 of that Directive, pursuant to which Member States

“shall ensure that transparent, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes, involving consumers, relating to

issues covered by this Directive [...] without prejudice to national court procedures.”

Similarly, in the *Menini* case (C-75/16) the national judge questioned the compliance of the pre-trial mandatory out-of-court settlement procedure in credit agreement-related disputes involving consumers with Directive 2013/11/EU on alternative dispute resolution for consumer disputes. The question was raised within the context of an opposition to an enforceable payment order and concerned, in the first place, the fact that under Italian law such ADR procedure was set as mandatory in order to access the judicial system. The national judge raised two further questions concerning the mandatory assistance by a lawyer during the ADR procedure and the limitations to the consumer’s right to withdraw at will without consequences, both of which issues will be addressed in what follows.

*Preliminary question referred to the CJEU:*

In the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), the referring judge put the following question to the CJEU:

“Do the Community rules referred to above (Article 6 of the [ECHR], [the Universal Service] Directive, Directive [1999/44], Recommendation [2001/310] and [Recommendation [98]/257]) have direct effect and must they be interpreted as meaning that disputes “in the area of electronic communications between end-users and operators concerning non-compliance with the rules on Universal Service and on the rights of end-users, as laid down in legislation, decisions of the Regulatory Authority, contractual terms and service charters” (the disputes contemplated by Article 2 of [the regulation annexed to] Decision No 173/07/CONS of the Regulatory Authority) must not be made subject to a mandatory attempt to settle the dispute without which proceedings in that regard may not be brought before the courts, thus taking precedence over the rule laid down in Article 3(1) of [the regulation annexed to] Decision No 173/07/CONS?”

In *Menini* (C-75/16) the national judges referred two questions to the CJEU. The first concerned the relationship between Directive 2008/52/EC and Directive 2013/11. The second comprised two parts, the first being as follows:

“In so far as it guarantees consumers the possibility of submitting complaints against traders to appropriate entities offering alternative dispute resolution procedures, must Article 1 (...) of Directive 2013/11 be interpreted as meaning that it precludes a national rule which requires the use of mediation in one of the disputes referred to in Article 2(1) of Directive 2013/11 as a precondition for the bringing of legal proceedings by the consumer (...)?”

*Reasoning of the CJEU:*

In *Alassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), after first clarifying that the Universal Service Directive should not be construed as explicitly prohibiting a pre-judicial mandatory settlement procedure (*Alassini*, paragraph 42), the CJEU tackled the question of compliance of such mandatory schemes with EU law from two concurrent perspectives:

- (i) compliance with the **principle of effectiveness**, because the Directive provides remedies for consumers whose exercise may be hampered by the compulsory ADR mechanism, thus jeopardizing the effectiveness of the substantive rights granted to consumers;
- (ii) compliance with **Article 47** of the CFREU and the principle of effectiveness of judicial remedies, because the procedure may hinder access to judicial redress of consumers' rights violations, which in itself is a fundamental right recognized by EU law.

With respect to the first point, the CJEU recalled that, in accordance with the **general principle of procedural autonomy**, Member States are free to “*lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law*” provided that both the principle of equivalence (not under discussion in the present case) and the principle of effectiveness are respected. Regarding the latter, the Court acknowledged that “*making the admissibility of legal proceedings conditional upon the prior implementation of an out-of-court settlement procedure affects the exercise of rights conferred on individuals*” and therefore asserted that such limitations can be considered valid under EU law upon the condition that they do not “*make it in practice impossible or excessively difficult to exercise the rights which individuals derive from the [relevant] directive*”. In order to test whether this is the case, the CJEU further stated six specific criteria:

- (a) the procedure shall not result in a decision which is binding on the parties;
- (b) the procedure shall not cause a substantial delay for the purposes of bringing legal proceedings;
- (c) the procedure shall suspend the period for the time-barring of claims;
- (d) the procedure shall not give rise to significant costs for the parties;
- (e) the procedure shall not be accessible only by electronic means; and
- (f) the mandatory requirement shall not prevent the grant of interim measures in exceptional cases where the urgency of the situation so requires.

With respect to the second point – **compliance with the right enshrined in Article 47 of the CFREU** – the CJEU recalled the long-standing assumption that fundamental rights shall not be construed as *unfettered prerogatives* and may be restricted, provided that such restrictions pursue objectives of general interest, are proportional to such aims, and do not excessively impair the substance of the rights guaranteed. This is what the Court specifically argued:

“Nevertheless, it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed” (see, to this effect, Case C-28/05 *Doktor and Others* [2006] ECR I-5431, paragraph 75 and the case-law cited, and the judgement of the ECHR in *Fogarty v United Kingdom*, no. 37112/97, §33, ECHR 2001-XI (extracts)). (*Alassini*, joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, paragraph 63)

In the specific case considered, the CJEU then stated that the imposition of a mandatory ADR mechanism pursued the general and legitimate objectives of offering a quicker and less expensive procedure for the settlement of disputes and reduced the burden on the court system, and that the test of proportionality was satisfied considering that “*no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives*”, that “*it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives*”, and that the procedure respected the six criteria set out in relation to the principle of effectiveness.

In the subsequent *Menini* case (C-75/16), the question of the validity of mandatory ADR procedures was raised with specific reference to Directive 2013/11 on alternative dispute resolution for consumer disputes. As in the *Allassini* judgement (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), the Advocate General first clarified that the Directive should not be construed as explicitly prohibiting a pre-judicial mandatory settlement procedure and that, on the contrary, the obligation to use an out-of-court settlement proceeding may actually strengthen the effectiveness of the Directive. Secondly, the Advocate General recalled that the principle of procedural autonomy of Member States in the field of consumer law is constrained by respect of the right to an effective remedy and to a fair trial guaranteed by Article 47 of the CFREU, and she suggested that compliance of a mandatory pre-judicial procedure with the principle of effective judicial protection and Article 47 of the CFREU should be verified by taking into consideration the six tests stated in the *Allassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08). **The test run in *Allassini* with regard to the respect of the principle of effectiveness was thus taken as reference as the general test applicable to verify whether Article 47 of the CFREU is respected in cases where Member States impose pre-trial mandatory ADR mechanisms.** In the subsequent judgement, the CJEU pointed out that the expression “on a voluntary basis” in Article 1 of Directive no. 2013/11 must be interpreted according to the context and the objectives pursued. The CJEU also stated that the same Article 1 asserts that Member States can render participation in an ADR procedure mandatory, provided that – the CJEU noted – the parties’ right of access to judicial proceedings is maintained. Indeed, also the opinion of the Advocate General adduced this argument, recalling that the principle of procedural autonomy of Member States in the field of consumer law is constrained by the respect of the right to an effective remedy and to a fair trial guaranteed by Article 47 of the CFREU. The CJEU stated that “*although the first sentence of Article 1 of Directive 2013/11 uses the expression ‘on a voluntary basis’, it must be noted that the second sentence of that article expressly provides for the possibility, for the Member States, of making participation in ADR procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system*”. In order to reinforce its interpretative choice, the Court directly referred to Article 3(a) of Directive no. 2008/52, where it defines mediation as “*a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute*” and then clarified that it “*is without prejudice to national legislation making the use of mediation compulsory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system*”. The Court then referred to the *Allassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), and pointed out that: (i) the fact that the national legislation makes participation in



an ADR mandatory does not, but *could* – i.e. by introducing an additional step before accessing a court – contrast with the principle of effective judicial protection; (ii) nevertheless, fundamental rights may be restricted on the basis of “*objectives of general interest pursued by the measure in question*” and provided that proportionality is respected. Mandatory mediation procedure as a requirement to access a court may prove compatible with effective judicial protection, provided that it does not produce a binding decision, does not cause substantial delay for bringing judicial proceedings, that it suspends the period for the time-barring of claims, and that it does not give rise to costs for the parties. Therefore “*It is (...) for the referring court to establish whether the national legislation at issue in the main proceedings, in particular Article 5 of Legislative Decree No 28/2010 and Article 141 of the Consumer Code, as amended by Legislative Decree No 130/2015, does not prevent the parties from exercising their right of access to the judicial system, in accordance with the requirement of Article 1 of Directive 2013/11, in that that legislation meets the requirements set out in the previous paragraph*”.

#### Conclusion of the CJEU:

In the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), the CJEU decided the case on the grounds that:

“Article 34 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and users’ rights relating to electronic communications networks and services (Universal Service Directive) must be interpreted as not precluding legislation of a Member State under which the admissibility before the courts of actions relating to electronic communications services between end-users and providers of those services, concerning the rights conferred by that directive, is conditional upon an attempt to settle the dispute out of court.

Nor do the **principles of equivalence and effectiveness** or the **principle of effective judicial protection** preclude national legislation which imposes, in respect of such disputes, prior implementation of an out-of-court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires”.

Whereas in the *Menini* case (C-75/16), the CJEU ruled that:

“Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prescribes recourse to a mediation procedure, in disputes referred to in Article 2(1) of that directive, as a condition for the

admissibility of legal proceedings relating to those disputes, to the extent that such a requirement does not prevent the parties from exercising their right of access to the judicial system.”

In summary, with respect to mandatory ADR schemes in matters related to consumer rights, Member States shall be free to set certain procedures as mandatory in accordance with the principle of procedural autonomy, provided that such imposition does not prevent the consumer from accessing the judicial system in accordance with **Article 47** of the Charter of Fundamental Rights of the European Union. The following criteria, set out in the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), could provide judges with guidance points when assessing whether national provisions on mandatory ADR schemes comply with Article 47 of the Charter, so that the procedure:

- (a) does not result in a decision which is binding on the parties;
- (b) does not cause a substantial delay for the purposes of bringing legal proceedings;
- (c) suspends the period for the time-barring of claims;
- (d) does not give rise to significant costs for the parties;
- (e) is not accessible only by electronic means; and
- (f) does not prevent the granting of interim measures in exceptional cases where the urgency of the situation so requires.

*Impact on the follow-up case:*

The *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) had a major impact on the subsequent debate between Italian legislators and the Italian judiciary, with the intervention of the Constitutional Court, and among Italian courts themselves.

In Italy, shortly before the decision of the CJEU in *Alassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), the Italian legislator enacted legislative decree no. 28 of 4 March 2010, which introduced a mandatory mediation procedure that had to be attempted before bringing an action to court in certain specific civil matters.<sup>36</sup> Several courts<sup>37</sup> then addressed the question of the constitutionality of such a mandatory settlement procedure before the national Constitutional Court, on the grounds that such a procedure violated Articles 76 and 77 of the Italian Constitution on the government’s legislative power, Article 24 of the Italian Constitution on the right of defence and the right to a cause of action, and Article 3 of the Italian Constitution on the right to equal treatment, since the lower courts deemed that there might emerge an unjust

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<sup>36</sup> The mediation procedure was set as mandatory in litigation related to insurance, banking and financial agreements, joint ownership, property rights, division of assets, hereditary and family law, leases in general, gratuitous loans, leases of going concern, compensation for damages due to car/nautical accidents, medical liability or defamation/libel.

<sup>37</sup> Giudice di pace di Parma, 1.8.2011; Tribunale amministrativo regionale per il Lazio, 12.4.2011; Giudice di pace di Catanzaro, 1.9.2011 and 3.11.2011; Giudice di pace di Recco, 5.12.2011; Giudice di pace di Salerno, 19.11.2011; Tribunale di Torino, 24.1.2012; Tribunale di Genova, 18.11.2011.

disparity of treatment between the matters covered by mandatory settlement procedures and those that were not.<sup>38</sup>

On 24 October 2012, the Constitutional Court deliberated on the case and ruled that Article 5.1 of legislative decree no. 28/2010 was unconstitutional due to its violation of certain legislative procedural rules, without considering whether Article 24 was also violated.<sup>39</sup> In that judgement, the Constitutional Court acknowledged the CJEU's decision in the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) but also stated that the decision's relevance, with respect to the role of out-of-court settlement procedures for the enhancement of access to justice, was limited to the specific area of communication service contracts, and that it could not be generalized. However, in a decision adopted before the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) with regard to compulsory mediation attempts in the field of communication services, the Constitutional Court had already considered that obligation compatible with the constitutional right to access judicial redress (Article 24, Italian Constitution), provided that the out-of-court procedure is interpreted as not precluding the recourse to interim measures<sup>40</sup>.

Then, in 2013, the legislator amended the content of legislative decree 28/2010. It introducing a new Article 5.1 *bis* formulated so as to reprise the mandatory settlement procedure,<sup>41</sup> no longer as an admissibility condition for the action before the court, but as a condition to proceed and bring the claim before a court.

On the same point, the Supreme Court intervened with decision no. 24711, 4 December 2015. The case concerned a contractual claim filed by a client against a communication services provider. The claim addressed the problem as to whether the mandatory settlement procedure should be interpreted as a condition for admitting the claim or for proceeding with the claim before the court. Whereas the wording of the CJEU decision rendered in the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) referred to the issue of admissibility, the Supreme Court interpreted the principles therein stated as referring "in substance" to the possibility to proceed with the claim and to the possibility for the claim to be admitted in court. The reference to the principle of effectiveness, as stated in Article 47, CFREU, is the legal basis for this interpretation. The Supreme Court concluded that, if an attempt of settlement has not been started by the client, the judge shall suspend the proceeding for the time needed for the

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<sup>38</sup> Note that previous jurisprudence of the Constitutional Court had already deemed such a disparity compliant with constitutional principles. *See* Italian Constitutional Court, Ordinance no. 51/2009 (11 February 2009); Italian Constitutional Court, Ordinance no. 355/2007 (22 October 2007); Italian Constitutional Court, Judgement no. 403/2007 (21 November 2007); Italian Constitutional Court, Judgement no. 276/2000 (6 July 2000).

<sup>39</sup> The Article was enacted as a legislative decree implementing Directive 2008/52/EC by the Italian government under mandate of the Italian parliament. The Italian constitutional court concluded that the Directive did not require Member States to set out-of-court procedures as mandatory and that no explicit mandate was given by the parliament in this regard. Hence the rule had to be considered as outside the scope of the government's powers and, thus, in violation of Articles 76 and 77 Italian Constitution. *See* Italian Constitutional Court, Judgement no. 272/2012, paragraphs 12.1-12.2.

<sup>40</sup> Italian Constitutional Court, Judgement no. 403/2007 (21 November 2007).

<sup>41</sup> The government first adopted the urgency decree n. 63/2013, which the parliament ratified on 9 August 2013, with Act no. 98/2013.

settlement within the legal time limitation, with no prejudice to the claim already filed before the court.

Even after the decision of the Supreme Court, however, the Italian jurisprudence was not settled. Some lower-instance courts continued to interpret national provisions in accordance with the CJEU's approach in *Alassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) holding that the right to effective protection may be subject to restrictions to the extent these are proportionate to general interest goals pursued through the restriction (Trib. Lamezia Terme, Order 1 August 2011). Other courts went further and interpreted Article 111 of the Constitution on the right to a reasonable duration of judicial procedures as holding that mandatory mediation is inadmissible if it occurs after the judicial action has commenced; and therefore that a consumer claim brought before a court before any attempt of mediation has been started must be considered inadmissible without leading to a mere suspension of the proceeding (see judgements of Tribunal of Milan, sect. XI, of 24 September 2014 and 17 December 2015). This ruling implicitly departed from the conclusions adopted by the Supreme Court.

With regard to the *Menini* case (C-75/16), the decision of 28 September 2017 of the Verona Tribunal implemented the CJEU judgement in the case examined here. It first stated that Directive no. 2013/11 could not apply to the case because the ADR body which should have managed the case was not inserted in the proper list or notified to the Commission, as instead laid down by Directive no. 2013/11.

In second place, the Tribunal upheld the principles laid out by the CJEU concerning the relationship between the mandatory ADR procedure and Article 47 of the Charter. In order to decide the case and assess the compliance of national provisions with the principle of the Charter, the judge mostly focused on aspects concerning legal assistance (see the 'Impact on the follow-up case' section related to the next question). However, the reasoning of the CJEU in the *Menini* case (C-75/16) appears to have widely influenced the stance of Italian courts regarding mandatory ADR procedures: the Milan Tribunal, with its decision of 18 July 2017, upheld the same principles as expressed in the *Menini* decision (C-75/16), although it did not mention it. With regard to a case concerning a provision requiring a mandatory conciliatory attempt before accessing a court, the Tribunal pointed out that the provision did not constitute a violation of Article 47 of the CFREU, provided that it did not lead to a binding decision, nor cause either excessive delay or excessive costs. The principle of proportionality was also used as the interpretative tool to distinguish a justifiable restriction of the right to access a court from an unjustifiable one. The Tribunal did not mention the *Menini* case, but it directly referred to the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), where it ruled that a mandatory conciliatory meeting in matters concerning phone communications did not constitute an infringement of the individual right to judicial protection.

In deciding a case of a mandatory out-of-court proceeding with the assistance of lawyers, the Tribunal of Verona, with its decision of 28 September 2017, in a case in which an out-of-court proceeding with the assistance of lawyers was mandatory, referred to the *Menini* decision (C-75/16) and to Article 47 CFR. The tribunal stated that the rules providing for mandatory defensive assistance are sources of unreasonable costs for the parties. They were therefore to be

disapplied because they were contrary to Article 47 CFR. The same reasoning, with a different result, was adopted by the Verona Tribunal, in a decision of 27 February 2018, where the judge, through the disapplication technique, denied the mandatory character of out-of-court proceedings.

More recently, the *Menini case* (C-75/16) and Article 47 CFR have been recalled in a decision of the Verona Tribunal of 14 December 2018, where that court referred to the Italian Constitutional Court a question with regard to national procedural rules which provided two mandatory out-of-court procedures in order to have access to the first-instance court. The parties filed two different but related claims, concerning compensation and succession law, which in the first-instance court's view were subject to two different mandatory out-of-court procedures. Though not related with consumer law, the case is particularly interesting with regard to the judicial dialogue dimension: indeed, the national court recalled *Menini* (C-75/16) and Article 47 CFR in order to strengthen its arguments based on the constitutional right granting access to court (Article 24, Italian Constitution). In its decision no. 266, 12 December 2019, the Italian Constitutional Court dismissed the claim, stating that it was inadmissible because not relevant to the decision on the present case.

#### *Elements of judicial dialogue:*

A first and significant horizontal judicial dialogue within the CJEU can be noted in relation to the *Allassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) and the *Menini* (C-75/16) cases, because the reasoning applied to the latter largely draws on the reasoning developed in the former – so much so that it is likely the tests applied in *Allassini* will consolidate as a general standard that may be applied to any case of a mandatory ADR mechanism implemented by Member States, and possibly not only with respect to matters related to consumers' protection. The *Volksbank* case (C-602/10) should be taken into account. The case concerned the interpretation of Article 24 of the consumer credit directive (Directive 2008/48), according to which Member States shall ensure that adequate and effective out-of-court dispute resolution procedures for the settlement of consumer disputes concerning credit agreements are put in place. The referring court asked whether that article must be interpreted as precluding a rule that, as regards disputes concerning consumer credit, allows consumers to have direct recourse to a consumer protection authority, which may subsequently impose penalties on credit institutions for infringement of that national measure, without previously having to use the out-of-court resolution procedures provided for by national legislation for such disputes. The CJEU stated that Article 24 of Directive 2008/48 provides that out-of-court dispute resolution procedures should be adequate and effective, and that it is for Member States to lay down the details of those procedures, including whether they are mandatory. The CJEU, recalling by analogy *Allassini* (joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), considered that imposing an obligation of prior recourse to an out-of-court dispute resolution procedure could strengthen the effectiveness of Directive 2008/48 in so far as it ensures that such a procedure is systematically used. However, relying on the wording of Article 24 of consumer credit directive, the CJEU stated that Member States maintain discretion as regards the regulation of out-of-court resolution of disputes concerning consumer credit agreements, also with respect to its mandatory nature. Therefore, the CJEU stated that Article 24(1) of Directive 2008/48 must be interpreted as not

precluding a national rule that, as regards disputes concerning consumer credit, allows consumers to have direct recourse to a consumer protection authority, which may subsequently impose penalties on credit institutions for infringement of that national measure, without having to use beforehand the out-of-court resolution procedures provided for by national legislation for such disputes.

A second element of judicial dialogue is apparent in the references made by the Italian Constitutional Court and by the Italian Supreme Court to the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) in matters not directly related to litigation concerning communication services, as well as by other Italian lower courts. It is clear, in fact, that the CJEU ruling acquired importance in Italy in the general debate concerning whether a compulsory out-of-court procedure fosters or instead impairs effective judicial protection, rather than being limited solely to matters related to communication services.

In this respect, the case law that followed the CJEU's decision shows how consistent interpretation of it was made by different courts and the different outcomes that it might trigger: (1) the Constitutional Court used consistent interpretation in order to clarify that compulsory proceeding was not an obligation emerging either from EU law or from the CJEU decision, but rather was the result of choices by the national legislator; (2) the Supreme Court limited the consequences deriving from the CJEU's decision in favour of compulsory proceedings, distinguishing between admissibility (as addressed by CJEU) and a procedural precondition; (3) some lower courts derived a more stringent approach to admissibility from the CJEU's reasoning.

*Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

## **Poland**

In Poland the Supreme Court (*Sąd Najwyższy*) referred a request for a preliminary ruling to the CJEU<sup>42</sup> and it recalled the *Alassini* case (joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) to argue that Article 4(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) should be construed as a limitation on effective judicial protection and that such right (as ascertained in *Alassini*, joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) is not absolute and can be restricted under certain circumstances.<sup>43</sup> In the CJEU's decision, reference to *Alassini* (joined Cases C-317/08, C-318/08,

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<sup>42</sup> Polish Supreme Court (*Sąd Najwyższy*), Decision of 18 February 2015 (III SK 18/14), and Request for a preliminary ruling from the *Sąd Najwyższy* (Poland) lodged on 21 May 2015 — *Prezes Urzędu Komunikacji Elektronicznej, Petrotel sp. z o.o. w Płocku v Polkomtel sp. z o.o.* Case C-231/15.

<sup>43</sup> The question referred to the CJEU was as follows: “*Must the first and third sentences of Article 4(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) be interpreted as meaning that — in the event that a network provider contests a decision of the national regulatory authority setting call termination rates in the network of that undertaking (MTR decision), and that undertaking then contests a subsequent decision of the national regulatory authority amending a contract between the addressee of the MTR decision and another undertaking so that the rates paid by that other undertaking for call termination in the network of*

C-319/08 and C-320/08) was made only by analogy to the exercise of national procedural autonomy in the area of appeal as being subject to compliance with the requirements arising from the principles of equivalence and effectiveness (see paragraph 23).

## 6.2. Question 2 – Further EU specific requirements for ADR mechanisms involving consumers.

When are requirements concerning access to ADR pre-judicial procedures (e.g., legal assistance) and the right to withdraw from them (e.g. need to show a valid ground for withdrawal) compatible with the consumers' right of access to justice?

### The case

In the *Menini* case (C-75/16), as already said above, the national judge questioned compliance of the Italian pre-trial mandatory out-of-court settlement procedure in disputes with consumers involving credit agreements with Directive 2013/11/EU on alternative dispute resolution for consumer disputes. The question was raised in the context of an opposition to an enforceable payment order. Compliance with EU law was not questioned only on the ground that the mandatory procedure might excessively limit access to justice by consumers (see above), but also on the ground that, under Italian, law assistance by a lawyer is mandatory and in the following judicial proceedings the judge may apply a special fee to the succumbing party who withdrew from the ADR procedure without a valid reason (“*giusta causa*”), so that the consumer may not, in fact, be completely free to withdraw at will from the procedure at any stage.

### Preliminary question referred to the CJEU:

The second part of the second question in the *Menini* case (C-75/16) was as follows:

“In so far as it guarantees consumers the possibility of submitting complaints against traders to appropriate entities offering alternative dispute resolution procedures, must Article 1 ... of Directive 2013/11 be interpreted as meaning that it precludes a national rule which requires the use of mediation in one of the disputes referred to in Article 2(1) of Directive 2013/11 [...] as precluding a national rule that requires a consumer taking part in mediation relating to one of the abovementioned disputes to be assisted by a lawyer and to bear the related costs, and allows a party not to participate in mediation only on valid grounds?”

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*the addressee of the MTR decision correspond to the rates set in the MTR decision (implementing decision) — the national court, having found that the MTR decision has been annulled, cannot annul the implementing decision in view of the fourth sentence of Article 4(1) of Directive 2002/21/EC?”*

### Reasoning of the CJEU:

The reasoning of the Advocate General in her opinion strictly applied the wording of Article 8(b) of Directive 2013/11 to conclude that compulsory assistance of a consumer by a lawyer in an ADR pre-judicial procedure is contrary to Directive 2013/11,<sup>44</sup> and that the consumer shall always be completely free to withdraw from the ADR procedure at any stage, even on purely subjective grounds, and that such a decision shall not adversely impact the consumer in the following judgement.<sup>45</sup>

Therefore, in this case, the Advocate General did not explicitly consider the relevance of Article 47 of the CFREU or the relevance of the principles of equivalence, effectiveness, dissuasiveness, or proportionality in order to suggest the answer to the question posed. On the contrary, she highlighted that the Directive obliges Member States not to impose the assistance of a lawyer, as well as to let consumers withdraw without consequences from the ADR procedures. At the same time, she stated that it is understood that parties who are not consumers may otherwise be compelled not to abandon the procedure without a valid reason, and that the Directive does not completely exclude a lawyer's assistance (which would not be in the best interest of consumers), but rather only the imposition of such assistance.

As far as the judgement is concerned, the Court considered some provisions that constitute an unjustified restriction of access to justice. In particular, the Court ruled that “*as regards the obligation, on the part of the consumer, to be assisted by a lawyer in order to initiate a mediation procedure*”, Article 8(b) of Directive 2013/11 provides that the Member States are to ensure that the parties have access to the ADR procedure without being obliged to retain a lawyer or a legal advisor. Moreover, the Court examined the compliance with EU law of a provision allowing the consumer to withdraw from the mediation proceeding without penalties only if he or she demonstrated the existence of a valid reason, and stated that “such a limitation restricts the parties’ right of access to the judicial system, contrary to the objective of Directive 2013/11”.

### Conclusion of the CJEU:

The CJEU thus concluded that:

“That directive (i.e. n. 2013/11) must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that, in the context of such mediation, consumers must be assisted by a lawyer and that they may withdraw from a mediation procedure only if they demonstrate the existence of a valid reason in support of that decision.”

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<sup>44</sup> See *Menini*, Opinion, paragraphs 87–89. Article 8(b) of Directive 2013/11 expressly requires Member States to ensure that the parties have access to the ADR procedure “*without being obliged to retain a lawyer or a legal advisor*”.

<sup>45</sup> See *Menini*, Opinion, paragraphs 93-94. Article 9(2)(a) of Directive 2013/11 provides that “*in ADR procedures which aim at resolving the dispute by proposing a solution, Member States shall ensure that the parties have the possibility of withdrawing from the procedure at any stage if they are dissatisfied with the performance or the operation of the procedure. They shall be informed of that right before the procedure commences. Where national rules provide for mandatory participation by the trader in ADR procedures, this point shall apply only to the consumer*”.



### Impact on the follow-up case:

With its decision of 28 September 2017, the Verona Tribunal stated that the parties could participate in the mediation procedure without the assistance of a lawyer or legal counsellor, in accordance with the rulings of the CJEU. The Tribunal also pointed out that requesting mandatory legal assistance – as is the case in the Italian legislation – does not respect the CJEU ruling according to which the mandatory mediation procedure must not generate new costs for the parties. Therefore, the Tribunal concluded that the provision requesting mandatory legal assistance violates the principle of effective judicial protection (Article 47 of the CFREU) as well as Articles 6 and 13 of the ECHR. The focus on the relation between the ADR procedure and the cost to be sustained by the parties drew the attention of the Italian courts as a guiding criterion in order to assess the compliance of such procedures with Article 47 of the Charter. In particular, the decision of 27 February 2018 dealt with the costs deriving from legal assistance in a conciliatory procedure and judged that the national provisions did not comply with the CJEU ruling in *Menini* (C-75/16), since the mandatory ADR proceeding gives rise to new and high costs for the parties.

### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

#### **Italy**

Recently, the Court of Appeal of Venice (10 December 2020, no. 3527) has applied the principles outlined in *Menini* (C-75/16).

The case concerned the possibility of enforcing a measure taken at the end of a mediation process without the assistance of a lawyer. In particular, the appellant asked the court to consider the mediation as null and void for breach of Article 8(1) of Legislative Decree 28/2010, which states that "at the first meeting and subsequent meetings, the parties shall attend with the assistance of a lawyer".

According to the Court of Appeal of Venice, this Article must be interpreted together with the following Article 12, which provides that "If all the parties participating in the mediation are assisted by a lawyer, the agreement [...] constitutes grounds for enforcement [...] In all other cases, the agreement is approved by the court [...] after ascertaining its formal regularity and compliance with mandatory rules and public order".

The contradiction between these two provisions is in fact only apparent, since legal assistance in the context of mediation procedures is permitted but not mandatory. No consequences or sanctions are foreseen in the event that one of the parties is not assisted by a lawyer. Therefore, the compulsoriness only concerns the initiation of the mediation procedure. Article 12 specifically regulates the case in which not all the parties are assisted by a lawyer, entrusting to the authorisation of the president of the court the enforceability of the measure. According to

the Court of Appeal, the decision not to provide for the mandatory assistance of a lawyer stems from the intention to keep the national legislation compatible with the European rules. The CJEU (*Menini*) has held that the adoption by Member States of national legislation providing, in disputes involving consumers, for recourse to compulsory mediation is compatible with European law only on condition that no legal assistance is required, and that the consumer may withdraw from the procedure at any time, without any justification.

The voluntary nature of the mediation procedure does not therefore relate to the freedom of the parties to use the procedure or not, but to the fact that the parties may manage the procedure independently, without the necessary assistance of a lawyer, and terminate it at any time, even without justification.

Among the disputes examined here, the issue concerning the requirement of legal assistance in settlement procedures has given rise to a parallel debate involving both courts and legislator. Indeed, due to the possible impact of the settlement procedure under law 28/2010 on the follow-on judicial proceedings, including the executory proceedings, legal assistance has been conceived as a necessary means for litigants' protection (see Consiglio Stato, 17.11.2015).

### 6.3. Guidelines for judges emerging from the analysis

The *Menini* (C-75/16) and the *Alasini* (joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) cases exhibit a shared pattern in their reasoning, as is also shown both by the incorporation of *Alasini*'s guidelines in the Opinion rendered by the Advocate General in the *Menini* case (C-75/16) and by the reference that national courts have made to both cases in order to assess similar issues.

Further to the two judgements, with respect to mandatory ADR schemes in matters related to consumer rights, Member States shall be free to set certain procedures as mandatory in accordance with the principle of procedural autonomy, provided that such imposition does not prevent the consumer from accessing the judicial system in accordance with **Article 47** of the Charter of Fundamental Rights of the European Union. This test is to be conducted having regard to the following criteria requiring that the procedure:

- (a) does not result in a decision which is binding on the parties;
- (b) does not cause a substantial delay for the purposes of bringing legal proceedings;
- (c) suspends the period for the time-barring of claims;
- (d) does not give rise to significant costs for the parties;
- (e) is not accessible only by electronic means; and
- (f) does not prevent the granting of interim measures in exceptional cases where the urgency of the situation so requires;
- (g) allows the consumer to withdraw from the proceeding without penalties even if he or she does not demonstrate the existence of a valid reason.

Furthermore, according to *Volksbank* (C-602/10), the principle of effectiveness of out-of-court procedure does not require Member States to lay down that procedure as mandatory.

## 7. Effective consumer protection in cross-border cases

### 7.1. The jurisdiction of courts in cross-border consumer cases

#### 7.1.1. Introduction and relevant EU legal provisions

The issue of the jurisdiction of courts in cross-border cases has a major impact on the effective access of consumers to justice. When required to bring their claims in foreign courts, consumers face financial, logistical, legal and even psychological obstacles which may induce them to simply abandon legal actions to protect their rights. Such a situation is not compatible with the principle of effective consumer protection. It is thus not surprising that EU law provides rules on the jurisdiction of courts, applicable to cross-border consumer cases, designed to facilitate the access of consumers to courts as well as to protect them against claims brought by professionals. Regulations Brussels I (44/2001) and Brussels I recast (no. 1215/2012), and before these the 1968 Brussels Convention, all include jurisdiction rules based on the same idea that:

*“in relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for”* (Regulation Brussels I, Recital 13).

To encourage consumers to bring their claims to court, “Brussels I” instruments give consumers an option as to the courts having jurisdiction. A consumer may bring proceedings either in the courts of the Member State in which the other party (professional) is domiciled, or in the courts of the place where the consumer is domiciled.

#### **Article 16 (1), Regulation Brussels I (44/2001)**

*“A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled”.*

**Article 18 (1), Regulation Brussels I recast (1215/2012)** (extending the scope of the rule, now applicable even if the other party is domiciled outside the EU)

*“A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled”.*

To protect consumers against claims brought by professionals, “Brussels I” instruments require professionals to bring their claim before the courts of the place where the consumer is domiciled, and strictly monitor choice-of-courts provisions in consumer contracts.

#### **Article 16 (2) & (3), Regulation Brussels I (44/2001), Art 18 (2) & (3) Brussels I recast (1215/2012)**

*“2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.*

*3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending”.*

**Article 17, Regulation Brussels I (44/2001); Article 19, Regulation Brussels I recast (1215/2012)**

*“The provisions of this Section may be departed from only by an agreement:*

- 1. which is entered into after the dispute has arisen; or*
- 2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or*
- 3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State”.*

However, conditions are to be met for consumers to benefit from this protection. Only in specific contracts, or under specific circumstances, are consumer cases eligible for the application of the above-mentioned rules, forming the specific section of the regulation entitled “Jurisdiction over consumer contracts”.

**Article 15, Regulation Brussels I (44/2001); Article 17, Regulation Brussels I recast (1215/2012)**

*“1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:*

- (a) it is a **contract for the sale of goods on instalment credit terms**; or*
  - (b) it is a **contract for a loan repayable by instalments**, or for any other form of credit, made to finance the sale of goods; or*
  - (c) in all other cases, the contract has been concluded **with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State** or to several States including that Member State, and the contract falls within the scope of such activities.*
- 2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.*
  - 3. **This Section shall not apply to a contract of transport** other than a contract which, for an inclusive price, provides for a combination of travel and accommodation”.*

The CJEU is particularly aware that rules of jurisdiction, in their drafting or their implementation, are a potential threat for the principle of the effective judicial protection of consumers (*Profi Credit Polska*, C-176/17, §59; *Sziber*, C-483/16, §49; *Sanchez Morcillo & Abril Garcia*, C-169/14, §35; *Alassini*, C-317/08, §49). This is why, even if EU law defines rules of jurisdiction which are

protective of consumers, the CJEU recalls that the intent behind the Brussels I rules is that proceedings be conducted in full respect of Article 47 of the Charter, and stresses that the “Brussels I” rules of jurisdiction should be interpreted in light of the fundamental rights which are now included in the Charter (CJEU, 11 Sept. 2014, C-112/13, *A v/ B*, §50 & 51):

*“50. According to settled case-law, the provisions of Regulation No 44/2001 must be interpreted autonomously, primarily by reference to the scheme and purpose of that regulation (see, to that effect, Cartier parfums-lunettes and Axa Corporate Solutions Assurance, C-1/13, EU:C:2014:109, paragraph 32 and the case-law cited, and Hi Hotel HCF, C-387/12, EU:C:2014:215, paragraph 24).*

*51. Furthermore, the provisions of EU law, such as those of Regulation No 44/2001, must be interpreted in the light of fundamental rights which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures and which are now set out in the Charter (see, to that effect, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 68 and the case-law cited). In that respect, it must be borne in mind that all the provisions of Regulation No 44/2001 express the intention to ensure that, within the scope of the objectives of that regulation, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence enshrined in Article 47 of the Charter are observed (see *Hypoteční banka*, C-327/10, EU:C:2011:745, paragraphs 48 and 49, and *G*, C-292/10, EU:C:2012:142, paragraphs 47 and 48 and the case-law cited)”*

But the CJEU is also bound by the letter of the “Brussels I” regulations and is reluctant to depart from it when the drafting is clear, even for the purpose of enhancing consumer protection (*Salvoni*, C-347/18, §34-39). The interpretation of the jurisdiction rules protecting consumers, in light of the fundamental rights protected by the Charter, should not result in a substantial change of the rules which have been drafted by the EU legislator.

The CJEU case law is the product of this quest for a balance between deference for the letter of EU rules, and creative interpretation in light of the principle of effective access to justice.

#### Relevant CJEU cases in this cluster

- Judgement of the Court (Sixth Chamber) of 1 October 2002, *Verein für Konsumenteninformation and Karl Heinz Henkel*, Case C-167/00 (“**Henkel**”) - [link](#) to the database for analysis of the lifecycle of the case
- Judgement of the Court (Fourth Chamber) of 4 June 2009, *Pannon GSM Zrt. v Erzsébet Sustikné Györfi*, Case C-243/08 (“**Pannon**”)
- Judgement of the Court (Grand Chamber) of 7 December 2010, *Peter Pammer V Reederei Karl Schlüter GmbH & Co KG* (C-585/08), and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09), Joined Cases C-585/08 and C-144/09 (“**Pammer and Hotel Alpenhof**”) - [link](#) to the database for analysis of the lifecycle of the case
- Judgement of the Court (First Chamber), of 17 November 2011, *Hypoteční banka a.s. v Udo Mike Lindner*, C-327/10 (“**Hypoteční**”)

- Judgement of the Court (Fourth Chamber), of 6 September 2012, *Daniela Mühlleitner v Ahmad Yusufi, Wadat Yusufi*, Case C-190/11 (“**Mühlleitner**”)
- Judgement of the Court (Eighth Chamber), of 14 November 2013, *Armin Maletic & Marianne Maletic v lastminute.com GmbH & TUI Österreich GmbH*, Case C-478/12 (“**Armin Maletic**”)
- Judgement of the Court (Third Chamber) of 5 December 2013, *Asociación de Consumidores Independientes de Castilla y León V Anuntis Segundamano España SL*, Case C-413/12 (“**Asociación de Consumidores Independientes de Castilla y León**”)
- Judgement of the Court (First Chamber), of 14 April 2016, *Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA* (Catalunya Banc S.A.), Joined Cases C-381/14 and C-385/14 (“**Sales Sinués**”) - [link](#) to the database for analysis of the lifecycle of the case
- Judgement of the Court (Third Chamber) of 28 July 2016, *Verein für Konsumenteninformation (VKI) v Amazon EU Sàrl*, Case C-191/15 (“**Amazon**”) - [link](#) to the database for analysis of the lifecycle of the case
- Judgement of the court (First Chamber), 3 April 2019, *Aqua Med sp. z o.o. v Irena Skóra*, C-266/18 (“**AquaMed**”)
- Judgement of the court (Third Chamber), 2 May 2019, *Pillar Securitisation Sàrl v Hildur Arnadóttir*, Case C-694/17 (“**Pillar**”)
- Judgement of the court (First Chamber), 4 September 2019, *Alessandro Salvoni v Anna Maria Fiermonte*, Case C-347/18 (“**Salvoni**”)
- Judgement of the court (First Chamber), 3 October 2019, *Verein für Konsumenteninformation v. TVP Treuband- und Verwaltungsgesellschaft für Publikumsfonds mbH & Co KG*, Case C-272/18, (“**TVP**”)
- Judgement of the court (First Chamber), 7 November 2019, *Adriano Guaitoli et alii v. easyJet Airline Co. Ltd*, Case C-213/18, (“**Guaitoli**”)
- Judgement of the court (First Chamber) 26 March 2020, *Libuše Králová v. Primera Air Scandinavia*, Case C-215/18 (“**Králová**”)
- Judgement of the court (sixth Chamber), 30 September 2021, *Commerzbank v. E.O.* Case C-296/20 (“**Commerzbank**”)

### Main question addressed

- Question 1      Based on the right to an effective consumer protection, shall judges interpret broadly the scope of application of the Brussels I Regulation rules of jurisdiction protecting consumers?
- Question 2      What court has jurisdiction over a case regarding the protection of consumers, where such a court is not clearly identifiable under the rules of the ‘Brussels I’ Regulation?

- Question 3 Based on the principle of effectiveness, should a court finding out that the jurisdiction rules protecting consumers have been violated in prior proceedings, take positive action of its own motion in order to inform the consumer that there has been a breach of the rules on jurisdiction laid down in Chapter II, Section 4 of that Regulation?
- Question 4 Based on the principle of the effective protection of consumers, should courts control choice-of-court provisions included in transnational consumer contracts, beyond the specific protection laid down by the 'Brussels I Regulation'?
- Question 5 In the case of parallel proceedings brought by consumer associations and by consumers individually before courts of different Members States, should or could a stay of proceedings be decided?

Relevant legal sources

See § 7.1.1.

### 7.1.2. Question 1 & 1a)- Scope of application of the Brussels I Regulation rules in consumer related cases

Question 1: Based on the right to effective consumer protection, shall judges interpret broadly the scope of application of the Brussels I Regulation rules of jurisdiction protecting consumers?

In particular, does the Brussels I Regulation (or recast) rules of jurisdiction protecting consumers apply:

- a) when the domicile of the consumer, being the defendant, is unknown, but the consumer is a national of a Member State? (*Hypotecni*, C-327/10).
- b) to a domestic consumer contract, if inseparably linked to a cross-border contractual relationship? (*Maletic*, C-478/12).
- c) to a credit agreement concluded by a consumer, when the agreement does not fall within the scope of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers? (*Pillar*, C-694/17).
- d) to accommodation contracts concluded by 'consumers' from their own domicile, through the website of the professional? (*Pammer & Alpenhof and Mühlleitner*, C-585/08 and C-144/09).
- e) where the parties to a consumer contract – the consumer and the professional counterparty – were, at the time that contract was concluded, domiciled in the same Member State and where an international element in the legal relationship emerged only after that contract was concluded, on account of the subsequent transfer of the consumer's domicile to another Member State? (*Commerzbank*, C- 296/20)

1.a.) Based on the right to an effective consumer protection, shall judges interpret broadly the scope of application of the Brussels I Regulation rules of jurisdiction protecting consumers? In particular, does the Brussels I Regulation (or recast) rules of jurisdiction protecting consumers apply when the domicile of the consumer, being the defendant, is unknown, but the consumer is a national of a Member State?

### The case

The issue is addressed in *Hypoteční*.

A contract for a mortgage loan was concluded in 2005 between a Czech Bank established in Prague, Hypoteční, and a German national who, at the time at which the contract was concluded, was deemed to be domiciled in the Czech Republic, but more than 150 km from Prague. The contract included a choice-of-court provision, according to which “in relation to any disputes arising out of this (...) contract, the local court of the bank, determined according to its registered office as entered in the commercial register at the time of the lodging of the claim, shall have jurisdiction”. The bank brought an action for an order requiring the borrower to pay a significant sum of money by way of arrears on the mortgage loan before the “court with general jurisdiction over the defendant” rather than before the “local court of the bank”, notwithstanding the choice-of-court provision (because it could not submit the original contract to the judge). The order was granted by a district court, but was subsequently set aside by the same court because it could not be served on the defendant personally.

Being unable to establish any place of residence for the defendant in the Czech Republic, that court, in application of Paragraph 29(3) of the Czech Rules of Civil Procedure, assigned a guardian *ad litem* to the defendant, who was considered to be a person whose domicile was unknown. The guardian raised several objections on the merits.

The court decided to stay the proceedings and to refer a preliminary question to the CJEU.

### Preliminary question referred to the CJEU

“If one of the parties to court proceedings is a national of a State other than the one in which those proceedings are taking place, does that fact provide a basis for the cross-border element within the meaning of Article 81 of the Treaty, which is one of the conditions for the applicability of Council Regulation No 44/2001 (...)?”

### Reasoning of the CJEU

The CJEU recalled firstly that the application of the rules of jurisdiction of the Brussels I Regulation requires the existence of an international element in the case at hand. The Court concluded that, even if the foreign nationality of a party is not a relevant criterion for determining the international jurisdiction of the courts, this does not mean that it cannot be a relevant criterion for the purpose of deciding on the applicability of the Regulation (§29-32).

The Court considered secondly that, when the domicile of a foreign national is unknown, the courts of the Member State of which the defendant is a national may also consider themselves to



have jurisdiction. In those circumstances, application of the uniform rules of jurisdiction laid down by Regulation no. 44/2001 to replace those in force in the various Member States would be in accordance with the requirement of legal certainty and with the purpose of that Regulation, which is to guarantee, to the greatest extent possible, the protection of defendants who are domiciled in the European Union.

The CJEU did not specify the basis on which jurisdiction could be assumed by the court of the Member State of which the defendant is a national. This presumably concerns the jurisdiction rules based on the nationality of the parties comprised by several Member States systems, the application of which is excluded by the Brussels I Regulation. There is here an implicit reference to the principle of effectiveness of the Brussels I Regulation. It might be wondered if it is more particularly the effectiveness of the consumer protection organised by EU rules that is at stake. The reasoning of the Court was not developed, but it may tentatively be inferred from the decision in light of the Advocate General's opinion. The application of the Brussels I Regulation is needed: 1) to avoid parallel proceedings; 2) to guarantee the application of the jurisdiction rules of the regulation protecting consumers (see, the opinion of the Advocate General §62, which is very clear on this matter). The scope of application of the consumer protection implemented by the Brussels I Regulation is thus 'preventively' or 'presumptively' extended for the benefit of a consumer whose domicile is unknown (and could therefore be outside the EU, whereas when the defendant is domiciled outside the EU, jurisdiction is normally determined by the law of the forum, pursuant to Article 4 RBI). It is only where there is "firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union" (§42 of the decision), that the national rules on jurisdiction should apply instead of those of the Brussels I Regulation.

It is true that the decision of the court in *Visser* (see below) seems to minimise the role played by consumer protection considerations in the extension of the scope of the Brussels I Regulation.

But then in *Armin Maletic* (see question 1.b below), the CJEU clearly linked the extension of the scope of RBI rules on jurisdiction protecting consumers with the objective of protecting consumers.

### *Conclusion of the CJEU*

Regulation no. 44/2001 must be interpreted as meaning that the application of the rules of jurisdiction laid down by that Regulation requires that the situation at issue in the proceedings of which the court of a Member State is seized is such to raise questions relating to determination of the international jurisdiction of that court. Such a situation arises in a case like that in the main proceedings, in which an action is brought before a court of a Member State against a national of another Member State whose domicile is unknown to that court.

### *Elements of judicial dialogue*

Patterns of horizontal dialogue within the CJEU are to be noted in the following cases.

In *Zuid-Chemie* (C-189/08) and *Owusu* (C-281/02), the CJEU set the rule that the application of the rules of jurisdiction of the Brussels I Regulation requires the existence of an international element which is not necessarily embedded in the fact that the parties do not have their domicile

in the same Member State. It is thus possible to apply the Brussels I Regulation to cases which are apparently ‘domestic’ because both parties have their domicile in the same Member State, so long as the situation at issue in the proceedings is such as to raise questions relating to the determination of international jurisdiction. *Hypoteční* decided that the foreign nationality of one of the parties was a relevant element in that regard at least (and only) if the domicile of such party is unknown.

In *Visser* (C-291/10), a decision that was rendered subsequently, the CJEU made reference to *Hypoteční* and held that the Brussels I Regulation, particularly Article 5(3), was applicable to an action for liability arising from the operation of an internet site against a defendant who was probably a European Union citizen but whose whereabouts were unknown, if the court seized of the case did not have firm evidence to support the conclusion that the defendant was in fact domiciled outside the European Union. The reason given was that the application of the uniform rules of jurisdiction established by Regulation no. 44/2001, instead of those in force in the various Member States, met the essential requirement of legal certainty and the objective, pursued by that Regulation, of strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which s/he may sue and the defendant reasonably to foresee before which court s/he may be sued. *Visser* seems to minimise the role played by consumer protection considerations in expanding the scope of the Brussels I Regulation. The same rules apply when the defendant, whose domicile is unknown, is a consumer, or to any other defendant, such as a professional.

However, in *Armin Maletic*, the CJEU confirmed that the broad interpretation of the scope of the Brussels I Regulation protecting consumers was driven by the objective of ensuring an effective protection of consumers (effectiveness of the protection organised by Article 16) (see question 1.b below):

*Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

**France**

See below, under question 1.b

### **7.1.3. Question 1b) – Scope of application of the Brussels I Regulation rules of jurisdiction protecting consumers. Domestic consumer contract inseparably linked to a cross-border contractual relationship**

1.b) Based on the right to an effective consumer protection, shall judges interpret broadly the scope of application of the Brussels I Regulation rules of jurisdiction protecting consumers? In particular, does the Brussels I Regulation (or recast) rules of jurisdiction protecting consumers apply to a domestic consumer contract, if inseparably linked to a cross-border contractual relationship?

The issue was addressed in *Armin Maletic*.

### The case

In 2011, the Maletics, who were domiciled in Austria within the jurisdiction of the *Bezirksgericht Bludenz* (District Court, Bludenz), booked a package holiday on the website of lastminute.com, a company whose registered office is in Munich (Germany). Lastminute.com stated that it acted as the travel agent and that the trip would be operated by TUI, which has its registered office in Vienna (Austria). The Maletics had to pay a significant surcharge to be able to stay in the hotel initially booked on lastminute.com's website.

In order to recover the surcharge paid and to be compensated for the inconvenience which had affected their holiday, the Maletics brought an action before the *Bezirksgericht* seeking payment from lastminute.com and TUI, jointly and severally.

The *Bezirksgericht Bludenz* limited its examination to verifying whether it had jurisdiction to hear the action and, by order of 4 July 2011, it dismissed the action in so far as it was brought against TUI on the ground that it lacked local jurisdiction. According to that court, Regulation no. 44/2001 was not applicable to the dispute between the applicants in the main proceedings and TUI because the situation was purely domestic. It held that, in accordance with the applicable provisions of national law, the court with jurisdiction was the court of the defendant's domicile, that is, the court having jurisdiction in Vienna and not that the one in Bludenz.

The applicants brought an appeal against that part of the decision, claiming that the booking that they had made was from the outset inseparably linked, as a uniform legal transaction, with lastminute.com as the travel agent and with TUI as the travel operator. Since a package holiday was involved, a combined reading of Articles 15(3) and 16(1) of Regulation no. 44/2001 constituted the legal basis for the jurisdiction of the court seized, which also applied with respect to TUI.

The *Landgericht Feldkirch* (Regional Court, Feldkirch) decided to stay the proceedings and to refer a preliminary ruling to the CJEU.

### Preliminary question referred to the CJEU

Is Article 16(1) of Regulation no. 44/2001, which confers jurisdiction on the courts for the place where the consumer is domiciled, to be interpreted as meaning that, in the case where the other party to the contract (here, a travel agent with its registered office abroad) has recourse to a contracting partner (here, a travel operator with its registered office in the home country)? Moreover, is Article 16(1) of Regulation no. 44/2001, for the purpose of proceedings brought against those two parties, also applicable to the contracting partner in the home country?

### Reasoning of the CJEU

The CJEU recalled firstly that the application of the rules of jurisdiction of the Brussels I Regulation requires the existence of an international element in the case at hand (§25-27).

The CJEU concluded, secondly, that when there are two separate contractual relationships, one concluded by a consumer with a professional having its establishment in a different Member State, and the other apparently domestic because the professional and the consumer are

domiciled in the same Member State, the second contractual relationship cannot be classified as ‘purely’ domestic if it is inseparably linked to the first contractual relationship (§29).

The CJEU emphasised, finally, that “account must be taken of the objectives set out in recitals 13 and 15 in the preamble to Regulation No 44/2001 concerning the protection of the consumer as ‘the weaker party’ to the contract and the aim to ‘minimise the possibility of concurrent proceedings ... to ensure that irreconcilable judgments will not be given in two Member States’” (§30); “those objectives preclude a solution which allows the Maletics to pursue parallel proceedings in Bludenz and Vienna, by way of connected actions against two operators involved in the booking and the arrangements for the package holiday at issue in the main proceedings” (§31). ***The principle of the effectiveness of consumer protection*** was clearly at stake and implicitly drove the conclusion of the Court.

### *Conclusion of the CJEU*

The concept of ‘other party to the contract’ laid down in Article 16(1) of Council Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters must be interpreted as meaning, in circumstances such as those at issue in the main proceedings, that it also covers the contracting partner of the operator with which the consumer concluded that contract and which has its registered office in the Member State in which the consumer is domiciled.

### *Impact on the follow-up case*

Regional Court Feldkirch, 21 November 2013

### *Impact on national case law in Member States different from that of the court referring the preliminary question to the CJEU*

#### **France**

The French *Cour de Cassation* (Supreme Court) decided in two decisions of 22 February 2017 (no.15- 27.809 & no.16-11.509) that, where applying the French rules on jurisdiction to an alleged domestic ‘consumer contract’ concluded between two parties having their establishment/domicile in the same Member State (France), the scope of the French rules on jurisdiction protecting consumers was to be interpreted in a manner consistent with the scope of the Brussels I Regulation rules on jurisdiction protecting consumers. Consequently, Article L. 141-5 of the consumer code (today Article R 631-3) giving jurisdiction to the courts of the domicile of the consumer, does not apply to an action brought on the basis of a contract of transport other than with respect to a contract which, for an inclusive price, provides for a combination of travel and accommodation (to which the rules on jurisdiction of the Brussels I Regulation protecting consumers do not apply when the Regulation is applicable).

These decisions may be criticized for considering that the Brussels I Regulation does not apply to the contract between two parties having their domicile/establishment in the same Member State, whereas the object of the contract (a service offered for the transportation of the passenger from one Member State to another) implies the existence of a cross-border element which could be seen as sufficient for the application of the Brussels I Regulation, on the basis of the CJEU case law. For the *Cour de Cassation*, the French domestic rules on jurisdiction are applicable (but

the scope of application of the French domestic rules protecting consumers should be the same as the scope of application of the Brussels I Regulation rules protecting consumers).

The reasoning of the applicant was somewhat different: 1) he admitted that the Brussels I Regulation was applicable to the case; 2) he claimed that the rules protecting consumers were not applicable to a contract of transport; 3) he claimed then that the courts of the Member State where the defendant was established had a general jurisdiction over the claim, under Article 2 of the Brussels I Regulation; 4) and that, for the identification of the court having a territorial jurisdiction over the claim within the said Member State, it was not possible to resort to Article L. 141-5 of the Consumer Code, which would amount to extending the scope of the rules on jurisdiction protecting consumers against the letter of the regulation.

#### 7.1.4. Question 1c) – Scope of application of the Brussels I Regulation rules of jurisdiction protecting consumers – credit agreements

1.c.) Based on the right to an effective consumer protection, shall judges interpret broadly the scope of application of the Brussels I Regulation rules of jurisdiction protecting consumers? In particular, does the Brussels I Regulation (or recast) rules of jurisdiction protecting consumers apply to a credit agreement concluded by a consumer, where the agreement does not fall within the scope of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers?

##### The case

The issue was addressed in *Pillar*.

In March 2005, Ms Arnadottir, a resident of Iceland, obtained a loan from Kaupthing Bank Luxembourg (KBL) the amount of which in Icelandic *króna* was equivalent to more than 1,000,000 euros. That loan, to be reimbursed by 1 March 2010 at the latest, was meant to enable Ms Arnadottir to acquire shares in the Icelandic company Bakkavör Group hf in which she was an employee. A guarantee for the repayment of the loan was given by the Bakkavör Group; the guarantee was signed by two directors of that company, one of whom was Ms Arnadottir herself.

Subsequently, KBL was divided into two entities. One of those entities, Pillar Securitisation, claimed repayment of the loan obtained by Ms Arnadottir. Since Ms Arnadottir was still in default of repayment of that loan, in 2011 Pillar Securitisation brought an action before the Luxembourg courts pursuant to a term of the loan agreement that conferred jurisdiction to those courts.

The *Tribunal d'arrondissement de Luxembourg* (District Court, Luxembourg, Luxembourg) held that it lacked jurisdiction to hear the case on the ground that Ms Arnadottir should be regarded as a 'consumer' within the meaning of Article 15 of the Lugano II Convention [The Lugano II Convention is a treaty, the provisions of which are very similar to those of the Brussels I Regulation, applicable in the relations between EU Members States and Iceland, Switzerland, and Norway; the CJEU is competent to interpret the Lugano Conventions]. It considered that the clause that granted jurisdiction to the Luxembourg courts should be struck out on the ground

that it did not satisfy the conditions for derogation provided for by Article 17 of the Lugano II Convention.

On appeal, the *Cour d'appel* (Court of Appeal, Luxembourg) upheld the lack of jurisdiction of the Luxembourg courts to hear Pillar Securitisation's claim in a judgement of 27 April 2016.

Before the *Cour de cassation*, Pillar Securitisation claimed that the *Cour d'appel* (Court of Appeal) had disregarded Article 15 of the Lugano II Convention, since: a) Ms Arnadottir had not acted for non-commercial purposes; b) the court had misinterpreted Article 15 of the Lugano II Convention in finding that a loan for more than 1,000,000 euros, such as that at issue in the main proceedings, could have been taken out by a 'consumer' within the meaning of Article 15. According to Pillar, in order to determine whether a loan agreement is a contract concluded by a consumer within the meaning of Article 15 of the Lugano II Convention, it must be determined whether that agreement is a 'consumer credit agreement' within the meaning of Directive 2008/48. It claimed that this was apparent from Professor Fausto Pocar's Explanatory Report on the Convention (OJ 2009 C 319, p. 1).

The *Cour de Cassation* (Court of Cassation, Luxembourg) decided to refer to the CJEU to determine how the concept of 'consumer' must be interpreted within the meaning of Article 15 of the Lugano II Convention and of Article 3 of Directive 2008/48. It asked, more particularly, whether the definition of the scope of the consumer credit directive is relevant to the definition of a 'consumer' within the meaning of Article 15 of the Lugano II Convention.

#### Preliminary question referred to the CJEU

"In the context of a credit agreement which, by reason of the total amount of the loan, does not come within the scope of Directive 2008/48 ..., can a person be regarded as a 'consumer' within the meaning of Article 15 of the Lugano II Convention in the absence of any national legislation applying the provisions of that directive to areas which do not come within its scope, on the ground that the contract was concluded for a purpose that can be regarded as [being outside his trade or profession]?"

#### Reasoning of the CJEU

The CJEU recalled, firstly, the applicable jurisdiction rules according to which, if a credit agreement is a contract concluded by a 'consumer' within the meaning of Article 15 of the Lugano II Convention, it follows, under Article 16 of the Lugano II Convention, that the courts of the Member State bound by that convention in which that consumer is domiciled, in the present case the Icelandic courts, have jurisdiction. By contrast, if the contract at issue is not a consumer contract covered by Article 15 of that convention, the courts elected in the clause conferring jurisdiction stipulated in that contract, in the present case the Luxembourg courts, have jurisdiction.

The CJEU also pointed out that the Lugano II Convention is drafted in terms almost identical to the corresponding articles in Regulations nos. 44/2001 and 1215/2012 and that a converging interpretation of those provisions that are equivalent must be ensured. Consequently, it is permitted to consider that the interpretation in *Pillar* should also apply to the "Brussels I" regulations.

The CJEU then observed that it is clear from Article 15 of the Lugano II Convention and from Article 3 of Directive 2008/48 that the concept of a ‘consumer’ is defined in broadly identical terms in both instruments, namely as referring to a person who has concluded a contract or acted for purposes ‘outside his trade, business or profession’. However, whereas Article 3 of Directive 2008/48 defines a threshold for the application of its provisions, no threshold is mentioned in the Lugano II Convention.

The CJEU considered that, even if it had previously stressed the importance of consistently defining the concept of ‘consumer’ in different rules of EU law (judgements of 5 December 2013, *Vapenik*, C-508/12, EU:C:2013:790, paragraph 25, and of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37, paragraph 28), that need to ensure consistency between different instruments of EU law cannot, in any event, lead to the provisions of a regulation on jurisdiction being interpreted in a manner that is unconnected to the scheme and objectives pursued by that regulation.

In this regard, it appears that the Lugano II Convention and Directive 2008/48 pursue different aims. The objective of Directive 2008/48 consists in providing, as regards consumer credit, full and mandatory harmonisation in a number of key areas, which is regarded as necessary in order to ensure that all consumers in the European Union enjoy a high and equivalent level of protection of their interests and to facilitate the emergence of a well-functioning internal market in consumer credit. By contrast, the purpose of the Lugano II Convention is not to harmonise the substantive law on consumer contracts, but to provide, like Regulation no. 44/2001 and then Regulation no. 1215/2012, rules that determine which court has jurisdiction to hear a case in civil and commercial matters, in particular, in respect of a contract between a trader or professional and a person acting outside his trade or profession, in order to protect the latter in such a case. In pursuing that objective, the Convention does not provide for a scope limited to any particular amounts and covers all types of contracts except for those stipulated in Article 15(3) thereof.

Given these distinct purposes, the scope of Directive 2008/48 should not influence the determination of the scope of the Lugano Convention. Furthermore, using the threshold defined by Directive 2008/48 would not be consistent with the objectives of the Lugano II Convention, since there is no substantive difference regarding the presumed weakness of a person who has concluded a credit agreement below or above the threshold set by the Directive.

Here the CJEU implicitly but clearly relied on *the effective judicial protection of consumers*. It is because it is necessary to ensure full access of consumers to justice that the Convention (or the Regulations) has provided specific rules on the jurisdiction of courts in consumer litigation. Such protection should be awarded in credit agreements regardless of the amount of the credit, since the issue of access to courts is the same whatever the amount of the credit.

#### Conclusion of the CJEU

“Article 15 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, (Lugano II) must be interpreted as meaning that, for the purposes of ascertaining whether a credit agreement is a credit agreement concluded by a ‘consumer’ within the meaning of Article 15, it must not be determined whether

the agreement falls within the scope of 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, in the sense that the total cost of credit in question does not exceed the ceiling set out in Article 2(2)(c) of that directive, and that it is irrelevant, in that regard, that the national law transposing that directive does not provide for a higher ceiling.”

### **7.1.5. Question 1d) – Scope of application of the Brussels I Regulation rules of jurisdiction protecting consumers. Accommodation contracts.**

1.d.) Based on the right to an effective consumer protection, shall judges interpret broadly the scope of application of the Brussels I Regulation rules on jurisdiction protecting consumers? In particular, does the Brussels I Regulation (or recast) rules on jurisdiction protecting consumers apply to accommodation contracts concluded by ‘consumers’ from their own domicile, through the website of the professionals?

The issue is addressed in both the *Pammer and Hotel Alpenhof* and *Mühlleitner* judgements. Among these, the main case which can be presented as a reference point for the judicial dialogue within the CJEU and between EU and national courts is *Pammer and Hotel Alpenhof*.

#### The case

Consumers, who resided in Austria and Germany, booked accommodation from companies whose establishments were in Germany and Austria respectively. The reservation was made from their own domiciles, through the websites of the professionals. Disputes arose concerning the payment of the price. The Austrian consumer brought his claim before the Austrian tribunal of his own domicile, while the Austrian company brought its claim against the German consumer before the Austrian tribunal of the place where the service was provided.

In both cases, the jurisdiction of the courts was challenged on the basis that, the professional having “directed its activity” to the Member State of the consumer’s residence, the Brussels I rules on jurisdiction protecting consumers – according to which the courts of the Member State where the consumer has his residence have jurisdiction – were applicable.

#### The question referred to the CJEU

On the basis of what criteria can a trader whose activity is presented on its website or on that of an intermediary be considered to be ‘directing’ its activity to the Member State of the consumer’s domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001? Is the fact that the trader’s website can be consulted on the internet sufficient for that activity to be regarded as being ‘directed’?

#### Reasoning of the CJEU

The CJEU first recalled that Article 15(1)(c) of Regulation no. 44/2001 constitutes a derogation both from the general rule on jurisdiction laid down in Article 2(1) of the Regulation, which confers jurisdiction upon the courts of the Member State in which the defendant is domiciled, and from the rule of special jurisdiction for contracts, set out in Article 5(1) of the Regulation,



under which jurisdiction lies with the courts for the place of performance of the obligation in question. It allows the consumer to bring claims, or to be exclusively brought, before the courts of his/her own residence.

The Court observed, secondly, that the Regulation does not define the concept of “activity directed to” a Member State. Consequently, that concept should be interpreted independently, by reference principally to the system and objectives of the Regulation, in order to ensure that it is fully effective (principle of effectiveness of the Regulation).

The CJEU then noted that the system established by the Regulation fulfils the function of protecting the weaker party (implicitly, the principle of effectiveness of the rules of the regulation protecting consumers).

Considering the conditions for application of the protective rules which consumer contracts must fulfil, the CJEU observed, thirdly, that they are worded in the Regulation more generally than they were in the Brussels Convention, in order to ensure better protection for consumers with regard to new means of communication and the development of electronic commerce. The change (replacing the reference to a “specific invitation” addressed to the consumer with the reference to “activities directed to the Member State of residence of the consumer”), which strengthens consumer protection, was made because of the development of internet communication, which makes it more difficult to determine the place where the steps necessary for the conclusion of the contract are taken. At the same time, it increases the vulnerability of consumers with regard to traders’ offers. However, it is not clear whether the Regulation requires that the professional intended to direct his activities to the Member State in which the consumer is domiciled, or if it simply relates to an activity *de facto* provided for foreign consumers.

Particularly, does the objective of increasing the protection of consumers mean that the words “directs such activities to” must be interpreted as relating to a website’s merely being accessible in Member States other than that in which the trader concerned is established?

The CJEU implicitly referred to the principle of proportionality to reach a balanced interpretation, stating that “whilst there is no doubt that the aim of Articles 15(1)(c) and 16 of Regulation No 44/2001 is to protect consumers, that does not imply that that protection is absolute”. Analysing several legislative provisions, the Court concludes that it must be held that, in order for Article 15(1)(c) of Regulation no. 44/2001 to be applicable, the trader must have manifested his/her intention to establish commercial relations with consumers in one or more other Member States, including that of the consumer’s domicile. It must therefore be determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States, including the Member State of that consumer’s domicile, in the sense that the trader was minded to conclude a contract with those consumers.

Among the evidence establishing whether an activity is ‘directed to’ the Member State of the consumer’s domicile are all clear expressions of the intention to solicit the custom of that State’s consumers. Clear expressions of such an intention on the part of the trader include mention that

it is offering its services or its goods in one or more Member States designated by name. The same applies to the disbursement of expenditure on an internet referencing service to the operator of a search engine in order to facilitate access to the trader's site by consumers domiciled in various Member States, which likewise demonstrates the existence of such an intention.

However, the direction of activities to a Member State needs not to be "purposeful", which would result in a weakening of consumer protection by requiring proof of an intention on the part of the trader to develop activity of a certain scale with those other Member States.

Consequently, "other items of evidence, possibly in combination with one another, are capable of demonstrating the existence of an activity 'directed to' the Member State of the consumer's domicile, such as: the international nature of the activity (certain tourist activities); mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com' or '.eu'; the description of itineraries from one or more other Member States to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers".

#### Conclusion of the CJEU

"In order to determine whether a trader whose activity is presented on its website can be considered to be 'directing' its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that he was minded to conclude a contract with them.

The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.

On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established."

Impact on the follow-up case:

*Pammer* case: Supreme Court, 28 January 2011

*Hotel Alpenhof* case: Supreme Court, 28 January 2011

Elements of judicial dialogue

In terms of horizontal dialogue within the CJEU, to be noted is that *Pammer and Alpenhof Hotel* should be read in light of the *Mühlleitner* judgement.

The referring court asked whether Article 15(1)(c) of the Brussels I Regulation must be interpreted as requiring the contract between the consumer and the trader to be concluded at a distance. In that context, the court asked whether it follows from paragraphs 86 and 87 of *Pammer and Hotel Alpenhof* that the scope of Article 15(1)(c) of the Brussels I Regulation is limited solely to consumer contracts concluded at a distance.

The CJEU completed the analysis made in *Pammer and Hotel Alpenhof*.

Because Article 15 is a derogation from the ordinary rules on jurisdiction, it must necessarily be interpreted strictly, just as any derogation from or exception to a general rule is to be interpreted strictly. In this regard, it is true that, while the aim of Article 15(1)(c) of the Brussels I Regulation is to protect consumers, this does not imply that that protection is absolute. Moreover, the need for consumer contracts to be concluded at a distance is mentioned in the joint statement and in recital 24 in the preamble to the Rome I Regulation, which cites the joint statement.

However, several reasons were proposed by the CJEU to justify its conclusion that “Article 15(1)(c) of the Brussels I Regulation must be interpreted as not requiring the contract between the consumer and the trader to be concluded at a distance”. Specifically, the Court relied on a teleological interpretation of Article 15(1)(c) of the Brussels I Regulation, to note that “the addition of a condition concerning the conclusion of consumer contracts at a distance would run counter to the objective of that provision in its new, less restrictive formulation, in particular the objective of protecting consumers as the weaker parties to the contract”. The principle of effectiveness of the consumer protection drives the rather ‘extensive’ interpretation made by the CJEU of the conditions set by Article 15(1).

Impact on national case law in Member States different from that of the court referring the preliminary question

France, Court of Cassation, First civil chamber, 30 September 2020, no. 18-19.241, PWC. The French Court of Cassation applied the *Pammer and Alpenhof* case to determine whether the trader directed its activity to the consumer's Member State. The judgement, which is noteworthy because of the recognition of the unfairness of the arbitration clause, commended the court of appeal for having noted that the trader indicated on its website the international prefix of its telephone number, presented itself as active on the national and international markets, and offered its clients the services of French lawyers.

### 7.1.6. Question 1e) – Scope of application of the Brussels I Regulation rules of jurisdiction protecting consumers – consumer and professional domiciled in the same State at the time that contract was concluded but domiciled in different States at the time that jurisdiction was seized.

1.e.) Based on the right to an effective consumer protection, shall judges interpret broadly the scope of application of the Brussels I Regulation rules of jurisdiction protecting consumers? In particular, do the Brussels I Regulation (or recast) rules of jurisdiction protecting consumers apply where the parties to a consumer contract – the consumer and the professional counterparty – were, at the time when that contract was concluded, domiciled in the same Member State and where an international element in the legal relationship emerged only after that contract was concluded, on account of the subsequent transfer of the consumer’s domicile to another Member State? (*Commerzbank*, C- 296/20)

#### The case

The relevant case is *Commerzbank*.

Commerzbank, a company incorporated under German law, has its registered office in Frankfurt am Main (Germany). In 2009, E.O., who was then domiciled in Dresden (Germany), had opened a current account with a branch of Commerzbank, also established in Dresden. The latter issued a credit card to him. In 2014, E.O. transferred his domicile to Switzerland. In January 2015, E.O. sought to close his account with Commerzbank. The current account showed a debit balance of 6,283.37 euros. E.O. refused to repay that balance on the ground that it resulted from fraudulent use of his credit card by third parties. Having called in vain upon E.O. several times to repay the debit balance in question, in April 2015 Commerzbank terminated the ‘credit relationship’ between the parties with immediate effect and issued a final statement of account showing a debit balance in its favour of 4,856.61 euros. Since E.O. did not repay that balance, Commerzbank brought an action in November 2016 before the *Amtsgericht Dresden* (Local Court, Dresden, Germany) seeking an order that E.O. pay that balance. That court dismissed that action as inadmissible on the ground that it lacked jurisdiction, in light of the defendant’s domicile, which was now in Switzerland. On 14 June 2018, the *Landgericht Dresden* (Regional Court, Dresden, Germany) upheld the judgement at first instance on appeal. Commerzbank then brought an appeal on a point of law (*Revision*) before the referring court, the *Bundesgerichtshof* (Federal Court of Justice, Germany).

#### Preliminary questions referred to the CJEU:

- “(1) Is Article 15(1)(c) of the Lugano [II] Convention to be interpreted as meaning that the “pursuit” of a professional or commercial activity in the State bound by [that convention] and in which the consumer is domiciled presupposes that the other party was already engaged in cross-border activity at the time when the contract was initiated and concluded or does that provision also apply for the purpose of determining the court having jurisdiction to hear proceedings where the parties were domiciled within the meaning of Articles 59 and 60 of the Lugano [II] Convention in the same State bound by [that convention] at the time when the contract was concluded and a foreign element to the legal relationship arose only subsequently

because the consumer relocated at a later date to another State bound by [that convention]?

- (2) If cross-border activity at the time when the contract was concluded is not necessary:

Does Article 15(1)(c) of the Lugano [II] Convention, read in conjunction with Article 16(2) thereof, generally preclude determination of the court having jurisdiction in accordance with Article 5(1) of [that convention] in the case where the consumer relocated to another State bound by the [Lugano II] Convention between the time when the contract was concluded and the time when the proceedings were brought, or is it also necessary for the professional or commercial activities of the other party to be pursued in or directed to the new State of domicile and for the contract to come within the scope of such activities?”

### Reasoning of the CJEU

As regards the provisions of the Lugano II Convention which are, in essence, identical to those of Regulation (EU) no. 1215/2012 and, before it, to those of Council Regulation (EC) no. 44/2001 and, earlier still, to those of the Brussels Convention of 27 September 1968, the case-law of the Court of Justice on the interpretation of those provisions of EU law remains relevant.

Article 15 of the Lugano II Convention lays down the three conditions which must be satisfied in order to trigger the application of Section 4 of that convention. All of those conditions must, according to the case-law, be satisfied, with the result that, if one of them is not satisfied, jurisdiction cannot be determined under the rules relating to consumer contracts.

The concept of ‘consumer’s domicile’ must be interpreted as designating the consumer’s domicile at the date on which the court action is brought (order of 3 September 2020, *mBank*, C-98/20, EU:C:2020:672, paragraph 36).

When the action is brought against the consumer by the professional counterparty, it may be brought only in the courts of the Member State in which the consumer is domiciled (see, by analogy, order of 3 September 2020, *mBank*, C-98/20, EU:C:2020:672, paragraph 26).

It does not follow either expressly or implicitly from the wording of that provision that, at the time the contract was concluded, the professional activity must necessarily be directed to a Member State other than that in which the professional counterparty has its seat. Similarly, there is also nothing to indicate that the State in which the consumer is domiciled must be a Member State other than that in which the professional counterparty has its seat. Thus, the only express requirement is that the professional counterparty pursues its activity in the State in which the consumer is domiciled.

The CJEU related to its case-law, namely to the judgement of 17 November 2011, in *Hypoteční banka* (C-327/10), to state that the uniform rules of jurisdiction were applicable notwithstanding the fact that, at the time when the contract was concluded, the consumer and the professional counterparty were domiciled in the same Member State.

Citing *Pammer and Hotel Alpenhof* (C-585/08 and C-144/09), the CJEU stated that, in principle, in connection with Article 15(1)(c) of the Lugano II Convention, the pursuit of a professional or commercial activity must not necessarily relate to another Contracting State at the time when the contract was concluded. The application of that Article would not be excluded if the consumer, at the time when the contract was concluded, was domiciled in the same Member State as the professional counterparty.

The CJEU added that none of the three situations referred to in Article 15(1) of the Lugano II Convention mentions the requirement that the activity pursued must have an international element at the time when the contract was concluded.

Thus, the fact that the parties were domiciled in the same Member State when the contract at issue in the main proceedings was concluded does not prevent the application of the provisions of Section 4 of Title II of the Lugano II Convention, such as Article 17(3) thereof, which does not require that the professional counterparty was already pursuing a cross-border activity at the time the contract was concluded.

The applicability of Article 15(1)(c) of the Lugano II Convention is subject only to the express condition that the professional counterparty pursues its activity in the Member State in which the consumer was domiciled at the time when the contract was concluded, and the subsequent transfer of the consumer's domicile to another Contracting State is not liable to prevent the applicability of that provision.

Article 15(1)(c) of the Lugano II Convention must be interpreted as meaning that that provision determines jurisdiction when the parties to a consumer contract – the consumer and the professional counterparty – were, at the time that contract was concluded, domiciled in the same State bound by that Convention, and when an international element in the legal relationship emerged only after that contract was concluded, on account of the subsequent transfer of the consumer's domicile to another State bound by that convention.

#### *Conclusion of the CJEU:*

Article 15(1)(c) of the Lugano II Convention must be interpreted as meaning that that provision determines jurisdiction where the parties to a consumer contract – the consumer and the professional counterparty – were at the time when that contract was concluded, domiciled in the same Member State bound by that convention, and where an international element in the legal relationship emerged only after the contract had been concluded, on account of the subsequent transfer of the consumer's domicile to another Member State bound by that convention.

#### *Elements of judicial dialogue:*

Although a court does not emphasise the objective of consumer protection, that objective underlies its overall decision. The court may consider reference to previous case law as sufficient. Nevertheless, it would be desirable for the objective of consumer protection to be systematically mentioned.

### 7.1.7. Identification of the courts having jurisdiction over cross-border cases regarding the protection of consumers

What court has jurisdiction over a case regarding the protection of consumers, when such a court is not clearly identifiable under the rules of the 'Brussels I' Regulations?

*Particularly,*

What court has jurisdiction in situations in which the domicile of the consumer is unknown?  
*Hypoteční, C-327/10.*

What court has jurisdiction over cross-border claims brought by consumer associations?  
*Asociación de Consumidores Independientes de Castilla y León, C-413/12, and Amazon, C-191/15.*

What court has jurisdiction over cross-border claims brought by air transport passengers?  
*Guaitoli, C-213/18.*

2. a.) What court has jurisdiction in situations in which the domicile of the consumer is unknown?

#### The case

The relevant case is *Hypoteční*, whose features were described above.

#### Preliminary question referred to the CJEU:

Does Regulation no. 44/2001 preclude the use of provisions of national law which enable proceedings to be brought against persons of unknown address?

#### Reasoning of the CJEU

In the absence of an express provision in the Brussels I Regulation which defines jurisdiction in a case in which the exact domicile of a defendant is unknown, the CJEU assumes that it should first be decided whether it is possible to derive from the Regulation a criterion on which to base jurisdiction. In particular, the Court wondered whether it is possible to interpret Article 16(2) of the Brussels I Regulation as meaning that the rule on jurisdiction of the courts of the Member State in which the consumer is domiciled also covers the consumer's last known domicile (§37-42).

The CJEU decided that such an interpretation was supported by:

- 1) the objective, pursued by Regulation no. 44/2001, of strengthening the legal protection of persons established in the European Union by ensuring the certainty and foreseeability of the rules on jurisdiction (§44)
- 2) the necessity to ensure a fair balance between the rights of the applicant and those of the defendant (§45-54).

The CJEU extensively justified this latter argument. Article 47 of the Charter requires that the rights of the defendant be observed and implemented, in conjunction with respect for the right of the applicant to bring proceedings before a court (**principle of effectiveness**). Fundamental

rights may be subject to restrictions, but such restrictions must correspond to the objectives of public interest pursued by the measure in question and **must not constitute**, with regard to the aim pursued, **a disproportionate interference** with the rights thus guaranteed (**principle of proportionality**).

Relying on Article 26(2) of the Brussels I Regulation, the CJEU ruled that in order to avoid a disproportionate interference with the rights of the defendant, where the domicile of the consumer is said to be unknown, the national tribunal must be satisfied that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant. Even if those conditions are satisfied, the rights of the defendant are restricted by the possibility of taking further steps in the proceedings without the defendant's knowledge by means of notification of the action served on a guardian *ad litem* appointed by the court; but such restriction is justified in the light of an applicant's right to effective protection, given that, in the absence of such proceedings, that right would be meaningless. The CJEU thus combined **the principle of effective access to justice with the principle of proportionality** in order to reach its conclusion.

#### Conclusion of the CJEU:

Regulation no. 44/2001 must be interpreted as meaning that:

- in a situation such as that in the main proceedings, in which a consumer who is a party to a long-term mortgage loan contract, which includes the obligation to inform the other party to the contract of any change of address, renounces his/her domicile before proceedings against him/her for breach of his contractual obligations are brought, the courts of the Member State in which the consumer had his/her last known domicile have jurisdiction, pursuant to Article 16(2) of that regulation, to deal with proceedings in the case where they have been unable to determine, pursuant to Article 59 of that regulation, the defendant's current domicile and also have no firm evidence allowing them to conclude that the defendant is in fact domiciled outside the European Union;
- that regulation does not preclude the application of a provision of national procedural law of a Member State which, with a view to avoiding situations of denial of justice, enables proceedings to be brought against, and in the absence of, a person whose domicile is unknown, if the court seised of the matter is satisfied, before giving a ruling in those proceedings, that all investigations required by the principles of diligence and good faith have been undertaken with a view to tracing the defendant.

#### Elements of judicial dialogue:

The CJUE recalled the objective, pursued by Regulation no. 44/2001, of strengthening the legal protection of persons established in the European Union, by enabling both the applicant to easily identify the court in which s/he may sue, and the defendant reasonably to foresee before which court he may be sued. This definition of the consequences attached to the objective had already been made in *eDate Advertising* (C-509/09 & C-161/10), *Falco Privatstiftung et Rabitsch* (C-533/07), *Color Drack* (C-386/05).



The CJUE extensively relied on *Gambazzi* (C-394/07) to balance the fundamental rights of the defence and the right of the applicant to effective access to justice. The CJUE recalled that if restrictions may apply to the rights of the defence, such restrictions must not constitute, with regard to the aim pursued, a disproportionate interference with the rights thus guaranteed. In *Hypoteční*, the Court decided that it is proportionate to allow the applicant to bring his/her claim before the court of the last known domicile of the consumer only if all necessary steps have been taken to ensure that the defendant can defend his/her interests (which implies that the national court must be satisfied that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant).

### 7.1.8. Question 2b) – jurisdiction over cross-border claims brought by consumer associations

2. b.) What court has jurisdiction over cross-border claims brought by consumer associations?

Regulation Brussels I and Regulation Brussels I recast do not set any specific rule on jurisdiction applying to cross-border claims brought by consumer associations. The question, therefore, is what court should have jurisdiction over such claims? This issue has not been expressly decided by the CJEU. However, some of the cases mentioned above can be presented as reference points for this concern: *Henkel*, *Asociación de Consumidores Independientes de Castilla y León* and *Amazon*.

#### The case

The case with the most relevant features is *Asociación de Consumidores Independientes de Castilla y León*.

A Spanish consumer protection association registered in the Castilla y León Registry of Consumer and User Organisations decided to bring an action for an injunction to delete allegedly unfair terms from the general terms and conditions against a Spanish company registered in Barcelona.

In this *domestic case*, the question was whether the Charter of Fundamental Rights of the European Union, read in conjunction with Directive 93/13 and the case-law of the Court of Justice relating to the high level of protection of the interests of consumers, as well as to the practical effect of Directives and the principles of equivalence and effectiveness, must be interpreted as meaning that the court of the place where that association has its address, and not the court of the place where the defendant has its address, is to have territorial jurisdiction to hear and determine the action for an injunction against the use of unfair terms.

What would happen if a Spanish association intended to protect Spanish consumers against unfair terms in the general terms and conditions of a company registered in a different Member State? The case occurred in *Henkel* and *Amazon*.

#### Question possibly referred to the CJEU in a cross-border case

Is the action for an injunction brought by a consumer association within the scope of application of Chapter II, Section IV of the Brussels I Regulation (rules on jurisdiction protecting consumers), with the consequence that when bringing a cross-border action, the association may

seize the national courts of its own domicile instead of the national courts of the Member State where the defendant has its establishment?

### Possible reasoning of the CJEU

The CJEU would probably have to decide, firstly, if a cross-border action brought by a consumer association falls within the scope of application of the Brussels I/Brussels I bis Regulation.

Considering the broad meaning given to the notion of “civil or commercial matter”, it would certainly be decided that the Brussels I Regulation applies. Moreover, in the Green Paper on Consumer Collective Redress (27 Nov. 2008, COM (2008) 794 final), the Commission stated that: “In cross-border cases the Regulation on jurisdiction would be applicable to any action including an action brought to court by a public authority, if it is exercising private rights (e.g. an ombudsman suing for consumers). Representative actions would have to be brought to the trader's court or the court of the place of performance of the contract (Article 5 (1)).”

The Brussels I Regulation being applicable, the CJEU would then decide what constitute the rules of the Regulation specifically applied to determine what court ought to have jurisdiction over such a claim. Specifically, the Court would decide whether it is the rules set by Chapter II, Section IV (jurisdiction over consumer contracts) that are applicable to the action of the association, or whether the ordinary rules of the Regulation (general or special) ought to apply. In the view of the Commission (Green Paper on Consumer Collective Redress, mentioned above), the rules on jurisdiction protecting consumers should not apply to determine the court having jurisdiction to decide on the action brought by an association.

As decided by the CJEU in *Sales Simués* and *Asociación de Consumidores Independientes de Castilla y León*, the association is not (as is the consumer) in an inferior position *vis-à-vis* the seller or supplier.

In *Asociación de Consumidores Independientes de Castilla y León*, the CJEU concluded that, in domestic cases, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and **the principles of equivalence and effectiveness** must be interpreted as not precluding national procedural rules under which actions for an injunction brought by consumer-protection associations must be brought before the courts where the defendant is established or has its address (Article 2, Regulation no.44/2001). Therefore, it is likely that the CJEU would decide that the same principles do not require an extension of the scope of the protection of consumers established by the Regulation to consumer associations.

The CJEU would then, finally, decide on what courts have jurisdiction to rule on the claim brought by the consumer association. As in *Asociación de Consumidores Independientes de Castilla y León*, general jurisdiction should be given to the courts of the Member State in which the defendant has its residence.

In *Henkel*, the Court decided that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict, or quasi-delict within the meaning of Article 5(3) of the Brussels Convention. In *Amazon*, the CJEU decided that an action

for an injunction within the meaning of Directive 2009/22/EC brought by an association is based on a non-contractual obligation (see below at paragraph 7.2). Such qualification is transposable to the application of the Brussels I Regulation. Consequently, the jurisdiction of the courts shall also be determined according to Article 5(3) of the Regulation.

#### Probable conclusion of the CJEU

In cross-border cases, the conclusion of the CJEU would then probably be that the Brussels I/Brussels I recast Regulation is applicable to decide on the jurisdiction of national courts seized of an action brought by a consumer association, but that the rules on jurisdiction protecting consumers do not apply to such action. The courts having jurisdiction are the courts of the Member State where the defendant (the professional) has its establishment OR the courts of the Member State where the damage is suffered.

#### Elements of judicial dialogue:

It should be noted that in *Amazon*, VKI brought its action before the Austrian courts, Austria being the Member State where the consumers meant to be protected and the consumer association were established, whereas Amazon had its establishment in Luxembourg or Germany. The Austrian courts assumed jurisdiction and no question was referred to the CJEU on this issue.

### **7.1.9. Question 2c) – Jurisdiction over cross-border claims brought by air transport passengers**

2.c.) What court has jurisdiction over cross-border claims brought by air transport passengers?

The issue is addressed in *Guaitoli* and in *Krállová*.

#### The Guaitoli case

Passengers had concluded an air transport contract with easyJet Airline, an airline headquartered in the United Kingdom, for a return flight from Rome Fiumicino (Italy) to Corfu (Greece). The outward flight was delayed and then finally cancelled and postponed to the next day. The return flight was delayed by more than 2 hours and less than 3 hours.

The passengers, who were domiciled in Rome (Italy), brought an action before the *Tribunale Ordinario di Roma* (Rome District Court, Italy) seeking an order that easyJet Airline pay the compensation referred to in Articles 5, 7 and 9 of Regulation No 261/2004 and compensate for further material damage and non-material damage resulting from easyJet Airline's failure to fulfil its contractual obligations. EasyJet Airline objected to the jurisdiction of the court hearing the case.

The *Tribunale Ordinario di Roma* (Rome District Court) noted that its territorial jurisdiction depended on the applicable law – national law or Union law – and on the interpretation to be given to it. Does the Montreal Convention apply to the dispute, at least to part of it, or does that dispute fall exclusively within the scope of Regulation no. 261/2004?

The *Tribunale* also wondered, in the case of an exclusive or partial application of the Montreal Convention, whether the rule in Article 33 thereof is limited, as held by the *Corte di Cassazione* (Court of Cassation, Italy), to designating the competent Member State, or rather, whether, which it considered to be the case, that rule also governs the designation of the competent court within that Member State.

In those circumstances, the *Tribunale Ordinario di Roma* (District Court, Rome) decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling.

#### Preliminary questions referred to the CJEU

“(1) If a party whose flight has been delayed or cancelled jointly requests, not only the standardised and lump-sum compensation provided for by Articles 5, 7 and 9 of Regulation No 261/2004, but also the further compensation referred to in Article 12 of the Regulation, must Article 33 of the Montreal Convention apply, or is ‘jurisdiction’ (both international and local) governed by Article 5 of Regulation No 44/2001?”

(2) In the first hypothesis in question 1, must Article 33 of the Montreal Convention be interpreted to the effect that it governs only the allocation of jurisdiction among the States Parties, or as meaning that it also governs local jurisdiction within the individual State?

(3) In the first hypothesis in question 2, is the application of Article 33 of the Montreal Convention ‘exclusive’, precluding application of Article 5 of Regulation No 44/2001, or may the two provisions be applied jointly, so as to determine directly both the jurisdiction of the State and the local jurisdiction of its courts?”

#### Reasoning of the CJEU

Regarding the first question, the CJEU recalled its previous case law according to which, since the rights based respectively on the provisions of Regulation no. 261/2004 and of the Montreal Convention fall within distinct regulatory frameworks, the rules on international jurisdiction provided for in that convention do not apply to applications made on the basis of Regulation no. 261/2004 alone, which must be examined in light of Regulation no. 44/2001 (judgement of 10 March 2016, *Flight Refund*, C-94/14). It then stated that Article 67 and Article 71(1) of Regulation 1215/2012 allow the application of rules of jurisdiction relating to specific matters which are contained respectively in Union acts or in conventions to which the Member States are parties. Since air transport is such a specific matter, the rules of jurisdiction provided for by the Montreal Convention must be applicable within the regulatory framework laid down by it. Consequently, for claims based on Regulation no. 261/2004, the national court must determine its own jurisdiction in accordance with Regulation no. 1215/2012, while for claims based on the Montreal Convention, it must determine its jurisdiction to rule on that part of the action in light of Article 33 of that Convention.

Concerning the jurisdiction of courts based on Regulation no.1215/2012 (Brussels I recast), the CJEU stressed that the jurisdiction rules protecting consumers are not applicable to contracts of transport, following Article 17(3) of the Regulation. The rule applicable is, then, either the general rule giving jurisdiction to the court of the Member State where the defendant has its domicile (Article 4), or the special rule applying to contractual matters (Article 7). The CJEU recalled its

previous case law, according to which, in transport contracts which are service contracts, Article 7 designates as the court having jurisdiction to deal with a claim for compensation based on an air transport contract of persons, at the applicant's choice, that court which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that transport contract (judgement of 9 July 2009, *Rehder*, C-204/08).

Regarding the second question, whether Article 33(1) of the Montreal Convention must be interpreted as governing not only the allocation of jurisdiction between the States Parties to the convention, but also the allocation of territorial jurisdiction between the courts of each of those States, the Court first pointed out that the provisions of the Montreal Convention are an integral part of the Union's legal order, and that it has jurisdiction to give a preliminary ruling concerning its interpretation.

Based on several arguments, the Court decided that it should be considered that Article 33 of the Montreal Convention, allowing the plaintiff to choose to bring an action against the air carrier concerned, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination, must be regarded as governing not only the allocation of international jurisdiction between the courts of each of the States party to it, but also the allocation of territorial jurisdiction.

Amongst the arguments put forward by the CJEU, one was based on the purpose of the Montreal Convention. For the CJEU:

*“it is clear from the preamble to that convention that the States Parties to that convention have intended not only to [ensure] the protection of the interests of consumers in international carriage by air’, but also to further [harmonise and codify] certain rules governing [such carriage, so as to achieve] an equitable balance of interests”.*

And

*“the interpretation that the purpose of Article 33(1) of the Montreal Convention is to designate not only the State Party competent to hear the liability action concerned, but also the courts of that State before which the action is to be brought, is such as to contribute to attaining the objective of enhanced unification, as expressed in the preamble to that instrument, and to protect the interests of consumers, while at the same time ensuring a fair balance with the interests of air carriers”.*

The interpretation of Article 33 of the Montreal Convention, proposed by the Court, is thus inspired by the ***principles of effectiveness of the consumer protection and of proportionality***.

As a consequence of the answer given to the second question, the CJEU judged it not necessary to reply to the third question.

#### *Conclusions of the CJEU*

(1) “Article 7(1), Article 67 and Article 71(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the

recognition and enforcement of judgments in civil and commercial matters, and Article 33 of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999 and approved on behalf of the European Community by Council Decision 2001/539/EC of 5 April 2001, must be interpreted as meaning that the court of a Member State hearing an action to obtain both compliance with the flat-rate and standardised rights provided for in Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, and compensation for further damage falling within the scope of that convention, must assess its jurisdiction, for the first head of claim, in the light of Article 7(1) of Regulation No 1215/2012, and, for the second head of claim, in the light of Article 33 of that convention.”

(2) “Article 33(1) of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded at Montreal on 28 May 1999, must be interpreted, as regards actions for damages falling within the scope of that convention, as governing not only the allocation of jurisdiction as between the States Parties to the convention, but also the allocation of territorial jurisdiction as between the courts of each of those States.”

#### *The Králová case*

Ms Králová, who was domiciled in Prague, entered into a package travel contract with the travel agency FIRO-tour a.s. including, first, carriage by air between Prague and Keflavík, operated by Primera, and, second, accommodation in Iceland. The flight from Prague to Keflavík on 25 April 2013, for which Ms Králová had a confirmed reservation, was delayed for more than four hours. Accordingly, Ms Králová brought an action for compensation against Primera before the *Obvodní soud pro Prahu 8* (Prague 8 District Court, Czech Republic) to the amount of 400 euros, pursuant to Article 6(1) and Article 7 of Regulation no. 261/2004. The Court ruled that it had no jurisdiction to hear that action on the ground that Regulation no. 44/2001 did not apply to the Kingdom of Denmark, the Member State in which Primera has its seat. That court added that its jurisdiction did not arise from Section 4 of Chapter II of that Regulation either, since Ms Králová had concluded the contract for carriage not with Primera but with the travel agency FIRO-tour and that, in any event, that contract related to a contract combining travel and accommodation, as required by Article 15(3) of that regulation.

Ms Králová appealed against that order to the *Městský soud v Praze* (Municipal Court, Prague, Czech Republic), which dismissed the appeal. The court held that Regulation no. 44/2001 had applied to the Kingdom of Denmark since 1 July 2007, but that it could not serve as a basis for jurisdiction of the Czech courts in the main proceedings.

Ms Králová appealed against the second order to the *Nejvyšší soud* (Supreme Court, Czech Republic), which set aside the two orders, ruling that that court should examine Primera’s legal capacity to be sued in an action in the light of Article 5(1) and Articles 15 and 16 of Regulation no. 44/2001.

### Preliminary questions referred to the CJEU

- (1) “Did a contractual relationship exist between the applicant and the defendant for the purposes of Article 5(1) of [Regulation No 44/2001] even though no contract had been concluded between the applicant and the defendant and the flight was part of a package of services provided on the basis of a contract between the applicant and a third party (travel agency)?”

This question is not bound up with consumer protection and will not be addressed here.

- (2) “Can that relationship be qualified as a consumer relationship in accordance with ... Articles 15 to 17 of [Regulation No 44/2001]?”

- (3) “Does the defendant have legal capacity to be sued in an action seeking satisfaction of the claims arising from [Regulation No 261/2004]?”

### Reasoning of the CJEU

The CJEU first examined the third question, which concerned whether Regulation no. 261/2004 applies to an air carrier which performed the delayed flight on behalf of the person who had concluded the contract with the passenger and without itself having concluded a contract with that passenger.

The CJEU cited Article 2(b) of Regulation no. 261/2004 for definition of the concept of ‘operating air carrier’, which provides that this is an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger. The CJEU then cited Article 3(5) of the same Regulation, which applies to any operating air carrier providing transport to passengers to or from an airport located in the territory of a Member State and, where an operating air carrier which has no contract with the passenger performs obligations under that regulation, it is to be regarded as doing so on behalf of the person having a contract with that passenger (judgement of 7 March 2018, *flightright and Others*, C-274/16, C-447/16 and C-448/16, EU:C:2018:160, paragraph 62).

Thus a passenger whose flight has been delayed may rely on Regulation no. 261/2004 against the operating air carrier, even if the passenger and the operating air carrier have not concluded a contract between them (paragraph 29).

The CJEU added that the right to compensation provided for in Article 7 of Regulation no. 261/2004 is applicable in a situation where the flight purchased by a passenger is part of a package tour.

Addressing the question (second question) relating to the relevance of Articles 15 to 17 of Regulation no. 44/2001 to an action for compensation brought by a passenger against the operating air carrier, with which that passenger has not concluded a contract, the CJEU stated that the rules included in that Section 4 must necessarily be interpreted strictly (see, to that effect, judgement of 14 March 2013, *Česká spořitelna*, C-419/11, EU:C:2013:165, paragraph 26 and the case-law cited). For their application, the parties to the dispute have to be the parties to the

contract. These provisions necessarily imply that a contract has been concluded by the consumer with the trader or professional concerned (judgement of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37, paragraph 45 and the case-law cited).

The CJEU noted that the solution was consistent with the objective, set out in recital 11 of that Regulation, of ensuring a high degree of predictability as regards the attribution of jurisdiction (paragraph 62).

### Conclusion of the CJEU

Regulation no. 261/2004 must be interpreted as meaning that a passenger on a flight which has been delayed for three hours or more may bring an action for compensation under Articles 6 and 7 of that Regulation against the operating air carrier, even if that passenger and that air carrier have not entered into a contract between them and the flight in question forms part of a package tour covered by Directive 90/314.

Articles 15 to 17 of Regulation no. 44/2001 must be interpreted as meaning that an action for compensation brought by a passenger against the operating air carrier, with which that passenger has not concluded a contract, does not fall within the scope of those articles relating to special jurisdiction over consumer contracts.

### Elements of judicial dialogue

By insisting on predictability for the defendant (the trader) to justify the requirement of a contract between the parties to the dispute, the CJEU adopted a solution which was not very protective of the consumer. In this regard, the solution was not consistent with other positions taken by the CJEU (see for instance, 30 September 2021, *Commerzbank v. E.O.* Case C-296/20, developed above).

### Possible question to be referred to the Court

Can a relationship be classified as a consumer relationship in accordance with Articles 15 to 17 of Regulation no. 44/2001 even though no contract had been concluded between the consumer and the trader? Does this question emphasise the need for an effective consumer protection?

## **7.2. Powers of civil judges in cross-border consumer litigation**

### **7.2.1. Question 3 – Judicial control over the implementation, by prior judges, of the jurisdiction rules protecting consumers**

Based on the principle of effectiveness, should a court finding out that the jurisdiction rules protecting consumers have been violated in prior proceedings, take positive action of its own motion in order to inform the consumer that there has been a breach of the rules on jurisdiction laid down in Chapter II, Section 4 of that Regulation?

The issue is addressed in *Salvoni* (C-347/18).



### The case

Mr Salvoni, a lawyer based in Milan (Italy), asked the *Tribunale di Milano* (District Court, Milan, Italy) to issue a payment order against Ms Fiermonte, who resided in Hamburg (Germany), for an amount owed to him as consideration for the professional services rendered by him. The payment order was delivered and Ms Fiermonte did not challenge that judgement. Mr Salvoni thus submitted an application before that court, for the purposes of enforcement of that judgement, requesting that a certificate on the basis of Article 53 of Regulation no. 1215/2012 be issued.

The referring court, conducting research of its own motion, found that Mr Salvoni directed his activity to Germany. Upon request, Mr Salvoni confirmed that his activity was directed to Germany and that at the time when he provided his legal services to Ms Fiermonte, she was residing in Germany.

Finding that the relationship between Mr Salvoni and Ms Fiermonte was comparable to a consumer contract, the referring court concluded that the judgement ordering payment was given in breach of the rules on jurisdiction set out in Chapter II, Section 4 of Regulation no. 1215/2012 relating to jurisdiction in respect of consumer contracts.

In that context, the referring court had doubts as to the powers conferred on the court called on to issue the certificate provided for in Article 53 of Regulation no. 1215/2012 where a judgement, which has acquired the force of *res judicata* under national procedural law, was adopted in breach of the provisions relating to the rules on jurisdiction laid down by that Regulation. Should it transpose, in identical terms, into that certificate, the judgement given in the Member State of origin? Or can it decide of its own motion to inform the defendant-consumer, against whom the judgement is to be enforced in a Member State other than that of origin, of any breach of the rules on jurisdiction laid down in Chapter II, Section 4, of that Regulation and, therefore, of the possibility of precluding recognition within the meaning of Article 45(1)(e) of that Regulation?

If it is decided that the court has to transpose the judgement into the certificate, such an interpretation is liable to undermine Article 47 of the Charter, as interpreted by the Court in the field of consumer law. The case law of the CJEU implies that the weaker position of the consumer *vis-à-vis* the seller or supplier, as regards both his/her bargaining power and his/her level of knowledge, may be corrected only by positive action by the court, which is under an obligation to examine of its own motion whether a contractual term is unfair, provided that it has available to it the legal and factual elements necessary for that task. Then it is the task of the court to reconcile the objective of the swift circulation of judgements as pursued by Regulation no. 1215/2012 and the effective protection of consumers by means of the possibility, when the certificate provided for in Article 53 of that Regulation is issued, of informing the consumer of its own motion that there has been a breach of the rules on jurisdiction laid down in Chapter II, Section 4 of that Regulation.

The *Tribunale di Milano* (District Court, Milan), decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling.

### Preliminary question referred to the CJEU

“Should Article 53 of Regulation No 1215/2012 (Brussels I recast) and Article 47 of the [Charter] be interpreted as meaning that it is not possible for the court of origin, which has been requested to issue the certificate provided for in Article 53 of [that] regulation ... with regard to a judgment that has acquired the force of *res judicata*, to exercise powers of its own motion to ascertain whether there has been a breach of the rules set out in Chapter II, Section 4 of [that regulation], so that it may inform the consumer of any breach that is established and enable the consumer to consider, in full knowledge of the facts, the possibility of availing himself of the remedy provided for in Article 45 of [that regulation]?”

### Reasoning of the CJEU

On the basis of Article 42(1)(b) and (2)(b) and Article 53 of Regulation no. 1215/2012, the CJEU concluded that the court which has been requested to issue a certificate does not have to examine questions of substance and jurisdiction which have already been dealt with in the judgement whose enforcement is being sought: the delivery of the certificate is almost automatic.

It follows, the CJEU argued, that Article 53 of Regulation no. 1215/2012 must be interpreted as precluding the court of the Member State of origin, which has been requested to issue the certificate referred to in that Article concerning a judgement which has acquired the force of *res judicata* issued against a consumer, from examining of its own motion, in a case such as that in the main proceedings, whether that judgement was made in compliance with the rules on jurisdiction laid down by that Regulation.

The CJEU considered whether its case law concerning Directive 93/13 was capable of calling that conclusion into question, in so far as it implies that the court of origin is required, in order to remedy the imbalance between the consumer and the professional, to inform the consumer of its own motion of the alleged breach. The answer was negative, since the Directive, intended to achieve minimum harmonisation of the laws of the Member States concerning unfair terms in consumer contracts, is not applicable in the context of Regulation no. 1215/2012, which lays down rules of a procedural nature.

As regards the right to an effective remedy referred to in Article 47 of the Charter, the CJEU maintained that it had not been infringed given that Article 45 of Regulation no. 1215/2012 enables the defendant to rely, in particular, on a potential breach of the rules on jurisdiction provided for in Chapter II, Section 4 of that Regulation in respect of consumer contracts.

### Conclusion of the CJEU

The CJEU concluded that “Article 53 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended by Commission Delegated Regulation (EU) 2015/281 of 26 November 2014 read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding the court of origin which has been requested to issue the certificate provided for in Article 53 of that regulation in respect of a judgment which has acquired the force of *res judicata* from being able to ascertain of its own motion whether there has been a breach of the rules set out in Chapter

II, Section 4 of that regulation”. Therefore, it may inform the consumer of any breach that has been established and enable him/her to assess, in full knowledge of the facts, the possibility of availing him/herself of the remedy provided for in Article 45 of that Regulation.

### 7.2.2. Question 4 – Judicial control over choice-of-court provisions in consumer contracts

Based on the principle of the effective protection of consumers, should courts control choice-of-court provisions included in transnational consumer contracts, beyond the specific protection laid down by the ‘Brussels I’ Regulation?

In particular, should courts control choice-of-courts provisions in transnational consumer contracts:

whenever the specific protection of consumers against these provisions laid down by the ‘Brussels I’ Regulation is not applicable?

*Ex officio*, if the consumer enters an appearance without challenging the jurisdiction of the designated court?

4.a.) Should courts control choice-of-courts provisions in transnational consumer contracts whenever the specific protection of consumers against these provisions laid down by the ‘Brussels I’ Regulation is not applicable?

#### The case

To be noted is that, even if the ‘Brussels I Regulation protects consumers against choice-of-court provisions (see Article 17, Regulation 44/2001; Article 19 Regulation 1215/2012), the scope of such protection is limited to certain contracts and certain circumstances. Therefore, not all consumers are protected against choice-of-court provisions. For instance, a choice-of-court provision included in an air transport contract does not belong among the provisions of the Regulations protecting consumers.

The question is whether protection should nevertheless be offered to the consumer on the basis of Directive 93/13.

#### Possible preliminary question referred to the CJEU

Whenever the specific protection of consumers laid down by the ‘Brussels I’ Regulation is not applicable, should courts control choice-of-court provisions included in transnational consumer contracts in light of Directive 93/13 on unfair terms based on the principle of the effective protection of consumers?

#### Possible reasoning of the CJEU

In *AquaMed*, the CJEU made it clear that whenever a choice-of-court provision included in a consumer contract is not covered at all by the ‘Brussels I’ Regulation, it should be analysed in light of the provisions of Directive 93/13 on unfair terms. The contract was a domestic one, to which national law was applicable, particularly regarding the territorial jurisdiction of the courts.

The contractual choice-of-court provision allowed the application of a national rule under which a seller or supplier can bring an action against a consumer before the court within whose territorial jurisdiction that seller or supplier has its principal place of business. However, the local court considered this term unfair. The CJEU confirmed that it is the judges' task to assess the fairness or unfairness of choice-of-court provisions in light of Directive 93/13, even if they simply refer to the national law applicable. Article 7(1) of Directive 93/13 precludes clauses which give rise, for the consumer, to procedural conditions which are such as to excessively restrict *the right to an effective remedy* conferred on him/her by the European Union legal order, which is a matter for the national court to determine.

But what about choice-of-court provisions in transnational consumer contracts which, although falling within the scope of the 'Brussels I' Regulation, do not belong among the provisions specifically protecting consumers?

In *Salvoni*, the CJEU excluded that Directive 93/13 could influence the interpretation of Regulation no. 44/2001 or no.1215/2012, given their different objectives. When a transnational consumer contract does not fall within the scope of the rules on the jurisdiction of courts protecting the consumers, the general rule of the Regulations dealing with choice-of-courts provisions should apply. The question was therefore whether a choice-of-court provision, valid pursuant to Article 23 of the 'Brussels I' Regulation or 25 of the 'Brussels I recast' Regulation, may nevertheless be considered void or not applicable when included in a transnational consumer contract not covered by the protective rules laid down by the Regulations. The CJEU could consider, as in *Salvoni*, that it is not permitted to add to the protection offered to consumers by the Regulations, by referring to Directive 93/13. However, the situations have been quite different in *Salvoni*, where the Directive was invoked in the absence of any contractual clause, and in the situation considered here, where there is a contractual provision defining the court that has jurisdiction. The principle of the effective protection of consumers against unfair terms could justify the clause being – at least – controlled by judges in order to determine whether it gives rise, for the consumer, to procedural conditions such to excessively restrict the right to an effective remedy conferred on him/her by the European Union legal order (*AquaMed*).

*Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

#### **France:**

In a 2016 decision, the Paris Appeal Court (*Cour d'appel de Paris, Pôle 2 – Chambre 2, 12 février 2016, no. 15/08624, Facebook*) decided that the contract concluded between a user of the social network provided by Facebook, and the company Facebook Inc., was a consumer contract. Even if the service was provided to users free of charge, Facebook Inc., which was a professional, gained important benefits from its activity. The contract was not individually negotiated.

The general terms and conditions of the contract included a choice-of-court provision, according to which the courts of California (USA) had exclusive jurisdiction over any litigation concerning the terms of the contract.

The Paris Appeal Court stated that pursuant to Article 15 and 16 of the Brussels I Regulation, the consumer could decide to bring its claim before the court of its place of domicile, which in that case was Paris. The Paris tribunal consequently had jurisdiction to rule on the choice-of-court provision included in the general terms and conditions of the contract.

Given that the choice-of-court provision included in the contract obliged the consumer to bring his/her claims against the professional before a court which was a long way from his/her domicile, and to incur costs disproportionate to the amount of money at stake, the French Court conclude that the practical difficulties and the costs of accessing the foreign court were likely to deter the consumer from bringing any claim and cause him/her to forgo any legal remedy or defence.

On the other hand, Facebook had an agency in France, and had financial and human resources making it easy for it to ensure its legal representation and defence before the French courts.

The Paris Appeal Court decided that the choice-of-court provision was unfair: it should be deleted, and the French courts should have jurisdiction over the claims brought by the consumer.

**The Appeal Court's reasoning was implicitly based on *Pannon*, on the principle of effective access to justice, and on the principle of proportionality.**

### 7.2.3. Question 4b) – *ex officio* control on choice-of-court provisions in transnational consumer contracts

4.b.) Should courts control choice-of-court provisions in transnational consumer contracts *ex officio*, if the consumer enters an appearance without challenging the jurisdiction of the designated court?

The above question has not been strictly dealt with by the CJEU. However, probable answers may be inferred from some of its decisions, in particular *Pannon*, *Amazon* and *Salvoni*.

#### The case

The situation would be the following: A consumer contract is concluded between a consumer having his/her residence in a Member State, and a professional having his/her establishment in another Member State. Notwithstanding Article 17 of the Brussels I Regulation, a term of the contract, which was not subject to individual negotiation, confers exclusive jurisdiction on the court in the jurisdiction in which the professional is established. The professional brings a claim against the consumer before the designated court, and the consumer enters an appearance without challenging the jurisdiction of the court on the basis of Article 17.

#### Possible question to be referred to the CJEU

Should the court raise, of its own motion, the fact that a choice-of-court clause conflicts with Article 17 of Regulation 44/2001 and verify whether the consumer has knowingly submitted to the jurisdiction of the designated court by entering an appearance without challenging

jurisdiction, even if pursuant to Article 26 (1) of Regulation 44/2001, the lack of jurisdiction can be raised *ex officio* only where the defendant does not enter an appearance?

Possible reasoning of the CJEU

In *Pannon*, the CJEU decided that a term contained in a domestic contract concluded between a consumer and a seller or supplier, which has been included without being individually negotiated and which conferred exclusive jurisdiction, within the Member State where both parties are domiciled, on the court in the territorial jurisdiction of which the seller or supplier has his/her principal place of business, may be considered unfair. If the term is found unfair, it must not apply, except if the consumer opposes that non-application. The decision is based **on the principle of effectiveness of access to justice**. A term of this kind obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence.

In *Amazon* (see 7.2 below), the CJEU concluded that a choice-of-law clause in the general terms and conditions of a professional which has not been individually negotiated, under which the contract concluded with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established, is unfair in so far as it leads the consumer into error by giving him/her the impression that only the law of that Member State applies to the contract, without informing him/her that under Article 6(2) of Regulation no. 593/2008 s/he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term.

Based on the **principle of the effectiveness of consumer protection**, it should then be considered that a choice-of-court provision is unfair in so far as it leads the consumer into error by giving him/her the impression that the court of the Member State where the professional has/her his establishment has exclusive jurisdiction, and deprives the consumer from an effective access to justice.

Consequently, even if Article 26(1) of the Brussels I Regulation limits the possibility for national courts to declare of their own motion that they have no jurisdiction to a situation where the defendant does not enter an appearance, it could be considered that **such courts shall *ex officio* raise the issue of jurisdiction where the defendant entering an appearance is a consumer.**

Because it is unfair, the choice-of-court term should only apply if the consumer, fully informed of his/her right to claim that another court has jurisdiction, opposes that non-application and explicitly confirms the jurisdiction of the designated court.

However, the reasoning should also take into account *Salvoni*, in which the CJEU considered that:

*“the case-law of the Court concerning Directive 93/13 is not applicable in the context of Regulation No 1215/2012, which lays down rules of a procedural nature, whereas Directive 93/13 is*

*intended to achieve minimum harmonisation of laws of the Member States concerning unfair terms in consumer contracts?*” (§44).

But still unclear is what the conclusion of the CJEU could be if a contractual clause, such as a choice-of-court provision, was at stake (which was not the case in *Salvoni*). Is it possible to consider that, because they are included in transnational contracts covered by the ‘Brussels I’ Regulation, the choice-of-court provisions are immune from any review in light of Directive 93/13?

#### Follow-up

Such a solution has actually been implemented in the context of the recast of the Brussels I Regulation. A new provision is introduced.

Article 26 (2) of Regulation no.1215/2012 (Brussels I recast):

*“In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.”*

### 7.2.4. Question 5 – Stay of proceedings in parallel proceedings

In the case of parallel proceedings brought by consumer associations and by consumers individually before courts of different Member States, should or could a stay of proceedings be decided?

#### Relevant EU provisions

##### **Article 27 (1) Regulation no.44/2001; Article 29(1), Regulation no.1215/2012**

“Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established”

##### **Article 28, Regulation no.44/2001; Article 30, Regulation no.1215/2012**

“1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings.

[...]

3 For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

The question above has not been strictly dealt with by the CJEU. However, probable answers might be inferred from some of the decisions of the court, in particular *Sales Sinués*.

### The case

The situation would be the same as in *Sales Sinués*, but the collective action of the consumer association and the individual action of the consumer would be brought before the tribunals of *different Member States*.

A consumer association brings a collective action before a tribunal of a Member State A, seeking an injunction prohibiting the continued use of an allegedly unfair clause in the general terms and conditions of a professional. Later, but while the collective action is still pending, a consumer brings an individual action, seeking the annulment of the same allegedly unfair clause, before a tribunal of Member State B, where he has his domicile.

### Possible question to be referred to the CJEU

Does any provision of Regulation no.1215/2012 (Brussels I recast) imply that the court seized by a consumer seeking the annulment of an allegedly unfair clause shall or may, eventually of its own motion, stay its proceedings until the court, first seized of an action brought by a consumer association seeking an injunction prohibiting the use of the same clause, gives its decision?

### Possible reasoning of the CJEU

The question first raises the issue, still undecided, of the determination of the tribunal having jurisdiction to rule on a cross-border action brought by a consumer association (see above under question 3.b).

Regulation Brussels I/Brussels I *bis* being applicable, should Article 27/29 (*lis pendens*) or Article 28/30 (related actions) apply to require/allow judges to stay proceedings in a case like the one described above?

The provisions on *lis pendens* are most certainly not applicable, given that they should apply only “*where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States*”. In the case at hand, the parties are clearly not the same, which is sufficient to decide that the provisions on *lis pendens* do not apply. The condition of “the same cause of action” could lead to further debate. However, as the CJEU puts it in *Sales Sinués*, “*individual and collective actions have, in the context of Directive 93/13, different purposes and legal effects*”.

The provisions on related actions could in theory apply to allow the court seized by the consumer to stay its proceedings until the court, first seized of the action brought by the association, decides on the unfairness of the clause. But the CJEU’s reasoning in *Sales Sinués* seems transposable. **The principle of effectiveness** of the protection intended by the Directive on unfair terms implies that the consumer should not be prevented from obtaining without further delay the individual redress sought through his/her individual action.

### Possible conclusion of the CJEU

Regulation Brussels I/Brussels I *bis* applies to determine the court having jurisdiction on cross-border actions brought by consumer associations, but the jurisdiction of the court shall be defined according to the ordinary rules on jurisdiction (general jurisdiction of the courts of the defendant’s domicile and specific jurisdiction of the courts in contractual/tort matters), not according to the rules protecting consumers.



The provisions on related actions set out in Regulation Brussels I/Brussels I *bis* shall be interpreted as not allowing a national court, before which a consumer brings an individual claim based on an allegedly unfair term, to stay its proceedings because of the existence of parallel proceedings ongoing before the courts of another Member State on the basis of an action brought by a consumer association seeking an injunction against the same unfair term.

### 7.2.5. The guidelines for judges that emerge from the analysis

1. The scope of application of the rules on jurisdiction of the Brussels I Regulation protecting consumers should be defined broadly. The definition should be based on the principle of effectiveness of the protection of consumers mitigated by the principle of proportionality (necessity to ensure a fair balance between the rights of the applicant/professional (access to justice) and those of the defendant/consumer (right to defence). This need for a broad application of the rules on jurisdiction protecting consumers should be emphasised by the national judge when questioning the CJEU on the rules applicable to passenger transport.
2. The interpretation of the rules on jurisdiction set by the Brussels I Regulation for cases involving consumers should be based on the principle of effectiveness of the protection of consumers mitigated by the principle of proportionality (necessity to ensure a fair balance between the rights of the applicant/professional (access to justice) and those of the defendant/consumer (right to defence)). For example, the protective rules on jurisdiction should apply to a consumer contract even if at the time when that contract was concluded the parties were domiciled in the same Member State and an international element emerged afterwards.
3. On the basis of the principle of effectiveness of consumer protection, judges should verify, *ex officio*, if a choice-of-court provision included in a transnational consumer contract meets the conditions set by Article 17 of Regulation 44/2001 (19 of Regulation 1215/2012) and if not, verify that the consumer knowingly accepts the application of such clause.
4. On the basis of the principle of effectiveness of consumer protection, a national court, before which a consumer brings an individual claim based on an allegedly unfair term, shall not stay its proceedings because of the existence of parallel proceedings ongoing before the courts of another Member State on the basis of an action brought by a consumer association seeking an injunction against the same unfair term.

## 7.3. The law applicable to cross-border consumer contracts

### Relevant CJEU cases in this cluster

- Judgement of the Court (Sixth Chamber) of 1 October 2002, *Verein für Konsumenteninformation and Karl Heinz Henkel*, Case C-167/00 (“Henkel”) - [link](#) to the database for analysis of the lifecycle of the case

- Judgement of the Court (Grand Chamber), of 15 March 2011, *Heiko Koelzsch v État du Grand-Duché de Luxembourg*, Case C-29/10 (“Koelzsch”)
- Judgement of the Court (First Chamber), of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Case C-472/10 (“Invitel”)
- Judgement of the Court (Third Chamber), of 23 April 2015, *Jean-Claude Van Hove v CNP Assurances SA*, Case C-96/14 (“Van Hove”)
- Judgement of the Court (Third Chamber) of 28 July 2016, *Verein für Konsumenteninformation (VKI) v Amazon EU Sàrl*, Case C-191/15 (“Amazon”) - [link](#) to the database for analysis of the lifecycle of the case
- Judgement of the Court (First Chamber), 3 October 2019, *Verein für Konsumenteninformation (VKI) v TVP Treuhand- und Verwaltungsgesellschaft für Publikumsfonds mbH & Co KG*, Case C-272/18, (“TVP Treuhand”)

#### Main questions addressed

- Question 6 Is it permitted to find a choice-of-law clause included in a consumer contract, invalid pursuant to the Rome I Regulation, unfair under the provisions of Directive 93/13? If so, shall a judge decide, *ex officio*, to set aside such an unfair choice-of-law clause, and apply the mandatory provisions of the country where the consumer has his/her residence instead?
- Question 7 When dealing with an action for an injunction within the meaning of Directive 2009/2002, brought against the use of unfair terms by an undertaking established in one Member State which concludes contracts by way of electronic commerce with consumers resident in another Member State, what law should be applied by judges to such action, and to the examination of the unfairness of the contractual terms?

#### Relevant legal sources

See § 7.1.

### **7.3.1. The unfairness of choice-of-law clauses in cross-border consumer contracts**

Question 1.a: Is it permitted to find a choice-of-law clause included in a consumer contract, invalid pursuant to the Regulation Rome I, unfair under the provisions of Directive 93/13?

Question 1.b.: If so, shall a judge decide, *ex officio*, to set aside such an unfair choice-of-law clause, and apply the mandatory provisions of the country where the consumer has his residence instead?

#### Introduction and relevant EU legal provisions

Regulation (EC) no. 593/2008 of 17 June 2008, on the law applicable to contractual obligation (Rome I) identifies the law applicable to transnational consumer contracts, by taking into account

the need to protect consumers. Whereas the normal rule is that the law applicable to a transnational contract shall be the law of the country of residence of the party performing the characteristic performance (i.e. the professional), the rule is reversed when applying to consumer contracts: **The law applicable to consumer contracts is the law of the country of residence of the consumer.** This is a protective rule, because even if the law of the country of residence of the consumer is not necessarily the one with the most protective content, it is usually the law that the consumer knows and relies on at the moment the contract is concluded. The rule is meant to correct the informational asymmetry between the consumer and the professional.

However, as in other contracts, the law applicable to consumer contracts may be chosen by the parties. It is then necessary to protect the consumer against the stronger party, who could impose a law, less favourable than the law of the country of residence of the consumer (normally applicable, in the absence of choice of law), as the applicable law. In order to do so, the Regulation states that **where there is a choice of law, the consumer cannot be deprived of the protection afforded to him/her by the mandatory provisions of the law of his/her country of residence.**

However, the protection furnished by Rome I only applies **when the professional has somehow favoured the conclusion of a cross-border consumer contract**, either by pursuing activities in the country of residence of the consumer, or by directing its activity towards that country.

#### **Article 6, ‘Consumer contracts’, Regulation Rome I.**

*1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:*

*(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or*

*(b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.*

*2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.*

It may be inferred from the letter of Article 6 of the Rome I Regulation that, if the conditions for the application of the protective regime are fulfilled, the consumer is, at a minimum, entitled to the protection of the law of his/her country of residence. For instance, if a contractual provision is unfair according to such law, the sanctions defined by this law should apply (even if the parties chose a different law as the law ruling the contract). This solution is commonly admitted when the action against the unfair contractual clause is brought by the consumer.

However, the protection is not totally efficient because the consumer may not be aware that s/he is entitled to claim for the application of the law of his/her country of residence. The CJEU case law has extended the protection.

### **7.3.2. Question 1a) - choice-of-law clause included in a consumer contract, invalid pursuant to the Regulation Rome I, and unfairness under Directive 93/13**

1.a: Is it permitted to find a choice-of-law clause included in a consumer contract, invalid pursuant to the Rome I Regulation, unfair under the provisions of Directive 93/13?

The main case dealing with this question is *Amazon*.

#### The case

Amazon EU, a company incorporated in Luxembourg, addresses consumers residing in Austria via a website with a domain name with the extension .de ; Amazon has no registered office in Austria.

VKI, an entity qualified to bring actions for injunctions within the meaning of Directive 2009/22, alleged the illegality and unfairness of several clauses of the general terms and conditions in Amazon contracts, including a choice-of-law clause according to which Luxembourg law applied to the contracts.

VKI brought an action before the Austrian courts for an injunction to prohibit Amazon's use of the unlawful terms in those general terms and conditions and for publication of the judgement to be delivered. One of the allegedly illegal clauses was a choice-of-law clause included by Amazon in its general terms and conditions, according to which Luxembourg law (the law of the Member State where the operator had its establishment) applied to its contracts.

#### Preliminary question referred to the CJEU

Is a term included in general terms and conditions under which a contract concluded in the course of electronic commerce between a consumer and an operator established in another Member State to be subject to the law of the State in which that operator is established, unfair within the meaning of Article 3(1) of Directive 93/13?

#### Reasoning of the CJEU

The Court recalled that EU legislation in principle allows choice-of-law terms in consumer contracts. Article 6(2) of the Rome I Regulation states that the parties may choose the law applicable to a consumer contract, provided that the consumer is ensured the protection which is afforded by provisions of the law of his/her country that cannot be derogated from by agreement (§66).

The Court also recalled what an unfair term is. It should be defined according to two criteria: (i) it has not been individually negotiated (which is always the case when it has been drafted in advance by the seller or supplier and the consumer has therefore not been able to influence the

substance of the term); and (ii) contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer (§62-65).

Consequently, a pre-formulated choice-of-law provision designating the law of the Member State in which the seller or supplier is established is unfair only in so far as it displays certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties (§67). It shall be the case if the term is not drafted in plain and intelligible language as stated in Article 5 of Directive 93/13. This requirement should be interpreted broadly, given the consumer's weak position *vis-à-vis* the seller or supplier with respect in particular to his/her level of knowledge. It follows that when the effects of a term are specified by mandatory statutory provisions, it is essential that the seller or supplier informs the consumer of those provisions (§67-68).

Whilst Article 6 of the Rome I Regulation allows choice-of-law provisions in consumer contracts, it also provides that the choice of applicable law must not have the result of depriving the consumer of the protection afforded to him/her by provisions that cannot be derogated from by agreement by virtue of the law which would have been applicable in the absence of choice. As a result, having regard to the mandatory nature of the requirement in Article 6(2) of the Rome I Regulation, the court, faced with a choice-of-applicable-law term will, where a consumer with his/her principal residence in a Member State, has to apply this Member State's statutory provisions which cannot be derogated from by agreement. It will be for the referring court to identify those provisions if need be (§69-70).

It is clear that, for the CJEU, the effective protection of consumers requires the effective implementation of the protection awarded to them by the Rome I Regulation. In this regard, it is not enough that a clause is invalid pursuant to the Rome I Regulation. An effective protection of the consumer implies that a choice-of-law provision, invalid pursuant to the Rome I Regulation, may also be declared unfair under the provisions of Directive 93/13.

#### *Conclusion of the CJEU*

“Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a term in the general terms and conditions of a seller or supplier which has not been individually negotiated, under which the contract concluded with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established, is unfair in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of Regulation No 593/2008 he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term, this being for the national court to ascertain in the light of all the relevant circumstances (§71).”

#### *Impact on the follow-up case*

Supreme Court, 14 December 2017

### Elements of judicial dialogue:

The CJEU used *Kasler* (C-26/13) to recall that, although it is for the national court to decide if a term meets the requirements of good faith, balance and transparency laid down by Directive 93/13, the CJEU has jurisdiction to elicit from the provisions of Directive 93/13 the criteria that the national court may or must apply when examining a contractual term, before defining the criteria that national courts should apply to assess the unfairness of a choice-of-law clause.

The CJEU referred to *Van Hove* and *Invitel* to propose criteria for the assessment of the unfairness of a choice-of-law provision. The need for a broad interpretation of the requirement of transparency of contractual terms, laid down by Directive 93/13, based on the idea that the consumer is in a weak position *vis-à-vis* the seller or supplier, as regards, in particular, his/her level of knowledge (*Van Hove*) implies that the professional should inform the consumer of mandatory statutory provisions where the effects of a term are specified by these provisions (*Invitel*). As a consequence, when the contract includes a term according to which the law applicable is the law of the Member State where the professional has his/her establishment, the professional should make it clear to consumers that such choice of law may not have the result of depriving them of the protection afforded to them by the mandatory provisions of their Member State of residence.

*Koelzsch*, on the law applicable to employment contracts, is not expressly referred to by the CJEU. Nevertheless, it is interesting to read both cases together to reach a conclusion on the duty for national courts to use *ex officio* powers to guarantee the application of protective EU conflict-of-law rules.

In *TVP Treuhand* (C-272/18), the CJEU extended the scope of the ruling in *Amazon*, stating that “*The foregoing considerations are not limited to a specific form for the conclusion of contracts, namely, inter alia, by electronic means, and are of a general nature*”. Consequently, a choice-of-law clause included in a trust agreement may be found unfair under the conditions settled in *Amazon*.

### Impact on national case law in Member State other than that of the court referring the preliminary question to the CJEU

#### **France**

See the previous concurring Recommendation of the Commission *des clauses abusives* (no. 2014-02, 7 nov. 2014): contractual terms according to which a foreign law is applicable are unfair because they lead consumers residing in France to believe that they cannot rely on the protection of the mandatory provisions of French law.

But also compare: C. Cass., Soc. 16 Dec. 1992, Bull. V no. 593, no. 89-44187 (and less conclusive: C. cass., Soc. 5 Dec. 2007, p. no. 06-43352), in which the *Cour de Cassation* decided that, in proceedings related to employment contracts (subjected to a “protective” conflict-of-law rule, Article 8 Rome I Regulation), French judges have no duty to compare, *ex officio*, the protection resulting from the chosen law and the protection resulting from the law that would be applicable in the absence of any choice of law.

### 7.3.3. Question 1b) – *Ex officio* powers, unfair choice-of-law clause, and application of mandatory provisions of the country where the consumer has his/her residence

1.b.: Shall a judge decide, *ex officio*, to set aside an unfair choice-of-law clause, and apply the mandatory provisions of the country where the consumer has his/her residence instead?

The relevant case is still *Amazon* (see question 1.b), from which the answer to the above question may be inferred.

The Rome I Regulation admits the choice of law in consumer contracts, but with safeguards for the consumer's protection (if the conditions of the protection are met). Considering that the chosen law may be imposed by the stronger party, who may be inclined to choose the law giving the lowest protection to the consumer, Article 6 (2) of the Rome I Regulation imposes that such choice of law shall not deprive the consumer of the protection given him/her by the law of his/her country of residence.

But what should happen if the professional were to bring a claim pursuant to the law chosen in the contract, without the consumer opposing the law of his/her country of residence, despite the fact that such law would be more favourable? Should the judge raise, *ex officio*, the applicability of the law of the consumer's country of residence?

This issue is subject to debate in Member States. On the one hand, in certain Member States, the general procedural rule is that, insofar as the rights at stake are not 'public order rights', but rather disposable rights ('*droits disponibles*'), judges should not apply conflict-of-law rules on their own motion. And it is considered that the consumer's right to demand the application of the law of his/her country of residence is not of a 'public order' nature once the litigation has arisen.

Consequently, judges are not in a position to verify, *ex officio*, whether the law of the consumer's residence is more protective (this is the usual position of the French *Cour de Cassation*, for instance). On the other hand, the CJEU has decided that judges should apply, *ex officio*, substantive rules protecting consumers in order to guarantee the effectiveness of the protection. In particular, they shall verify, *ex officio*, if the contract terms are unfair.

The question, therefore, is whether judges should apply, *ex officio*, the conflict-of-law rule of the Rome I Regulation to substitute the law of the consumer's residence if it is more favourable than the chosen law.

The reasoning of the CJEU in *Amazon* implied that this should be the case, at least in certain circumstances. The CJEU decided that a choice-of-law clause included in a consumer contract can be an unfair term if certain criteria are met. And if a choice-of-law clause is an unfair term, then the CJEU's case law according to which judges shall assess, *ex officio*, the unfairness of the contract terms and declare them void if needed, necessarily applies. **The principle of effectiveness of consumer protection** therefore implies that, when there is a choice-of-law clause in a consumer contract, judges shall verify, *ex officio*, if that clause is an unfair term, and if

so, apply *ex officio* the law of the country of residence of the consumer, instead of the chosen law (see §70 of the motives of the CJEU).

#### 7.3.4. Question 2 – The law applicable to collective actions brought against the use of unfair terms in consumer contracts

When dealing with an action for an injunction within the meaning of Directive 2009/2002, brought against the use of unfair terms by an undertaking established in one Member State which concludes contracts by way of electronic commerce with consumers resident in another Member State, what law should be applied by judges to such action, and to the examination of the unfairness of the contractual terms?

##### The case

The relevant case is *Amazon* (see above for a description of the case).

##### Preliminary question referred to the CJEU:

In short, as the CJEU put it (§35):

How should the Rome I and Rome II Regulations be interpreted for the purpose of determining the law or laws applicable to an action for an injunction within the meaning of Directive 2009/22 brought against the use of allegedly unlawful contractual terms by an undertaking established in one Member State which concludes contracts by way of electronic commerce with consumers resident in other Member States, in particular in the State of the court seized?

Whereas the full preliminary question was as follows: Must the law applicable to an action for an injunction within the meaning of Directive 2009/22 be determined in accordance with Article 4 of the Rome II Regulation when the action is directed against the use of unfair contract terms by an undertaking established in a Member State which in the course of electronic commerce concludes contracts with consumers resident in other Member States, in particular in the State of the court seized?

If so:

Must the country in which the damage occurs (Article 4(1) of the Rome II Regulation) be understood as every State towards which the commercial activities of the defendant undertaking are directed, so that the terms challenged must be assessed according to the law of the State of the court seized if the qualified entity challenges the use of those terms in commerce with consumers resident in that State?

Does a manifestly closer connection (Article 4(3) of the Rome II Regulation) with the law of the State in which the defendant undertaking is established exist when that undertaking's terms and conditions provide that the law of that State is to apply to contracts concluded by the undertaking?



Does a choice-of-law term of that kind entail on other grounds that the contractual terms challenged must be assessed in accordance with the law of the State in which the defendant undertaking is established?

If not:

How must the law applicable to the action for an injunction be determined?

*Reasoning of the CJEU:*

The CJEU first reiterated its previous case law related to the Brussels Convention and the Brussels I Regulation, according to which a preventive action brought by a consumer-protection association for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict (§38). This analysis was fully applicable to the interpretation of the Rome I and Rome II Regulations (§39).

The CJEU stated, secondly, that the adequate conflict-of-law rule was Article 6(1) of the Rome II Regulation, dealing with non-contractual obligations arising out of an act of unfair competition. The law applicable to the action shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected (§40). Such law is, in the case of an action for an injunction referred to in Directive 2009/22, the law of the country of residence of the consumers to whom the undertaking directs its activities and whose interests are defended by the relevant consumer protection association by means of that action (§43).

The Court rejected, thirdly, the application of the exception clause (Article 4 (3) Rome II) according to which: (a) another law may be applied when it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country; (b) a manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

The protection of collective interests would be impaired if the exception clause was to be applied, in particular for the purpose of favouring the law which, as the result of a choice-of-law clause included in the consumer contracts, rules such contracts?. It would allow the professional to choose the law to which a non-contractual obligation is subject, and thereby evade the conditions set out in that respect in Article 14(1)(a) of the Rome II Regulation (§44 - §47).

However, the Court recalled, fourthly, that in the context of the action for an injunction, submitted to the law of the country of residence of the consumers to whom the undertaking directs its activities, the law applicable to the examination of the unfairness of terms in consumer contracts must be determined independently, in accordance with the Rome I Regulation, given the nature of those terms (§49-52). Such interpretation is the only one ensuring that the applicable law does not vary according to the type of action (individual or collective) (§53-57). Any variation in the applicable law would abolish the consistency of assessment between collective actions and individual actions which the CJEU has established by requiring the national courts of their own motion to draw, including for the future, all the conclusions provided for in national law that

ensue from the finding, in an action for an injunction, that a term included in the general terms and conditions of consumer contracts is unfair, in order that such a term should not bind consumers who have concluded a contract containing those general terms and conditions (§56). This inconsistency would jeopardise the objective pursued by Directives 2009/22 and 93/13 of efficaciously putting an end to the use of unfair terms (§57).

The CoJEU finally noted that the choice of the applicable law (to the contractual terms) is without prejudice to the application of the mandatory provisions laid down by the law of the country of residence of the consumers whose interests are being defended by means of that action. Those provisions may include ones that transpose Directive 93/13, provided that they ensure a higher level of protection for the consumer, in accordance with Article 8 of that Directive (§59).

#### Conclusion of the CJEU:

The law applicable to an action for an injunction within the meaning of Directive 2009/22/EC, directed against the use of allegedly unfair contractual terms by a business established in a Member State which concludes contracts in the course of electronic commerce with consumers resident in other Member States, in particular in the State of the court seized, must be determined in accordance with Article 6(1) of Regulation no. 864/2007 (Rome II). In contrast, the law applicable to the assessment of a particular contractual term must always be determined pursuant to Regulation no. 593/2008 (Rome I), regardless of whether that assessment is made in an individual action or a collective one.

#### **Analysis of the decision of the CJEU: relevance of the principle of effectiveness**

The CJEU drew a distinction between the law ruling upon the injunction brought by the association (2), and the law regulating unfairness itself (1). This distinction raises some questions as to the scope of each law (3), and also as to the coordination of both laws (4).

(1) The law regulating the unfairness of the contractual provisions of consumer contracts shall be the same in collective actions, as well as in individual actions. It shall be the law ruling the consumer contract, i.e. pursuant to Article 6 of the Rome I Regulation, at a minimum, the protective rules set by the mandatory provisions of the country where the consumer/consumers has/have its/their residence (if the conditions for the protection are met). For the CJEU, this unification is a matter of effectiveness of protection, because it “is the only one ensuring that the applicable law does not vary according to the type of action (individual or collective)”. The CJEU emphasised that, following its previous case law, whenever a term has been found unfair in the context of a collective action, judges have to draw all the consequences of that finding in individual cases regarding the same term. At the European level, it would be a problem if a judge dealing with a collective action in one Member State were to apply one law to assess the unfairness of a term, whereas a judge dealing with an individual action in another Member State applied a different law to assess the unfairness of the same term, because the results of these two assessments could be different. Consistent assessments are needed; accordingly, the same law should be applicable in each Member State.

It seems possible to infer from the reasoning of the decision that the CJEU deems that not only judges from different Member States must apply the same law (designated by Article 6 Regulation Rome I) to assess the unfairness of contractual terms in individual cases as well as collective ones, but also that judges are bound, in individual cases, by the application of the law made by judges from a different Member State in a previous collective action.

(2) The law enacting the injunction is not necessarily, at least theoretically (see below on the consequences), the same as the one regulating the unfairness of the term. This is because the conflict-of-law rule applicable is not the same. Whereas the unfairness of the term is subject to the law ruling the contract pursuant to Regulation Rome I, the action for an injunction brought by a consumer association is not a contractual matter but a non-contractual one, within the meaning of Regulation Rome II. The law ruling the injunction is to be identified by applying Article 6 of the Rome II Regulation. The reasoning of the CJEU in reaching this conclusion *was entirely based on an analysis of the nature of the action*, and did not include explicit or implicit references to the principle of effectiveness.

However, the CJEU referred again to **the principle of effectiveness of consumer protection to analyse the consequences of a possible choice of law**. It recalled that, as far as the assessment of the unfairness of a term is concerned, a choice of the law ruling the contract by the parties may not jeopardise the protection of the consumer. It may not do so because the Rome I Regulation (applicable to this issue) states that the chosen law cannot deprive the consumer from the protection of the law of his/her country of residence. This means that, whatever the applicable law, a term will necessarily be found unfair if it is unfair according to the law of the country of the consumer's residence.

In light of this rule, the CJEU determined that the same protection is afforded when the Rome II Regulation is applicable (collective action). Pursuant to the Rome II Regulation, no choice of law is acceptable when the law is defined according to Article 6 (Article 6 excluded the application of Article 14). The CJEU, however, explored in depth the result of a possible combination of the exception clause set by Article 4 (3) of the Rome II Regulation and of a choice of the law ruling the consumer contract (Article 6, Rome I Regulation). Pursuant to the exception clause, the judge shall not apply the law normally applicable when it is evident from the circumstances of the case that there is a manifestly closer connection with a country other than the one whose law would be applicable (in which case, the judge shall apply the law of that country); and the provisions of the Regulation further specify that such a "*manifestly closer connection with another country*" might be based, in particular, on a pre-existing contractual relationship between the parties. Let us assume that in a consumer contract, there is a choice of law imposed by the stronger party, i.e. the professional. If it was possible to decide that the action for an injunction, normally subjected to the law of the consumer's country of residence pursuant to Article 6 Rome II, could be ruled by the law of the contract in application of the exception clause, then the consumer protection would be jeopardised, because the professional would be able to subject -- through the contract -- the collective action to a law less favourable for the consumer than the one that should apply. This is the reason why the CJEU excluded the application of the exception clause.

However, to fully understand the effects of this decision, it is necessary to analyse the respective scopes of the law regulating unfairness and of the law ruling the injunction.

(3) The **respective scopes of both laws** have not been defined by the CJEU, although important questions arise in this respect.

The scope of the law of the contract (regulating unfairness) should be defined according to Article 12 of the Rome I Regulation ("Scope of the law applicable"). This law should rule on:

- the assessment of unfairness;

- the consequences of the unfairness of a term: is the term invalid? Does the term's

invalidity impact on the validity of the contract as a whole? Is the consumer entitled to damages? What are the parties' obligations if the contract is void?

The scope of the law regulating the injunction should be defined negatively: it includes everything not falling within the scope of the law of the contract, which is not much. It seems that it should mainly cover the following question: is the consumer association qualified to bring the action?

However, this is not neutral, because the issue would otherwise normally be seen as a procedural one, and consequently be subjected to the law of the forum, i.e. the law of the country where the professional has its domicile (see above 7.1, question 3b, on the courts having jurisdiction). Let us assume that a professional established in Germany directs its activities to Austria and Austrian consumers. An Austrian consumer association brings a claim for an injunction before German courts. The admissibility of the action of the association should be decided according to Austrian law (instead of German law, which would be applicable if a procedural qualification was preferred); and the unfairness of the terms should be assessed with due consideration given to the mandatory provisions of Austrian law, even if there is a choice of law in the contract. Let us now assume the same situation, but with a German consumer association: the admissibility of the action brought by the German association against the German professional before the German Courts should be assessed, insofar as the protection of Austrian consumers is at stake, according to Austrian law (and not German law), which would also be applicable as a minimum protection for the assessment of the unfairness of the terms.

(4) With this example, it appears that the system should not create major **coordination issues**.

In the absence of choice of law (in the consumer contract), the same law will normally regulate the unfairness of the terms (and its remedies) and the injunction, even if the conflict-of-law rules are different: they both designate the law of the country of residence of the consumer (Article 6 of Rome I and Article 6 of Rome II).

If there is a choice of law (in the consumer contract, because there can be no choice of law for the injunction), and that chosen law is more favourable than the one of the consumer's country of residence, the chosen law will regulate the unfairness of the term, while the admissibility of the consumer association's claim will still be ruled by the law of the consumer's country of residence. This is not an issue as such, so long as the laws have clearly differentiated scopes. But questions regarding the scope may arise, in particular, when it comes to the remedies that the

association is allowed to claim for. In this respect, the question of whether the remedies available to the consumer association shall be subjected to the law of the contract or to the law ruling the injunction remains open.

Impact on the follow-up case:

Supreme Court, 14 December 2017

Elements of judicial dialogue:

In *Brogssitter (C-548/12)* and *Henkel*, the CJEU concluded that, in the context of the Brussels I Regulation and of the Brussels Convention 1968, a preventive action brought by a consumer-protection association for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention. The CJEU recalled that a consistent interpretation of Rome I Regulation, Rome II Regulation, and the Brussels I Regulation is needed before concluding that an action for an injunction under Directive 2009/22 relates to a non-contractual obligation arising out of a tort/delict within the meaning of Chapter II of the Rome II Regulation.

In *Invitel*, the CJEU decided that where the unfair nature of a term included in the GBC of consumer contracts has been recognised in an action for an injunction, the national courts are required, of their own motion, and also as regards the future, to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which those GBC apply will not be bound by that term. The CJEU considered that the effectiveness of this duty of the courts implied the consistency of assessment (of the unfairness of the contractual terms) between collective actions and individual actions, i.e. that such assessment should be subject to the same law in both types of actions. Hence the assessment should be subject to the law ruling the contract (Rome I), even if the action is subject to another law (pursuant to Rome II).

Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

**France**

The French *Cour de Cassation* decided in 2010 that the law ruling an action brought by a claimant on behalf of other parties is the law of the forum, applicable to procedural issues (Civ.1, 14 April 2010, no. 08-70.229).

### 7.3.5. The guidelines for judges that emerge from the analysis

Effective consumer protection and courts with jurisdiction on cross-border consumer cases.

The scope of application of the rules on jurisdiction set out in the Brussels I Regulation protecting consumers should be defined broadly. The definition should be based on the principle of effectiveness of consumer protection, mitigated by the principle of proportionality [necessity to ensure a fair balance between the rights of the applicant/professional (access to justice) and those of the defendant/consumer (right of the defence)]. The same EU principles should provide

guidance in the interpretation of the rules on jurisdiction stated by the Brussels I Regulation for cases involving consumers.

Even if the notion of ‘consumer’ is to be strictly construed for the purpose of applying Article 15 and 16 of Regulation no. 44/2001 (Article 17 & 18, Regulation no. 1215/2012), judges shall interpret it in light of the principle of effectiveness, taking protection of the consumer into account as the party deemed economically weaker and less experienced in legal matters than the other party to the contract. This weakness must be distinct from the knowledge and information that the person concerned actually possesses. The consequence is that activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement does not entail the loss of a private Facebook account user’s status as a ‘consumer’ within the meaning of that Regulation (*Schrems* case, C-498/16). However, jurisdiction cannot be established through the concentration of several claims concerning consumers domiciled in several MSs in the person of a single applicant, since the consumer is protected only in so far as s/he is, in his/her personal capacity, the plaintiff or defendant in proceedings (*Schrems* case, C-498/16). Possible future developments in EU consumer law may further clarify the role of collective redress mechanisms in securing access to justice (See, in the framework of the New Deal for Consumers, Article 16 of the proposal for a Directive on representative actions for the protection of the collective interests of consumers, repealing Directive 2009/22, COM (2018) 184 final).

In light of the principle of effectiveness of consumer protection, judges shall verify, *ex officio*, if a choice-of-court provision included in a transnational consumer contract meets the conditions set by Article 17 of Regulation 44/2001 (corresponding to Article 19 of Regulation 1215/2012) and if not, verify that the consumer knowingly accepts the jurisdiction of the tribunal designated by the clause.<sup>46</sup>

A national court, before which a consumer brings an individual claim based on an allegedly unfair term, shall not stay its proceedings because of the existence of parallel proceedings ongoing before the courts of another MS on the basis of an action brought by a consumer association seeking an injunction against the same unfair term.

#### *Ex officio powers to declare the unfairness of a choice-of-law clause.*

The principle of effectiveness implies that, when dealing with a choice-of-law clause in a consumer contract, judges shall verify, *ex officio*, if the clause is unfair by applying the criteria established by the CJEU on the basis of the provisions of Directive 93/13. A pre-formulated

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<sup>46</sup> According to Article 24 Regulation no. 44/2001 and Art. 26 Regulation no. 1215/2012, when a defendant enters an appearance before a court without challenging its jurisdiction, the jurisdiction of that court is prorogated. The rule applies even if the defendant is a consumer. According to Article 17 Regulation no. 44/2001 and Article 19 Regulation no. 1215/2012, the conditions are that the agreement: a) is entered into after the dispute has arisen; or b) allows the consumer to bring proceedings in courts other than those indicated in this Section; or c) is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

choice-of-law clause is unfair when it misleads the consumer on the scope of the protection that s/he is entitled to under Article 6(2) of the Rome I Regulation, securing the protection afforded to the consumer by provisions that cannot be derogated from an agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of default criteria set by the Regulation.

Moreover, if the conflict-of-law clause is an unfair term, the judge should apply *ex officio* the law of the country of residence of the consumer, instead of the chosen law (Amazon case C- 191/15, paragraph 70). This conclusion may not change in cases in which an injunction is sought with regard to the future use of such contract terms.: indeed, whereas the fairness assessment is subject to the Rome I Regulation being a matter of contractual obligations, only the use of terms and their prohibition have an extra-contractual nature, therefore falling under the Rome II Regulation (Amazon case C- 191/15).

## 8. Effective consumer protection in the digital era: online platforms, social networks and effective remedies

### 8.1. Social networks, online platforms and the boundaries of effective consumer protection: the status of consumers

#### Main questions addressed

- Question 1 In light of the principles of effectiveness, proportionality and dissuasiveness and of Article 47 CFR, how is the consumer's status to be interpreted in the context of social networks and online platforms?
- Question 2 Are there cases in which the supplier is also to be considered a consumer with regard to its relationship with the platform?

#### Relevant European cases in the cluster:

- CJEU, 25 January 2018, *Maximilian Schrems v. Facebook Ireland Limited*, C-498/16
- CJEU, 5 June 2018, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH* (interveners: Facebook Ireland Ltd, Vertreter des Bundesinteresses beim Bundesverwaltungsgericht) (hereinafter *Facebook Holstein*), C-210/2016
- CJEU, *A.B., B.B. v. Personal Exchange International Limited*, C-774/19, 10 January 2020,
- CJEU, *'Tiketa' UAB v. M.S. other party: 'Baltic Music' Vsl*, C536/20, 24 February 2022
- CJEU, *DM v. CTS Eventim AG & Co. KGaA*, C-96/21, 31 March 2022

#### 8.1.1. Question 1 – Consumer status in online platforms

In light of the principles of effectiveness, proportionality and dissuasiveness and of Article 47 CFR, how is the consumer's status to be interpreted in the context of social networks and online platforms?

#### The case

Mr Schrems has been a user of the social network Facebook since 2008. Initially, he used that social network only for personal purposes under a false name. Since 2010, he has been using a Facebook account solely for his private activities such as exchanging photos, chatting, and posting with approximately 250 Friends. In that account he wrote his name using the Cyrillic alphabet in order to prevent any searches under his name. In addition, in 2011, he opened a Facebook page registered and established by him, in order to report to internet users on his legal proceedings against Facebook Ireland, his lectures, his participation in panel debates, and his media appearances, as well as to call for the donation of funds and to publicise his books.

From August 2011, Mr Schrems lodged before the Irish Data Protection Commissioner 23 complaints against Facebook Ireland, one of which gave rise to a reference for a preliminary ruling before the Court (judgement of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650).



Mr Schrems published two books on his legal proceedings against alleged infringements of data protection, gave lectures, some of which were remunerated, in particular with professionals, registered a number of internet websites such as blogs, online petitions, as well as crowdfunding sites to finance legal proceedings against the defendant in the main proceedings. Furthermore, he founded an association which seeks to uphold the fundamental right to data protection. He received various prizes and had assigned to him, by more than 25 000 people worldwide, claims to be brought in the case considered here.

The association founded by Mr Schrems and seeking to enforce data protection is a non-profit organisation, the purpose of which is to seek to uphold the fundamental right to data protection, to provide the required associated work on communication and the media and on policy clarification. Its objective is to provide financial support for test cases of public interest brought against undertakings which potentially endanger that fundamental right. The necessary costs are also funded and the corresponding donations gathered, administered and distributed.

Mr Schrems claimed, in essence, that the defendant had committed numerous infringements of data protection provisions, *inter alia* provisions of the *Datenschutzgesetz 2000* (Austrian Law of 2000 on data protection), of the Irish Data Protection Act 1988, or of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

#### Preliminary questions referred to the CJEU

- “(1) Is Article 15 of Regulation 44/2001 to be interpreted as meaning that a “consumer” within the meaning of that provision loses that status if, after the comparatively long use of a private Facebook account, he publishes books in connection with the enforcement of his claims, on occasion also delivers lectures for remuneration, operates websites, collects donations for the enforcement of his claims and has assigned to him the claims of numerous consumers on the assurance that he will remit to them any proceeds awarded, after the deduction of legal costs?”

#### The CJEU’s reasoning:

The referring court asked, in essence, whether Article 15 of Regulation no. 44/2001 must be interpreted as meaning that the activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of a private Facebook account user’s status as a ‘consumer’ within the meaning of that article.

The notion of a ‘consumer’ for the purposes of Articles 15 and 16 of Regulation no. 44/2001 must be strictly construed, reference being made to the position of the person concerned in a particular contract, having regard to the nature and objective of that contract and not to the subjective situation of the person concerned, since the same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others (see, to that effect, judgements of 3 July 1997, *Benincasa*, C-269/95, EU:C:1997:337, paragraph 16, and of 20 January 2005, *Gruber*, C-464/01, EU:C:2005:32, paragraph 36). [29]

Only contracts concluded outside and independently of any trade or professional activity or purpose, solely in order to satisfy an individual's own needs in terms of private consumption, are covered by the special rules laid down by the regulation to protect the consumer as the party deemed to be the weaker party. Such protection is, however, unwarranted in the case of contracts for the purpose of a trade or professional activity (see, to that effect, judgement of 20 January 2005, *Gruber*, C-464/01, EU:C:2005:32, paragraph 36).

As regards, more particularly, a person who concludes a contract for a purpose which is partly concerned with his/her trade or profession and is therefore only partly outside it, the CJEU held that s/he could rely on those provisions only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety (see, to that effect, judgement of 20 January 2005, *Gruber*, C-464/01, EU:C:2005:32, paragraph 39).

It is in light of those principles that it is appropriate to examine whether circumstances such as those at issue in the main proceedings do not entail the loss of a Facebook account user's status as a 'consumer' within the meaning of Article 15 of Regulation no. 44/2001.

#### *The CJEU's Conclusions:*

The CJEU interpreted the position of the consumer broadly by considering the relationship between the platform and its users. In order to provide effective consumer protection under Article 47 TFEU to platform users, the CJEU needed to provide for an extensive interpretation of the status of consumers in their relationships with platforms. In this respect, regardless of a user's activity within the platform and of his/her possible professional activity in it, the CJEU considered users to be consumers. It did not focus on their activity within the platform but on their contractual position with respect to the platform. Hence, whenever platform users are in an imbalance position in their contractual relationship with the platform – essential for European consumer protection regulations to apply – the CJEU expanded the status of consumers to embrace those users and hence those contracts with platforms.

More concretely, the CJEU stated that Article 15 of Regulation no. 44/2001 must be interpreted as meaning that the activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of a private Facebook account user's status as a 'consumer' within the meaning of that article.

The second relevant CJEU case dealing with consumer status in contracts between platforms and users is *Facebook Holstein* issued in June 2018. *Facebook Holstein* contrasts with *Schrems*, presented above, in that the contractual obligations *Facebook Holstein* focuses on the obligations part of the relationship not only between the digital platform and its users but also among the platform's users.

The *Facebook Holstein* case dealt with whether *Wirtschaftsakademie*, an administrator of a fan page hosted on Facebook, should be regarded as the 'controller' of the personal data of the visitors to the fan page jointly with Facebook Ireland and Facebook Inc. within the meaning of Article 2(d) of Directive 95/46. Consequently, the CJEU, in *Facebook Holstein*, addressed the issue of whether

platform users, regardless of their status, should be subject to obligations on data protection jointly with the digital platform.

As the administrator of a fan page on Facebook, *Wirtschaftsakademie* benefited from offering its services on that platform. The issue was whether the page was to be regarded as a ‘controller’ of data and hence subject to the obligations of data protection provided by European law.

In order to provide effective and complete protection to individuals involved in data processing (judgement of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 34), the CJEU Article 2(d) of Directive 95/46 broadly defined a ‘controller’ as the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.

In this regard, the CJEU noted that *Wirtschaftsakademie*, when creating a fan page on Facebook, entered into a contract with Facebook Ireland that included the conditions of use of the page and the cookies policy, among others.

The creation of the fan page enabled Facebook to place cookies on the computer or other device of a person visiting its fan page, whether or not that person had a Facebook account. Further, the administration could use the filters made available by Facebook and define the criteria in accordance with which the statistics were to be drawn up. It could even designate the categories of persons whose personal data were to be made use of by Facebook. From this perspective, the administrator of a fan page hosted on Facebook, such as *Wirtschaftsakademie*, had to be regarded as taking part in the definition of parameters depending in particular on its target audience and the objectives of managing and promoting its activities, in the determination of the purposes and means of processing the personal data of the visitors to its fan page – regardless of whether they had a Facebook account.

According to the CJEU, this resulted in the administrator of a fan page to be considered as a controller responsible for the processing of data jointly with Facebook Ireland under Article 2(d) of Directive 95/46.

The CJEU established that the holder of a Facebook fan page offering educational services in that platform was to be regarded as ‘controller’ and hence subject to obligations regarding the processing of personal data jointly with Facebook. When defining those obligations, the CJEU argued that consideration should be made of all relevant circumstances of the particular case so that their obligations might not be equivalent to, nor simultaneous with, those of Facebook since they might be established at different stages of processing personal data.

In sum, focusing on the triangular contract structures enabled by digital platforms, the status of consumer – or not – of a platform user with respect to the platform did not exempt him/her from the obligations, in this case of data protection, with respect to other platform users. In *Facebook Holstein* the CJEU seems to have distinguished the rights and obligations between platform users and the platform – which were not the main object of the case, in contrast with *Schrems* – from the ones involved in the relationships among platform users.

The CJEU concluded that, regardless of the status with respect to the platform, platform users may have obligations with respect to other platform users jointly with – but not necessarily equivalently to – the platform.

Determination of the circumstances defining the status of consumer has continued to be the focus of the CJEU. Specifically, in *A.B., B.B. v. Personal Exchange International Limited*, C-774/19 the CJEU established the relevant variables that could result in a poker player being considered a consumer.

### The case

B.B. was a poker player in Slovenia and opened a user account at Personal Exchange International (PEI), which offered online gambling services via the website [www.mybet.com](http://www.mybet.com). To open the account, he accepted the general terms and conditions established by PEI. One of the terms and conditions provided that the Republic of Malta had jurisdiction over any dispute relating to contractual relationships with the website.

From 31 March 2010 to 10 May 2011, B.B. won approximately 227,000 euros from playing poker on the website. On 10 May 2011, B.B.'s account was blocked by PEI and the earnings were withheld by PEI on the ground that B.B. had infringed the rules of play established by PEI by creating an additional user account for which he used A.B.'s name and data.

The issue arising in the case concerned determination of the court with jurisdiction over the dispute. PEI claimed that the terms and conditions in the contract established that courts of the Republic of Malta had jurisdiction over any contractual dispute, while B.B. claimed that his status as a consumer allowed him to bring proceedings before Slovenian courts, which were the courts of the country where he was domiciled.

The Slovenian court of first instance recognized the jurisdiction of Slovenian courts, relying on B.B.'s status as a consumer. PEI appealed, but the Slovenian appeals court upheld the judgement. PEI appealed before the Slovenian Supreme Court, which put preliminary questions to the CJEU.

### Preliminary questions referred to the CJEU

- “(1) Is Article 15 of Regulation 44/2001 to be interpreted as meaning that a natural person domiciled in a Member State who has concluded with a company established in another Member State a contract to play poker on the Internet, containing general terms and conditions determined by that company, and, secondly, has neither officially declared such activity nor offered it to third parties as a paid service loses the status of a “consumer,” within the meaning of that provision, where that person plays the game for a large number of hours per day and receives substantial winnings from that game.”

### The CJEU's Reasoning:

The CJEU stated that under Articles 15 to 17 of Regulation 44/2001 the status of consumer should be strictly construed based on the position of the person concerned in a particular contract, having regard to the nature and objective of that contract and not to the subjective situation of the person concerned, since the same person may be regarded as a consumer in relation to certain transactions and not with respect to others. The CJEU further stated that only contracts concluded solely for the purpose of satisfying an individual's own needs in terms of

private consumption are covered by consumer protection rules (judgement of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37, paragraph 30 and the case law cited).

The CJEU examined whether factors such as the size of the sums B.B. won in the poker games, which enabled him to live on those winnings, as well as that person's knowledge and the regularity of the activity, were within the meaning of 'consumer' under Article 15(1) of Regulation no. 44/2001.

The CJEU offered a four-part analysis. First, with respect to the amounts earned by B.B., it established that the scope of Articles 15 and 17 of Regulation no. 44/2001 was not limited to particular amounts earned by the consumer and, hence, the fact that B.B. could live on those winnings was not, in itself, a decisive factor in determining whether he had the status of a 'consumer'. Second, the CJEU considered that the knowledge B.B. had and which enabled him to win large sums of money from the poker games was not the objective element that differentiates consumer and 'economic operator' under Article 15(1). Third, the status of consumer referred to the position of that person in a particular contract having regard to the nature and purpose of that contract. Finally, the fact that B.B. played poker online regularly – it was established that he spent on average nine hours per working day playing the game – could be a factor to take into account for consideration of B.B. as a trader and not a consumer; but it did not result, by itself, in the classification of B.B. as a trader because his gambling did not give rise to the sale of goods or a supply of services to third parties as in other cases (such as, for example, *Kamenova*, C-105/17).

#### The CJEU's Conclusions:

The CJEU established that the various factors cited by the parties as relevant to consideration of B.B. as a consumer, such as the amount of his winnings from the poker games, possible knowledge or expertise, and the regularity of his activity as a poker player did not, by themselves, cause that person to lose his or her status as a 'consumer' under Article 15(1) of Regulation no. 44/2001. It further asked the referring court whether, in light of the facts available to it, B.B. had acted outside and independently of any professional activity.

### **8.1.2. Question 2 – Suppliers as consumers in digital platforms**

Are there cases in which the supplier is also to be considered a consumer with regard to its relationship with the platform so as to enlarge the scope of consumer protection? If so, shall this interpretation be based on the principle of effective judicial protection or on Article 47, Charter?

The economic activity that takes place in a digital environment allows for triangular contractual relationships. First, there are relationships between the platform and its users: the suppliers and demanders, who, in turn, may be professionals and/or non-professionals. The second contractual relationship takes place between platform users, professionals or non-professionals.

The question presented here refers to whether there are cases where the CJEU has considered that a platform user reporting to internet users about his professional activity – such as his legal proceedings against Facebook Ireland, his lectures, participation in panel debates and media

appearances, as well as calls for donation of funds – on a digital platform may be considered a consumer with respect to the platform itself.

This issue has in a way been addressed in *Schrems*. In that case, the CJEU established that a platform user, despite reporting his professional activity within the online platform to other platform users, could be considered a consumer with respect to the platform itself.

The CJEU in *Schrems* seemed to take a strict contractual approach to the consumer's status, which it based on the contractual position of the parties. The CJEU established that even when the platform user is conducting activities for profit within the platform, the nature of the relationship with the platform should be strictly construed so that a person concerned in a particular contract, considering the nature and objective of that contract and not the subjective situation of the specific contracting party, may be categorized as a consumer with respect to the platform under Article 15 of Regulation no. 44/2001 and an economic operator with respect to others.

Two recent cases have dealt with the determination of digital platforms acting as intermediaries as traders in the underlying transaction. The consideration of intermediary digital platforms as traders is fundamental because it puts the digital platform in the same position as the professional seller – who at the same time might be another digital platform – with respect to fulfilling the consumer's rights in the transaction.

The CJEU focused on the determination of the status as trader of the intermediary digital platform in *Tiketa* C526/20 under Article 2(2) of Directive 2011/83. *Tiketa* was a digital platform acting as an intermediary, selling tickets on behalf of other traders. The issue in that case was whether this structure of two-level provision of services relieved – or not – the party ultimately interacting with the consumer, the intermediary, of his/her status as a trader.

The CJEU first established that the concept of trader, based on Article 114 TFEU and as defined under Directives 2011/83 and 2005/29 should be interpreted uniformly given that it aims at the same objective, that is, ensuring a high level of consumer protection at the legislative, regulatory, and administrative levels. Article 2 (point 2) of Directive 2011/83 provides that traders are natural or legal persons acting for purposes relating to their trade business, craft, and profession but also those natural or legal persons acting as intermediaries in the name of or on behalf of that person without needing to establish the existence of the twofold structure of the provision of services. The CJEU further established that providing the information required in Article 6(1) of Directive 2011/83, such as the geographical situation of the trader in the general terms and conditions accepted by ticking a box, was sufficient as long as the consumer was also provided with a durable copy of the contract, as stated in Article 8(7) of that Directive.

Related to this case, the CJEU addressed in *Eventim AG & Co. KGaA*, C-96/21 whether consumers' rights or their exemption are conditioned by the fact that the consumer contracted with an intermediary digital platform acting on behalf of another seller. *Eventim* is a digital platform providing ticket agency services. DM, the consumer, ordered tickets through a platform operated by *Eventim* for a concert that was supposed to take place in March 2020. Due to Covid-19, the concert was cancelled, and a month later DM requested reimbursement of the purchase

price of the tickets and the ancillary costs of the transaction from Eventim. The German court understood that DM was withdrawing from the contract.

The issue before the CJEU was whether the exception to the right of withdrawal set out in Article 16(l) of Directive 2011/83 should benefit only the direct provider of a service related to a leisure activity – the concert organizer – and not a provider of a ticket agency service whose activity was limited to providing the right of access to that concert.

The CJEU decided that the service of providing a ticket to access a leisure activity like a concert could be considered as being related to the main activity – the concert – as long as the risk linked to the setting aside of the capacity thus released falls on the organizer of the activity concerned (Article 16(l) of Directive 2011/83).

Consequently, the CJEU held that the obligation to reimburse DM for the tickets and the ancillary costs resulting from the cancellation of the concert applied to the concert organizer and not to Eventim, the digital platform acting as an intermediary selling the tickets for the concert, as long as the leisure activity that would give access to the right of withdrawal was scheduled to take place on a specific date or period and the result of the application of the exception of the right of withdrawal under Article 16(l) of Directive 2011/83 would place the risk on the direct organizer of the activity.

## **8.2. Online platforms and effective protection against unfair terms/unfair commercial practices**

For a more in-depth analysis from a private international law perspective, see Chapter 7.

### Main questions addressed

Question 3 In the context of online platforms and in light of the principle of effectiveness and of Article 47 CFR, should Article 3(1) of Directive 93/13/EEC be interpreted as meaning that a non-individually negotiated contractual term included in an electronic contract providing that the contract is governed by the law of the Member State in which the seller or the supplier is established may be considered unfair if it induces the consumer to believe that the only law applicable to the contract is that of the Member State – and not mandatory provisions of the law.

### Relevant national cases in the cluster:

- CJEU, 28 July 2016, *Verein für Konsumenteninformation (VKI) v Amazon EU Sàrl*, Case C-191/15

### The case

Amazon EU is a company established in Luxembourg belonging to an international mail order group which, among other activities, via a website with a domain name with the extension .de, addresses consumers residing in Austria, with whom it concludes electronic sales contracts. The company has no registered office or establishment in Austria.

Until mid-2012 the general terms and conditions in the contracts concluded with those consumers were worded as follows:

*“1. Terms of the purchaser that differ from these will not be recognised by Amazon.de unless it has expressly agreed in writing to their application.*

...

*6. In the case of payment on receipt of invoice and in other cases where there are legitimate grounds for doing so, Amazon.de will check and evaluate the data provided by the purchaser and exchange data with other firms in the Amazon group, economic information agencies and, where appropriate, with Bürgel Wirtschaftsinformationen GmbH & Co. KG, Postfach 5001 66, 22701 Hamburg, Germany.*

...

*9. In our decisions on use of payment on receipt of invoice we use — in addition to our own data — probability values to assess the risk of default which we obtain from Bürgel Wirtschaftsinformationen GmbH & Co. KG, Gasstraße 18, 22761 Hamburg, and informa Solutions GmbH, Rheinstraße 99, 76532 Baden-Baden [(Germany)]. ... The firms specified are also used to validate the address data you supply.*

...

*11. If the user chooses to provide content on Amazon.de (e.g. customer reviews), he shall grant Amazon.de for the duration of the underlying right an exclusive licence without any limitation with regard to time or place to make further use of the content for any purpose whatsoever both online and offline.*

*12. Luxembourg law shall apply, excluding [the United Nations Convention on the International Sale of Goods].”*

The VKI, which is an entity qualified to bring actions for injunctions within the meaning of Directive 2009/22, brought an action before the Austrian courts for an injunction to prohibit the use of all the terms in those general terms and conditions and for publication of the judgement to be delivered, as it considered that those terms were all contrary to legal prohibitions or accepted principles of morality.

#### [Preliminary questions referred to the CJEU](#)

The Oberster Gerichtshof (Supreme Court, Austria), referred the following questions to the CJEU for a preliminary ruling:

*“(1) Must the law applicable to an action for an injunction within the meaning of [Directive 2009/22] be determined in accordance with Article 4 of [the Rome II Regulation] where the action is directed against the use of unfair contract terms by an undertaking established in a Member State which in the course of electronic commerce concludes contracts with consumers resident in other Member States, in particular in the State of the court seised?*

*(2) If Question 1 is answered in the affirmative:*

*(a) Must the country in which the damage occurs (Article 4(1) of the Rome II Regulation) be understood as every State towards which the commercial activities of the defendant undertaking are directed, so that the terms challenged must be assessed according to the law of the State of the court seised if the qualified entity challenges the use of those terms in commerce with consumers resident in that State?*

*(b) Does a manifestly closer connection (Article 4(3) of the Rome II Regulation) with the law of the State in which the defendant undertaking is established exist where that undertaking’s terms and conditions provide that the law of that State is to apply to contracts concluded by the undertaking?*



(c) Does a choice-of-law term of that kind entail on other grounds that the contractual terms challenged must be assessed in accordance with the law of the State in which the defendant undertaking is established?

(3) If Question 1 is answered in the negative:

How then must the law applicable to the action for an injunction be determined?

(4) Regardless of the answers to the above questions:

(a) Is a term included in general terms and conditions under which a contract concluded in the course of electronic commerce between a consumer and an operator established in another Member State is to be subject to the law of the State in which that operator is established unfair within the meaning of Article 3(1) of [Directive 93/13]?”

### The CJEU's Reasoning:

With its first three questions, which should be considered together, the referring court essentially sought to know how the Rome I and Rome II Regulations should be interpreted for the purpose of determining the law or laws applicable to an action for an injunction within the meaning of Directive 2009/22 brought against the use of allegedly unlawful contractual terms by an undertaking established in one Member State which concludes contracts by way of electronic commerce with consumers resident in other Member States, in particular in the State of the court seized. The CJEU answered these three questions as follows.

In light of the aim of consistent application mentioned in paragraph 36 above, the view that, in matters of consumer protection, non-contractual liability extends also to the undermining of legal stability by the use of unfair terms which it is the task of consumer protection associations to prevent (see, to that effect, the judgement of 1 October 2002 in *Henkel*, C-167/00, EU:C:2002:555, paragraph 42) is fully applicable to the interpretation of the Rome I and Rome II Regulations. It must therefore be considered that an action for an injunction under Directive 2009/22 relates to a non-contractual obligation arising from a tort/delict within the meaning of Chapter II of the Rome II Regulation.

In the case of an action for an injunction referred to in Directive 2009/22, the country in which the collective interests of consumers are affected within the meaning of Article 6(1) of the Rome II Regulation is the country of residence of the consumers to whom the undertaking directs its activities and whose interests are defended by the relevant consumer protection association by means of that action.

In any event, the fact that Amazon EU provides in its general terms and conditions that the law of the country in which it is established is to apply to the contracts that it concludes cannot legitimately constitute such a manifestly closer connection.

On the other hand, the law applicable in examination of the unfairness of terms in consumer contracts which are the subject of an action for an injunction must be determined independently in accordance with the nature of those terms. Thus, when the action for an injunction aims to prevent such terms from being included in consumer contracts in order to create contractual obligations, the law applicable to the assessment of the terms must be determined in accordance with the Rome I Regulation.

In the case considered, the allegedly unfair terms which were the subject of the action for an injunction in the main proceedings had, for the consumers to whom they were addressed, the nature of contractual obligations within the meaning of Article 1(1) of the Rome I Regulation.

The CJEU then stated that if, in a collective action, the contractual terms concerned had to be examined in the light of the law designated as applicable under Article 6(1) of the Rome II Regulation, there would be a risk that the criteria of examination would be different from those used in an individual action brought by a consumer.

In the examination of terms in an individual action brought by a consumer, the law designated as applicable as the law of the contract may be different from the law designated as applicable to an action for an injunction as the law of the tort or delict. The CJEU noted in this respect that the level of protection of consumers still varies from one Member State to another, in accordance with Article 8 of Directive 93/13, so that the assessment of a term may vary, other things being equal, according to the applicable law.

The law applicable to an action for an injunction within the meaning of Directive 2009/22 must be determined in accordance with Article 6(1) of the Rome II Regulation where what is alleged is a breach of a law aimed at protecting consumers' interests with respect to the use of unfair terms in general terms and conditions, whereas the law applicable to the assessment of a particular contractual term must always be determined pursuant to the Rome I Regulation, whether this is in an individual action or in a collective action.

However, the CJEU stated that, where in an action for an injunction an assessment is being made of whether a particular contractual term is unfair, it follows from Article 6(2) of the Rome I Regulation that the choice of the applicable law is without prejudice to the application of the mandatory provisions laid down by the law of the country of residence of the consumers whose interests are being defended by means of that action. Those provisions may include the provisions transposing Directive 93/13, provided that they ensure a higher level of protection for the consumer, in accordance with Article 8 of that directive.

The CJEU's answer to the above three questions was therefore that the Rome I and Rome II Regulations must be interpreted as meaning that, without prejudice to Article 1(3) of each of those regulations, the law applicable to an action for an injunction within the meaning of Directive 2009/22 directed against the use of allegedly unfair contractual terms by an undertaking established in a Member State which concludes contracts in the course of electronic commerce with consumers resident in other Member States, in particular in the State of the court seized, must be determined in accordance with Article 6(1) of the Rome II Regulation, whereas the law applicable to the assessment of a particular contractual term must always be determined pursuant to the Rome I Regulation, whether that assessment is made in an individual action or in a collective action.

#### **Question 4(a)**

By Question 4(a) the referring court sought to know whether a term in the general terms and conditions of a contract concluded in the course of electronic commerce between a seller or supplier and a consumer, under which the contract is to be governed by the law of the Member State in which the seller or supplier is established, is unfair within the meaning of Article 3(1) of Directive 93/13.

Article 6(2) of the Rome I Regulation provides that the parties may choose the law applicable to a consumer contract, provided that the protection is ensured which the consumer is afforded by provisions of the law of his country that cannot be derogated from by agreement.

It is essential that the seller or supplier informs the consumer of those provisions (see, to that effect, judgement of 26 April 2012 in *Invitel*, C-472/10, EU:C:2012:242, paragraph 29). That is the case of Article 6(2) of the Rome I Regulation, which provides that the choice of applicable law must not have the result of depriving the consumer of the protection afforded to him/her by provisions that cannot be derogated from by agreement by virtue of the law which would have been applicable in the absence of choice.

Article 3(1) of Directive 93/13 must be interpreted as meaning that a term in the general terms and conditions of a seller or supplier which has not been individually negotiated, under which the contract concluded with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established, is unfair in so far as it leads the consumer into error by giving him/her the impression that only the law of that Member State applies to the contract, without informing him/her that, under Article 6(2) of the Rome I Regulation, s/he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term, this being for the national court to ascertain in the light of all the relevant circumstance

#### *The CJEU's Conclusions:*

This case concerned the information that consumers should have regarding the consequences of the unfairness of a non-negotiated contract term in an electronic contract. In this regard, the CJEU established that consumers should be informed not only of the law applicable to the contract – in this case, an electronic contract – but also of the mandatory provisions of the law applicable in the case of unfairness of a non-negotiated contract term.

A seller or supplier may inform the consumer that a contract entered in the course of an electronic transaction is to be governed by the law of the Member State in which the seller or supplier is established. However, the consumer should further be informed that under Article 6(2) of Regulation 593/2008 s/he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term.

A clause inducing the consumer to believe that the only law applicable to the contract is that of the Member State where the seller or the supplier is established would result in its being considered unfair under Article 3(1) of Directive 93/13.

### **8.3. Consumer contracts in a digital environment**

#### **8.3.1. Online platforms and lack of transparency of terms and conditions:**

##### *Main questions addressed*

Question 1      In light of the principle of effective consumer protection, would transparency requirements in distance contracts be met when the general terms and conditions of a contract for sale are accepted by means of ‘click-wrapping’?

Question 2 How are the duties of information distributed between the platform and the supplier when the platform is not the supplier in cases in which a) the supplier is a consumer or b) is a professional?

Relevant national cases in this cluster:

- CJEU, *Jaouad El Majdoub*, C-322/14, 21 May 2015

### 8.3.2. Question 1 – General terms and conditions of a contract for sale by means of ‘click-wrapping’

In light of the principle of effective consumer protection, would the acceptance of terms and conditions of a distance contract by means of ‘click-wrapping’ constitute an electronic communication subject to transparency requirements and allowing an effective protection of consumer rights?

The case

A car dealer established in Cologne (Germany), purchased from the website of the defendant in the main proceedings, whose registered office is in Amberg (Germany), an electric car for a very low price. However, the sale was cancelled by the seller on account of damage allegedly sustained by that vehicle, which was noted during preparations for its transport to the purchaser.

Taking the view that the reason given was only a pretext for the cancellation of that sale, which was disadvantageous to the seller on account of the low sale price, the applicant in the main proceedings brought an action before the *Landgericht Krefeld* seeking an order that the defendant transfer ownership of that vehicle.

The applicant in the main proceedings claimed that his contracting partner was the defendant in the main proceedings, established in Germany, and not its parent company, established in Belgium. Consequently, the referring court has jurisdiction to deal with the case in question. The defendant in the main proceedings contended that the German courts did not have jurisdiction in the case. Article 7 of the general terms and conditions for internet sales transactions, accessible on the defendant’s website, contains an agreement conferring jurisdiction on a court in Leuven (Belgium). In addition, it claimed that it was not the contracting partner of the applicant in the main proceedings; rather, its parent company had that status. The applicant in the main proceedings could not have been unaware of that, because he had requested the Belgian parent company to issue an invoice without VAT, which was sent to him mentioning the parent company’s contact details; and he had paid the price of the motor vehicle at issue into a Belgian bank account.

The applicant in the main proceedings took the view that the agreement conferring jurisdiction in Article 7 had not been validly incorporated into the sale agreement, because it was not in writing in accordance with the requirements in Article 23(1)(a) of the Brussels I Regulation. He submitted that the webpage containing the general terms and conditions of sale of the defendant in the main proceedings did not open automatically upon registration and upon every individual sale. Instead, a box with the indication ‘click here to open the conditions of delivery and payment in a new window’ had to be clicked (known as ‘click wrapping’). The requirements of Article 23(2)

of the Brussels I Regulation are met only if the window containing those general conditions opens automatically.

#### Preliminary questions referred to the CJEU

The referring court wanted to know whether ‘click-wrapping’ – whereby a purchaser agrees to the general terms and conditions of sale on a website by clicking on a hyperlink which opens a window – meets the requirements of Article 23(2) of the Brussels I Regulation, which provides that those conditions must be saved and printed separately.

The court asked whether ‘click-wrapping’, may be regarded as a communication by electronic means which provides a durable record of the sale agreement and, therefore, as being in writing within the meaning of that provision. If this were the case, the agreement conferring jurisdiction on a Belgian court would be valid and the *Landgericht Krefeld* would not have jurisdiction to hear the dispute.

#### The CJEU’s Reasoning:

According to the terms of Article 23(1) of the Brussels I Regulation, the jurisdiction of a court or the courts of a Member State, agreed by the contracting parties in an agreement conferring jurisdiction is, in principle, exclusive. In order to be valid, that clause must be in writing or evidenced in writing, in a form which accords with practices which the parties have established between themselves or, in international trade or commerce, in a form which accords with a usage of which the parties were or ought to have been aware.

According to Article 23(2), “any communication by electronic means which provides a durable record of the agreement” must be regarded as “equivalent to ‘writing’”. The test of whether the requirement of this provision is met is “*whether it is possible to create a durable record of an electronic communication by printing it out or saving it to a backup tape or disk or storing it in some other way*”, and if that is the case “*even if no such durable record has actually been made*”, meaning that “*the record is not required as a condition of the formal validity or existence of the clause*”.

A literal interpretation of this provision led the CJEU to conclude that there must be the ‘possibility’, regardless of whether the consumer enjoys it or not, of providing a durable record of the agreement conferring jurisdiction, regardless of whether the text of the general terms and conditions has actually been durably recorded by the purchaser before or after s/he clicks the box indicating that s/he accepts those conditions. This would subject those ‘click-wrapping’ conditions to transparency requirements.

#### The CJEU’s Conclusions:

The CJEU established that Article 23(2) of the Brussels I Regulation must be interpreted as meaning that the method of accepting the general terms and conditions of a contract for sale by ‘click-wrapping’, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract.

As a result, non-negotiated contract clauses of contract for sale concluded by ‘click-wrapping’ are subject to transparency requirements under European law.

### 8.3.3. Online platforms and effective protection against information breaches

#### Main questions addressed

What is the impact of the principles of effectiveness, proportionality and dissuasiveness, and of Article 47 CFR, on rules applicable to a lack of transparency of terms and conditions of an online platform?

#### Relevant national cases in the cluster:

- CJEU, *Amazon*, C-649/17, 10 July 2019
- Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Text with EEA relevance)

#### The case

Amazon EU operates in particular the website [www.amazon.de](http://www.amazon.de), offering the online sale of various products.

By making an order on that website, consumers had the possibility, in August 2014, before completing their order, to click on an electronic link marked ‘Contact us’. Consumers thus reached a web page where, under the heading ‘Contact us’, there was a link ‘How would you like to contact us?’. They had the choice among three options: send an email, make contact by telephone, or start an online conversation by way of chat. But that page did not provide a fax number. If the consumer chose the option of making contact by telephone, another web page opened, on which s/he could provide his/her telephone number and be called back. The same page also contained the information: ‘If you prefer, you can also call our general helpline’. The link ‘general helpline’ opened a window showing Amazon EU’s telephone numbers and containing the following text:

#### *“General helpline*

*Please note: We instead recommend using the function “Call me now” to obtain assistance quickly. Based on the information you have already provided, we will be able to help you straightaway.*

*Should you prefer to call the general helpline, please bear in mind that you will have to answer a series of questions to confirm your identity.*

*Should you wish to contact us via conventional means, you can also reach us at the following telephone numbers: ...”*

The German Federal Union of Consumer Organisations and Associations considered that Amazon EU did not respect its legal obligation to provide consumers with effective means to enter into contact with it, because it did not inform them about the requisite legal standard of its telephone and fax numbers. Moreover, the Federal Union considered that Amazon EU did not indicate a telephone number in a clear and comprehensible manner, and that the callback service did not fulfil the information requirements, since consumers had to undertake a number of steps to make contact with the company.

The Federal Union brought an application for an injunction before the *Landgericht Köln* (Regional Court, Cologne, Germany) relating to Amazon EU's practices in the display of information on its website.

With a judgement of 8 July 2016, the *Oberlandesgericht Köln* (Higher Regional Court, Cologne) dismissed the appeal brought by the Federal Union. The court considered that Amazon EU fulfilled the pre-contractual information requirements by offering consumers sufficient possibilities for communication by means of its callback system and the possibility to contact it by chat or by email.

The Federal Union responded by bringing an appeal on a point of law (Revision) before the referring court, the *Bundesgerichtshof* (Federal Court of Justice, Germany).

The referring court considered that, in order to resolve the dispute before it, it was necessary *inter alia* to specify the scope of the expression '*lorsqu'ils sont disponibles*', '*gegebenfalls*' or '*where available*', included in Article 6(1)(c) of Directive 2011/83, respectively in the French, German and English versions of that Directive.

In that context, the question was raised as to whether traders who, although they have means of communication such as a telephone number, a fax number and an email address, use them only to communicate with other traders or the authorities, are required, under Article 6(1)(c) of Directive 2011/83, to provide information about those communication methods when entering into distance contracts with consumers.

#### Preliminary questions referred to the CJEU

In those circumstances the *Bundesgerichtshof* (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

*“(1) May Member States enact a provision that — like the provision in Article 246a(1)(1), first sentence, No 2, of the EGBGB (Introductory Law to the Civil Code) — obliges a trader to make his telephone number available to the consumer (not just where available but) always when entering into distance contracts prior to acceptance of the contract?”*

*“(2) Does the expression “gegebenenfalls” (meaning “where available”) used in the German language-version of Article 6(1)(c) of Directive 2011/83 mean that traders must, if they decide to enter into distance contracts, provide information solely about the means of communication that are already actually available within their business, and that they are therefore not required to set up a new telephone or fax connection or email account?”*

*“(3) If the second question is answered in the affirmative: Does the expression “gegebenenfalls” (meaning “where available”) used in the German language-version of Article 6(1)(c) of Directive 2011/83 refer solely to the means of communication that are already available in the business and are actually used by the trader for communication with consumers when entering into distance contracts, or does it also refer to means of communication that are available in the business but have hitherto been used by the trader exclusively for other purposes, such as to communicate with other traders or authorities?”*

(4) *Is the list of means of communication (telephone, fax and email) set out in Article 6(1)(c) of [that] directive ..., [namely the] telephone, fax and [the] email address, exhaustive, or may traders also use other means of communication not mentioned in that list, such as online chat services or call-back facilities, provided that they ensure rapid contact and efficient communication?*

(5) *Does the application of the transparency requirement of Article 6(1) of [that] directive ..., according to which the trader must inform the consumer of the communication methods set out in Article 6(1)(c) of Directive 2011/83 in a clear and comprehensible manner, depend on the information being supplied quickly and efficiently?"*

#### The CJEU's Reasoning:

The CJEU addressed the issue of whether Article 6(1)(c) of Directive 2011/83 was meant to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which requires traders, before concluding distance and off-premises contracts with consumers covered by Article 2(7) and (8) of that Directive, to provide, in all circumstances, their telephone number, and whether that provision obliges traders to establish a telephone or fax line, or to create a new email address to allow consumers to contact them, as well as an instant messaging or telephone callback system.

The CJEU maintained that Directive 2011/83 seeks to afford consumers extensive protection by conferring on them a number of rights in relation to, *inter alia*, distance and off-premises contracts.

The possibility for consumers to contact traders quickly and to communicate with them efficiently, as provided for by Article 6(1)(c) of Directive 2011/83, is of crucial importance for protecting their rights. However, it is also necessary to ensure the right balance between a high level of consumer protection and the competitiveness of undertakings, while respecting an undertaking's freedom to do business, as set out in Article 16 of the Charter (see, by analogy, judgement of 23 January 2019, *Walbusch Walter Busch*, C-430/17, EU:C:2019:47, paragraphs 41 and 42).

Article 6(1)(c) of Directive 2011/83 provides that, before the consumer is bound by a distance or off-premises contract or any corresponding offer, the trader is to provide him/her, in a clear and comprehensible manner, information about the geographical address where the trader is established and the latter's telephone number, fax number and email address, when they are available, in order to allow the consumer to contact it quickly and communicate with it efficiently and, where appropriate, the geographical address and identity of the trader on whose behalf s/he is acting.

Although Article 6(1)(c) of Directive 2011/83 does not determine the precise nature of the means of communication which must be established by traders, that provision necessarily requires traders to put at the disposal of all consumers a means of communication which allows the latter to contact them quickly and to communicate with them efficiently.

The expression "*where available*" provided for in Article 6(1)(c) of Directive 2011/83 covers cases where traders have a telephone or fax number and do not use them solely for purposes other than contacting consumers. In the absence thereof, that provision does not impose on traders



the obligation to inform consumers of that telephone number, to provide a telephone or fax line, or to create a new email address to allow consumers to contact them.

Furthermore, that provision does not preclude traders from providing means of communication other than telephone, fax or email in order to satisfy the criteria of direct and effective communication, such as, in particular, an electronic enquiry template, by means of which consumers can contact traders via a website and receive a written response or can be quickly called back. In that regard, the fact that the telephone number is available only following a series of clicks does not, in itself, mean that the process is not clear and comprehensible, regarding a situation such as that in the dispute in the main proceedings, which concerned a trader offering various goods for purchase solely by means of a website.

#### The CJEU's Conclusions:

The *Amazon* case concerned consumer rights in regard to ensuring communication with sellers or suppliers in distance contracts.

When ensuring consumer protection, the CJEU established that Article 6(1)(c) of Directive 2011/83 did not involve an obligation for traders to establish a telephone or fax line, or to create a new email address to allow consumers to contact them. If the trader already had such means of communication, consumers were to be informed of that telephone or fax number or of the trader's email address. As a result, Directive 2011/83 precluded national legislation that imposed on traders, before concluding a distance or off-premises contract, the obligation to provide, in all circumstances, their telephone number.

Nevertheless, the CJEU provided that effective communication was one of the elements of consumer protection. In that respect, the CJEU interpreted Article 6(1) of Directive 2011/83 as requiring traders to make available any means of communication – regardless of whether it was listed in Directive 2011/83 – that would be direct and effective.

### **8.3.4. Online platforms and effective consumer protection: against whom? When is the platform a trader?**

#### Main questions addressed

Question 1      In light of the principle of effectiveness of consumer protection, should the notion of trader be understood as covering an online platform exercising some degree of control over the supplier, although acting as an intermediary in respect of the consumer contract?

#### Relevant EU and national cases in the cluster:

- CJEU, *L'Oreal SA*, C-324/09, 12 July 2011
- CJEU, *Frank Peterson v. Google LLC, YouTube Inc., Yourtube LLC, Google Germany GmbH*, C-682/18, and *Elsevier Inc. v. Cyando AG*, C-683/18, 22 June 2021

- CJEU C-390/18, *Airbnb Ireland UC*, 19 December 2019
- CJEU, *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, C 434/15, 20 December 2017
- CJEU, *Uber France*, C-320/16, 10 April 2018
- Court of Appeals for the Third Circuit (US) *Amazon Inc*, 3 July 2019
- CJEU, *Airbnb Ireland UC v. Région de Bruxelles-Capitale*, C-674/20, 27 April 2022
- Spanish Supreme Court, STS 4484/2020, 30 December 2020
- Spanish Supreme Court, STS 6/2022, 7 January 2022

One of the most important issues arising from transactions entered into in digital environments is the role of the digital platform in the underlying transactions entered into among platform users on the platform. The platform's status will determine its obligations, as well as the parties' rights with respect to it.

Based on the European cases dealing with this issue and in light of the principles of effectiveness in consumer protection, the analysis presented here will be structured into two parts. The first one, represented by the *L'Oréal* case, addresses the issue of whether a digital platform characterized as an information society service may be held liable for possible trademark infringements committed by its users – consumers or not. A second set of cases comprises *Airbnb Ireland UC*, *Asociación Profesional Élite* and *Uber France Taxi and Uber France SAS v. Nabil Bensalem*, that specifically address the determination of the contractual elements that would represent contractual control of the underlying transaction and hence would result in the platform being considered a service provider instead of an information society service, with possible consequences on the scope of consumer protection.

### **a. May a digital platform characterized as an information society service be subject to liability under Article 14 of Directive 2000/31/EC for copyright and trademark violations committed by platform users?**

#### The case

L'Oréal is a manufacturer and supplier of perfumes, cosmetics and hair-care products. In the United Kingdom it is the proprietor of a number of national trademarks. It is also the proprietor of Community trademarks. L'Oréal operates a closed selective distribution network, in which authorised distributors are restrained from supplying products to other distributors.

eBay operates an electronic marketplace on which are displayed listings of goods offered for sale by persons who have registered for that purpose with eBay and have created a seller's account with it. eBay charges a percentage fee on completed transactions. eBay enables prospective buyers to bid for items offered by sellers. It also allows items to be sold without an auction, and thus for a fixed price, by means of a system known as 'Buy It Now'. Sellers can also set up online shops on eBay sites. An online shop lists all the items offered for sale by one seller at a given time. Sellers and buyers must accept eBay's online-market user agreement. One of the terms of that

agreement is a prohibition on selling counterfeit items and on infringing trademarks. In some cases, eBay assists sellers in order to enhance their offers for sale, to set up online shops, to promote and increase their sales. It also advertises some of the products sold on its marketplace using search engine operators such as Google to trigger the display of advertisements.

On 22 May 2007, L'Oréal sent eBay a letter expressing its concerns about the widespread incidence of transactions infringing its intellectual property rights on eBay's European websites. L'Oréal was not satisfied with the response that it received and brought actions against eBay in various Member States, including an action before the High Court of Justice (England & Wales), Chancery Division.

L'Oréal's action before the High Court of Justice sought a ruling, first, that eBay and the individual defendants were liable for sales of 17 items made by those individuals through the website [www.ebay.co.uk](http://www.ebay.co.uk), L'Oréal claimed that those sales infringed the rights conferred on it by, *inter alia*, the figurative Community trade mark including the words 'Amor Amor' and the national wordmark 'Lancôme'. It was common ground between L'Oréal and eBay that two of those 17 items were counterfeits of goods bearing L'Oréal trademarks. Second, L'Oréal submitted that eBay was liable for the use of L'Oréal trademarks when those marks are displayed on eBay's website and when sponsored links triggered by the use of keywords corresponding to the trademarks were displayed on the websites of search engine operators like Google.

Concerning the last point, it was not disputed that eBay, by choosing keywords corresponding to L'Oréal trademarks in Google's 'Ad Words' referencing service, caused to be displayed, whenever there was a match between a keyword and the word entered in Google's search engine by an internet user, a sponsored link to the site [www.ebay.co.uk](http://www.ebay.co.uk). That link would appear in the 'sponsored links' section displayed on either the right-hand side, or in the upper part, of the screen displayed by Google.

Thus, on 27 March 2007, when an internet user entered the words 'shu uemura' – which in essence coincide with L'Oréal's national wordmark 'Shu Uemura' – as a search string in the Google search engine, the following eBay advertisement was displayed in the 'sponsored links' section:

*'Shu Uemura  
Great deals on Shu uemura  
Shop on eBay and Save!  
[www.ebay.co.uk](http://www.ebay.co.uk).'*

Clicking on that sponsored link led to a page on the [www.ebay.co.uk](http://www.ebay.co.uk) website which showed '96 items found for shu uemura'. Most of those items were expressly stated to be from Hong Kong. Similarly, to take one of the other examples, when, on 27 March 2007, an internet user entered the words 'matrix hair', which correspond in part to L'Oréal's national wordmark 'Matrix', as a search string in the Google search engine, the following eBay listing was displayed as a 'sponsored link':

*"Matrix hair  
Fantastic low prices here  
Feed your passion on eBay.co.uk!  
[www.ebay.co.uk](http://www.ebay.co.uk)."*

Third, L'Oréal claimed that, even if eBay was not liable for the infringements of its trademark rights, it should be granted an injunction against eBay by virtue of Article 11 of Directive 2004/48.

L'Oréal reached a settlement with some of the individual defendants (Mr Potts, Ms Ratchford, Ms Ormsby, Mr Clarke and Ms Clarke) and obtained judgement in default against the others (Mr Fox and Ms Bi). Subsequently, in March 2009, a hearing dealing with the action against eBay was held before the High Court of Justice.

In its judgement, the High Court of Justice noted that eBay had installed filters in order to detect listings which might contravene the conditions of use of the site. That court also noted that eBay had developed, using a programme called 'VeRO' (*Verified Rights Owner*), a notice and take-down system that was intended to provide intellectual property owners with assistance in removing infringing listings from the marketplace. L'Oréal had declined to participate in the VeRO programme, contending that the programme was unsatisfactory.

The High Court of Justice also stated that eBay applies sanctions, such as the temporary – or even permanent – suspension of sellers who have contravened the conditions of use of the online marketplace.

Despite the findings set out above, the High Court of Justice took the view that eBay could do more to reduce the number of sales on its online marketplace which infringe intellectual property rights. According to that court, eBay could use additional filters. It could also include in its rules a prohibition on selling, without the consent of the trademark proprietors, trade-marked goods originating from outside the EEA. It could also impose additional restrictions on the volumes of products that can be listed at any one time and apply sanctions more rigorously.

The High Court of Justice stated, however, that the fact that it would be possible for eBay to do more did not necessarily mean that it was legally obliged to do so.

#### Preliminary questions referred to the CJEU

*(9) If it is sufficient for such use to fall within the scope of Article 5(1)(a) of [Directive 89/104] and Article 9(1)(a) of [Regulation No 40/94] and outside Article 7 ... of [Directive 89/104] and Article 13 ... of [Regulation No 40/94] that the advertisement or offer for sale is targeted at consumers in the territory covered by the trade mark:*

*(a) does such use consist of or include "the storage of information provided by a recipient of the service" within the meaning of Article 14(1) of [Directive 2000/31]?*

*(b) if the use does not consist exclusively of activities falling within the scope of Article 14(1) of [Directive 2000/31], but includes such activities, is the operator of the online marketplace exempted from liability to the extent that the use consists of such activities and if so may damages or other financial remedies be granted in respect of such use to the extent that it is not exempted from liability?*

*(c) in circumstances where the operator of the online marketplace has knowledge that goods have been advertised, offered for sale and sold on its website in infringement of registered trade marks, and that infringements of such registered trade marks are likely to continue to occur through the advertisement, offer for sale and sale of the same or similar goods by the same or different users of the website, does this constitute "actual knowledge" or "awareness" within the meaning of Article 14(1) of [Directive 2000/31]?*

### The CJEU's Reasoning:

The CJEU maintained that it was clear from the facts in the main proceedings that eBay, by selecting in the Google search engine keywords corresponding to L'Oréal trademarks, caused to appear, as soon as internet users performed a search including those words with that search engine, a sponsored link to the website [www.ebay.co.uk](http://www.ebay.co.uk), accompanied by a marketing message about the opportunity to buy, via that site, goods bearing the trade mark searched for. That advertising link appeared in the 'sponsored links' section, located on either the right-hand side, or on the upper part, of the screen showing the search results displayed by Google.

It is not disputed that, in such a situation, the operator of the online marketplace is an advertiser. The operator causes links and messages to be displayed which advertise not only certain offers for sale on that marketplace but also that marketplace as such.

The referring court asked, in essence, whether, on a proper construction of Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94, the proprietor of a trademark is entitled to prevent an online marketplace operator from advertising – on the basis of a keyword which is identical to its trademark and which has been selected in an internet referencing service by the operator without the proprietor's consent – the marketplace and goods bearing that trademark which are offered for sale on it. With regard to internet advertising on the basis of keywords corresponding to trademarks, a keyword is the means used by an advertiser to trigger the display of its advertisement and is therefore used 'in the course of trade' within the meaning of Article 5(1) of Directive 89/104 and Article 9 of Regulation no. 40/94 (Joined Cases C-236/08 to C-238/08 *Google France and Google* [2010] ECR I-0000, paragraphs 51 and 52, and Case C-278/08 *BergSpechte* [2010] ECR I-0000, paragraph 18).

That use, by eBay, of signs corresponding to L'Oréal trademarks for the purpose of promoting its online marketplace would thus, at the very most, be open to examination on the basis of Article 5(2) of Directive 89/104 and Article 9(1)(c) of Regulation no. 40/94, since those provisions establish, for trademarks with a reputation, more extensive protection than that provided by Article 5(1)(a) or Article 9(1)(b) and cover, *inter alia*, the situation in which a third party uses signs corresponding to such trademarks in relation to goods or services which are not similar to the goods or services for which those marks are registered.

A further use by eBay of keywords corresponding to L'Oréal trademarks promoted its customer-sellers' offers for sale of goods bearing those marks. In that regard, the words 'in relation to goods or services' did not relate solely to the goods or services of a third party which was using signs corresponding to the trademarks but which might also refer to the goods or services of other persons. The fact that an economic operator uses a sign corresponding to a trademark in relation to goods which are not his own goods – in the sense that it does not have title to them – does not in itself prevent that use from falling within Article 5 of Directive 89/104 and Article 9 of Regulation 40/94 (see *Google France and Google*, paragraph 60, and the order in Case C-62/08 *UDV North America* [2009] ECR I-1279, paragraph 43).

With regard, specifically, to a situation in which the supplier of a service uses a sign corresponding to the trademark of another person in order to promote goods which one of its customers is marketing with the assistance of that service, the CJEU deemed such a use to fall within the scope of Article 5(1) of Directive 89/104 and Article 9(1) of Regulation no. 40/94, when the use is such that a link is established between the sign and the service (see the order in *UDV North*

*America*, paragraph 47 and the case-law cited). eBay's advertisements created an obvious association between the trade-marked goods which were mentioned in the advertisements and the possibility of buying those goods through eBay.

Finally, the CJEU considered whether the use of a keyword corresponding to a trademark is liable to have an adverse effect on one of the functions of the trademark. It decided that there is such an adverse effect when that advertising does not enable reasonably well-informed and reasonably observant internet users, or enables them only with difficulty to ascertain whether the goods or services referred to by the advertisement originate from the proprietor of the trademark or from an undertaking economically linked to it or, on the contrary, originate from a third party (*Google France and Google*, paragraph 99; and Case C-558/08 *Portakabin and Portakabin* [2010] ECR I-0000, paragraph 54).

Thus, on a proper construction of Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94, the proprietor of a trademark is entitled to prevent an online marketplace operator from advertising – on the basis of a keyword which is identical to its trademark and which has been selected in an internet referencing service by that operator – goods bearing that trademark which are offered for sale on the marketplace, when that advertising does not enable reasonably well-informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods concerned originate from the proprietor of the trademark or from an undertaking economically linked to that proprietor or, on the contrary, originate from a third party.

#### D – *The ninth question concerning the liability of the operator of an online marketplace*

With its ninth question, the referring court asked, in essence,

- whether the service provided by the operator of an online marketplace is covered by Article 14(1) of Directive 2000/31 (hosting), and, if so,
- in what circumstances it may be concluded that the operator of an online marketplace has 'awareness' within the meaning of Article 14(1) of Directive 2000/31?

The CJEU replied that Articles 12 to 15 of Directive 2000/31 seek to restrict the situations in which intermediary providers of information society services may be held liable pursuant to the applicable national law (*Google France and Google*, paragraph 107). Although it was thus for the referring court to determine the conditions under which liability such as that raised by L'Oréal against eBay arises, it was the CJEU's task to consider whether the operator of an online marketplace may rely on the exemption from liability provided for by Directive 2000/31.

An internet service consisting in facilitating relations between sellers and buyers of goods is, in principle, a service for the purposes of Directive 2000/31. That Directive concerns, as its title suggests, 'information society services, in particular electronic commerce'. That concept encompasses services provided at a distance by means of electronic equipment for the processing and storage of data, at the individual request of a recipient of services and, normally, for remuneration. The operation of an online marketplace can bring all those elements into play.

It is not disputed, The CJEU stated, that eBay stores – that is to say, holds – in its server's memory, data supplied by its customers. That storage operation is carried out by eBay each time

that a customer opens a selling account with it and provides it with data concerning its offers for sale. Furthermore, eBay normally receives remuneration inasmuch as it charges a percentage on transactions completed on the basis of those offers for sale.

In order for an internet service provider to fall within the scope of Article 14 of Directive 2000/31, it is essential that the provider be an intermediary provider within the meaning intended by the legislature in the context of Section 4 of Chapter II of that Directive (see *Google France and Google*, paragraph 112). This is not the case when the service provider, instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data (*Google France and Google*, paragraphs 114 and 120).

It was clear from the documents before the CJEU that eBay processes the data entered by its customer-sellers. The sales in which the offers may result take place in accordance with terms set by eBay. In some cases, eBay also provides assistance intended to optimise or promote certain offers for sale. The mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31 (see, by analogy, *Google France and Google*, paragraph 116).

When, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.

It was for the referring court to examine whether eBay played a role such as that described in the preceding paragraph in relation to the offers for sale at issue in the case before it.

### **The possession, by the operator of the online marketplace, of ‘awareness’**

The CJEU ruled that if the referring court concludes that eBay has not acted in the way described in paragraph 116 of this judgement, it will have to ascertain whether, in the circumstances of the case before it, eBay had met the conditions to which entitlement to the exemption from liability is subject under points (a) and (b) of Article 14(1) of Directive 2000/31 (see, by analogy, *Google France and Google*, paragraph 120).

In situations in which that provider has confined itself to a merely technical and automatic processing of data and in which, as a consequence, the rule stated in Article 14(1) of Directive 2000/31 applies to it, it may nonetheless only be exempt, under paragraph 1, from any liability for unlawful data that it has stored on condition that it has not had “actual knowledge of illegal activity or information” and, as regards claims for damages, has not been “aware of facts or circumstances from which the illegal activity or information is apparent” or that, having obtained such knowledge or awareness, it has acted expeditiously to remove, or disable access to, the information.

Because the case in the main proceedings may result in an order to pay damages, it is for the referring court to consider whether eBay has, in relation to the offers for sale at issue and to the

extent that the latter have infringed L'Oréal's trademarks, been 'aware of facts or circumstances from which the illegal activity or information is apparent'. In the last-mentioned respect, it is sufficient, in order for the provider of an information society service to be denied entitlement to the exemption from liability provided for in Article 14 of Directive 2000/31, for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b) of Directive 2000/31.

Moreover, if the rules set out in Article 14(1)(a) of Directive 2000/31 are not to be rendered redundant, they must be interpreted as covering every situation in which the provider concerned becomes aware, in one way or another, of such facts or circumstances.

The situations thus covered include, in particular, that in which the operator of an online marketplace uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information. In the second case, although such a notification admittedly cannot automatically preclude the exemption from liability provided for in Article 14 of Directive 2000/31, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to the operator, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality.

Where the operator of the online marketplace has not played an active role allowing it to have knowledge or control of the data stored and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31. Nonetheless, the operator cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31.

#### *The CJEU's Conclusions:*

The case again concerned triangular contract structures involved in contractual relationships entered into within digital environments. The CJEU in this case addressed the issue of whether digital platforms may be subject to liability and hence to the payment of damages for infringements conducted by platform users – consumers or not.

The CJEU established that Article 14(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') was to be interpreted as applying to the operator of an online marketplace when that operator has not played an active role in gaining knowledge or control of the data stored. This active role involves providing assistance to platform users which entails, in particular, optimising the presentation of the offers for sale in question or promoting them.



If the operator of the online marketplace has NOT played an active role and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator may not rely on the exemption from liability and hence be obliged to pay damages if it was aware of facts or circumstances on the basis of which a diligent economic operator would have realised that the offers for sale were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31.

A follow-up case to *L’Oreal SA* has been the recent CJEU judgement in the joined cases *Peterson v. Google LLC, YouTube Inc., Youtube LLC, Google Germany GmbH* (C-682/18) and *Elsevier Inc. v. Cyando AG* (C-683/18), 22 June 2021. As in *L’Oreal SA*, the issue in both cases was whether digital platforms characterized as information society services – YouTube in the former case and Cyando in the latter – were making communications to the public under Article 3(1) of Directive 2011/29 and hence were liable for breach of copyright of the content of the platform. The second issue was if the liability exception for the supply of illegal content on the digital platform fell under Article 14(1) of Directive 2000/31; and the third was whether that national law could afford an injunction right against the intermediary under Article 8(3) of Directive 2001/29.

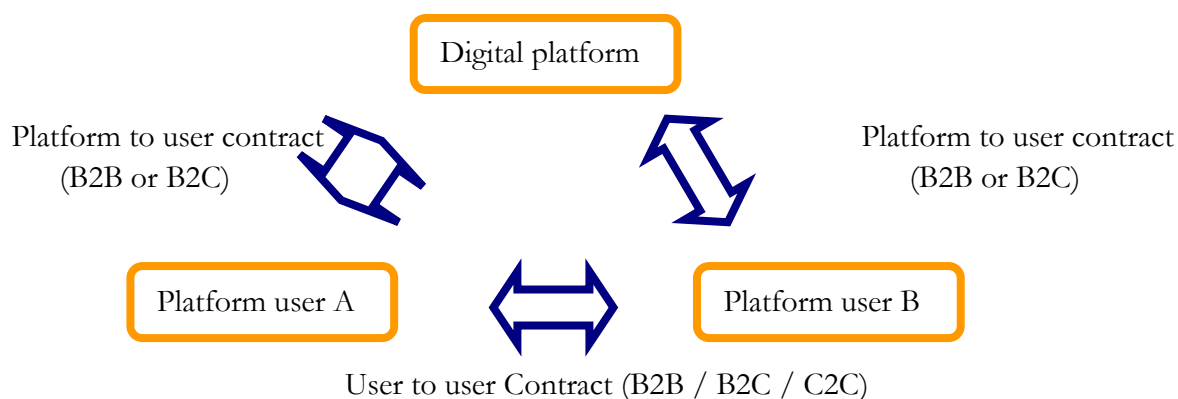
The CJEU held that YouTube’s and Cyando’s passive role in regard to the content offered on their platforms did not constitute a communication to the public because the platforms did not participate in selecting the content – possibly illegal – on them, did not have specific knowledge of the illegal content available on them, did not promote such sharing, and took technological measures to effectively and diligently remove the content illegally posted. Because of the nature of these digital platforms, both YouTube and Cyando fell within the liability exception of Article 14(1) of Directive 2000/31 as long as these platforms did not have knowledge or awareness of the specific illegal acts committed by their users relating to the copyright-protected content posted on their platforms. National law could provide for a right of injunction for the copyright holder or the holder of a related right as long as the intermediary had been notified and, hence, had knowledge or awareness of the illegal content within the meaning of Article 14(1)(a) of Directive 2000/31 and had not acted expeditiously in order to remove the content in question.

## **b. Does a digital platform constitute an information society service or a service provider of the underlying services exchanged on the platform**

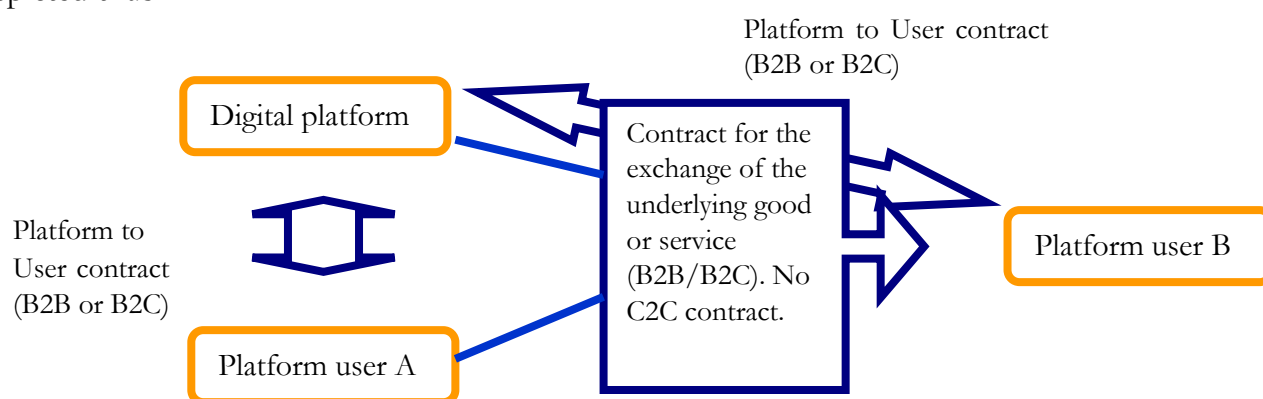
The second issue arising in the context of digital platforms is the characterization of those platforms as information society services or as service providers, and hence part of the product or service exchanged among platform users within the digital platform. The role, status and obligations of platforms in the underlying contract are of fundamental importance for competitors, employees, creditors, and particularly for consumer rights.

If digital platforms are considered to be information society services under Directive 2000/31, they are not part of the contract between platform users and hence are not subject to the contractual obligations involved in the exchange of the underlying exchange. In turn, if a digital platform is considered to be a service provider, it is subject to contractual obligations, so that the consumer has two parties who should comply with consumer protection rights.

When digital platforms are considered to be information society services, the contractual structures may be depicted as follows:



When digital platforms are considered to be service providers, the contractual structure can be depicted thus:



The consideration of digital platforms within the spectrum of information society services and/or service providers was conducted by the CJEU on a case-by-case basis.

*a) Intermediation service v. service provider*

The first distinction defined by the CJEU was whether digital platforms are service intermediaries under Article 2(a) of Directive 2000/31 or providers of the underlying service or product exchanged on the platform and hence subject to the obligations of all market participants. For the purpose of this determination, the CJEU conducted the strict contractual analysis summarized in what follows.

This distinction, which to date had arisen in Europe in the cases of *Uber Systems Spain*, *Uber France SAS* and *Airbnb*, is of fundamental importance: information society services may enjoy exemption from the obligation to monitor the activity of users of their platforms under Article 14 of Directive 2000/31, but service providers do not enjoy such exemption. This distinction has profound implications for consumers under the principle of effectiveness of consumer

protection and of Article 47 CFR: information society services that provide intermediation services are not part of the underlying contract between platform users; while service providers are part of it and are therefore subject to contractual obligations with consumers as well as to the obligations of the other members of the industry. Consequently, consumers find two parties obliged to comply with consumer protection: first, the platform user supplying the goods or services exchanged on the digital platform; second, the platform itself, whenever is considered to be a service provider as well. In the USA, it is worth mentioning *Oberdorf v. Amazon.com Inc*, US Court of Appeals for the 3<sup>rd</sup> District, 18-1041 (2019) establishing that Amazon is the seller under §402A of the Restatement (Third) of Product Liability, and hence subject to consumers' product liability claims for damages caused by defects in a product – in that case, a dog leash – sold on the digital platform.

European case law has so far addressed the nature of *Uber* and *Airbnb*. A first step analysis conducted by the CJEU focused on whether *Uber* and *Airbnb* could be considered information society services under Directive 2000/31. In both cases, the CJEU established that both companies were information society services under European law. The CJEU further provided that *Uber* was also a transportation company. This topic is developed below.

Specifically, in the first part of the analysis of the *Uber* case, the CJEU established that

*“An intermediation service consisting of connecting a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey is, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle. It should be added that each of those services, taken separately, can be linked to different directives or provisions of the FEU Treaty on the freedom to provide services, as contemplated by the referring court. [34]*

*An intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle, meets, in principle, the criteria for classification as an ‘information society service’ within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31. That intermediation service, according to the definition laid down in Article 1(2) of Directive 98/34, is ‘a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’. [35]”*

The CJEU has also recently held that *Airbnb* is an information society service:

*“Under Article 1(1)(b) of Directive 2015/1535, the concept of an ‘information society service’ covers ‘any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’.*

*In the present case, the referring court states, as is clear from paragraph 18 above, that the service at issue in the main proceedings, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services so as to enable the former to reserve accommodation.*

*It follows, first of all, that that service is provided for remuneration, even though the remuneration received by Airbnb Payments UK is only collected from the guest and not also from the host.*

*Next, in so far as the host and the guest are connected by means of an electronic platform without the intermediation service provider, on the one hand, or the host or guest, on the other, being present at the same time, that service constitutes a service which is provided electronically and at a distance. Indeed, at no point during the process of concluding the contracts between, on the one hand, Airbnb Ireland or Airbnb Payments UK and, on the other, the host or the guest, do the parties come into contact other than by means of the Airbnb Ireland electronic platform.*

*Finally, the service in question is provided at the individual request of the recipients of the service, since it involves both the placing online of an advertisement by the host and an individual request from the guest who is interested in that advertisement.*

*Therefore, such a service meets the four cumulative conditions laid down in Article 1(1)(b) of Directive 2015/1535 and therefore, in principle, constitutes an ‘information society service’ within the meaning of Directive 2000/31. [44 to 49]”*

- b) *The second part of the CJEU’s analysis consisted in determination of whether the intermediation services provided by a digital platform are a nondetachable part of other, broader services exchanged on the digital platform*

The CJEU considered that *Uber* was an intermediation service provided by an information society service provider, but that service was a nondetachable part of another service, in this case a transportation service.

*“(…) Although an intermediation service which satisfies all of those conditions, in principle, constitutes a service distinct from the subsequent service to which it relates and must therefore be classified as an ‘information society service’, that cannot be the case if it appears that that intermediation service forms an integral part of an overall service whose main component is a service coming under another legal classification (see, to that effect, judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981, paragraph 40).”*

In contrast, the CJEU considered that *Airbnb* is only an information society service.

The characterizations of *Airbnb* as an information society service, autonomous and independent from the hosting services exchanged within the platform, and of *Uber* as an information society

service part of another service, was based on the morphology of the contractual elements of the underlying transaction that the digital platform controls.

c) Relevant contractual parameters that may constitute control of the underlying transaction

The CJEU established that *Uber* is an information society service offering intermediation services that are nondetachable from the transportation services exchanged in it. Consequently, the CJEU considered that the complex nature of *Uber* made it a provider of the underlying service exchanged in it – in that case, transportation services – and hence subject to the legal requirements that transportation companies are subject to in the various Member States.

In contrast, CJEU has recently held that *Airbnb* is a digital platform offering digital intermediation services that are autonomous and independent from the hosting services exchanged on the platform. Consequently, it should be considered an information society service and not a hosting company.

The arguments and elements laid out by the CJEU were the following.

With respect to *Uber*,

*“The intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.*

*That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as ‘an information society service’ within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as ‘a service in the field of transport’ within the meaning of Article 2(2)(d) of Directive 2006/123.”*

Consequently, the CJEU established that:

- (1) The transportation service would not be offered and hence exchanged without *Uber* and hence is nondetachable.
- (2) *Uber* controls the conditions under which the service is provided by the drivers. Those conditions are: the maximum fare drivers may charge, the percentage that *Uber* keeps of the fare paid by the passenger, the quality of the vehicles and of the driver’s conduct, which *Uber* controls and disciplines.

These elements – the nondetachable nature of the intermediation service provided by *Uber* and the transportation service exchange in it, and the parameters of the underlying transaction that *Uber* controls – led to the CJEU to conclude that *Uber* is a transportation company and hence subject to the transport regulations of the various Member States.

In contrast, with respect to *Airbnb* the CJEU established that:

*“Such an intermediation service is intended not only to provide an immediate accommodation service, but also, on the basis of a structured list of the places of accommodation available on the electronic platform of the same name and corresponding to the criteria selected by the persons looking for short-term accommodation, to provide a tool to facilitate the conclusion of contracts concerning future interactions. It is the creation of such a list for the benefit both of the hosts who have accommodation to rent and persons looking for that type of accommodation which constitutes the essential feature of the electronic platform managed by Airbnb Ireland.*

*In that regard, because of its importance, the compiling of offers using a harmonised format, coupled with tools for searching for, locating and comparing those offers, constitutes a service which cannot be regarded as merely ancillary to an overall service coming under a different legal classification, namely provision of an accommodation service.*

*In addition, a service such as the one provided by Airbnb Ireland is in no way indispensable to the provision of accommodation services, both from the point of view of the guests and the hosts who use it, since both have a number of other, sometimes long-standing, channels at their disposal, such as estate agents, classified advertisements, whether in paper or electronic format, or even property lettings websites. In that regard, the mere fact that Airbnb Ireland is in direct competition with those other channels by providing its users, both hosts and guests, with an innovative service based on the particular features of commercial activity in the information society does not permit the inference that it is indispensable to the provision of an accommodation service.*

*Finally, it is not apparent, either from the order for reference or from the information in the file before the Court, that Airbnb Ireland sets or caps the amount of the rents charged by the hosts using that platform. At most, it provides them with an optional tool for estimating their rental price having regard to the market averages taken from that platform, leaving responsibility for setting the rent to the host alone.*

*As such, it follows that an intermediation service such as the one provided by Airbnb Ireland cannot be regarded as forming an integral part of an overall service, the main component of which is the provision of accommodation.”*

In sum, the CJEU established that:

- (1) sorting and matching, which connect hosts and guests via the electronic platform, are services inherent to information society services.
- (2) creating a rating system for platform participants allows platform users to take informed decisions on the reliability of hosts and guests engaging with each other.

- (3) providing, with a payment system through Airbnb Payments UK, a company collecting rents from guests and transferring them to the hosts provides a tool with which to secure transactions between platform participants.
- (4) offering an optional civil liability insurance, a guarantee against damage, does not modify the nature of the intermediation service provided by the digital platform.

Those services constitute services ancillary to – and hence separate from – the intermediation service provided by the “information society service”. They do not constitute elements of control of another overall service offered by the digital platform, in this case *Airbnb*, and hence do not modify the specific characteristics of that service.

As can be seen from the CJEU’s arguments, the market structure of the underlying service provided in the platform is relevant for a court to determine whether the digital platform is an information society service or a service provider subject to legal requirements of other providers and with direct contractual relationship with consumers. In the case of *Uber*, the CJEU seemed to consider that a transaction entered into in *Uber* would not exist without *Uber*. In order to support this idea, the CJEU argued that there are no alternative mechanisms in the market to supply and demand transportation services in real time different from the regulated market of taxis. In contrast, the CJEU considered that the situation with accommodation services and *Airbnb* is fundamentally different. The supply of and demand for accommodation services exists and is made by market participants different from *Airbnb*. *Airbnb* does not create the market but enables a segment of this market. This is one of the reasons why the CJEU considered *Uber* to be a service provider and *Airbnb* to be an information society service.

The determination of a digital platform as an information society service or as a service provider subject to the sectoral regulation is relevant not only to the consumers contracting with them but also to establishing whether public administrations may impose administrative obligations on digital platforms.

Based on the characterization of the digital platform, the CJEU has established whether these obligations complied or did not comply with EU law. For example, in *Airbnb Ireland v. Région de Bruxelles-Capitale*, C-674/20 of 27 April 2022, *Airbnb* challenged the obligation to provide information on tourist transactions to regional tax authorities imposed by the Brussels Capital Region. The CJEU considered that information for tax purposes was expressly excluded from the scope of the e-commerce Directive 2000/31, and its general application to all property intermediation services regardless of their place of establishment did not constitute a restriction of the freedom to provide services within the European Union.

Consequently, the obligation on an information society service like *Airbnb* to provide information on tourist transactions to regional tax authorities complied with EU law in that it did not constitute an undue restriction of the freedom to provide services within the European Union.

The determination of whether obligations imposed on digital platforms – classified as information society services or service providers by the CJEU – comply with EU law and with the CJEU case law has been followed up in domestic courts such as the Spanish Supreme Court.

### **Spain**

Spanish courts have applied the CJEU case law in *Uber* (C-434/15) and *Airbnb* (C-390/18) regarding the distinctive elements of digital platforms that allow them to be characterized as information society services under Directive 2000/31 and enjoy liability exemptions of Articles 14 and 15, or as service providers and hence subject to the sectoral obligations applicable, as well as to the obligation to monitor and remove illegal content offered on the platform.

The Spanish Supreme Court has addressed the obligation of *Homeaway* and *Airbnb* to remove illegal content from their websites in judgements STS 4484/2020 of 30 December 2020 and STS 6/2022 of 7 January of 2022.

In 2002, the Catalan government adopted Law 13/2002 on Tourism, whose Article 73 included the obligation of suppliers of tourist accommodation to register in a Catalan Tourist Registry and further provided that the tourist registration number should be included in any publicity that advertised them. The Catalan government, considering that Homeaway was subject to the sectoral tourist regulation, requested Homeaway to remove the listings of users that did not include the tourist registration number.

The same issue arose before the Spanish Supreme Court in regard to *Airbnb*, which in 2014 was requested by the head of the tourism department of the Generalitat of Catalonia – the Catalan Government – to suspend all listings from users that had not included the tourist registration number.

The Spanish Supreme Court's argument was a two-step analysis parallel in both cases. First, the Spanish Supreme Court considered that application of the Tourism Law entailed that Homeaway as well as Airbnb were digital platforms offering tourism services. However, the Spanish Supreme Court, applying the findings of the CJEU in *Airbnb* (C-390/18) establishing that Airbnb was an information society service considered that Airbnb – and, by analogy, Homeaway – was an information society service under the e-commerce Directive 2000/31 and hence exempt from liability resulting from supplying illegal content under Article 14. The court further stated that Homeaway as well as Airbnb, in their qualification as information society services, did not have the obligation to moderate the platform's content. Hence, the obligation to remove illegal content under the Catalan Tourist law was in compliance neither with EU law nor with the CJEU case law.



#### 8.4. Appendix on the new Regulation on fairness and transparency for business users and online intermediation services

While dealing with business-to-business relationships, the new Regulation addresses fairness issues within contracts characterized by strong power asymmetry. Business-to-business relationship of this type may be compared with business-to-consumer relationships and, at least in some cases, judges may address relatively similar issues, e.g. when unfair terms or practices are used and the role of judicial *ex officio* powers could be considered. Questions concerning the impact of the principle of effective judicial protection and Article 47 could arise in the near future when courts apply this new Regulation.

- Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users and online intermediation services, L 186/57
- European Parliament legislative resolution of 17 April 2019 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules (COM(2018)0185 – C8-0143/2018 – 2018/0090(COD))

The asymmetry in contractual relationships between businesses and consumers has been one of the guiding principles of European consumer protection. The unequal bargaining power between contracting parties when shaping their contractual relationships according to their preferences is one of the bases of European consumer protection regulation, which embraces the mandatory regulation of pre-contractual duties, as well as remedies for breach of contract.

Digital environments heighten the challenges in the contractual relationships entered within them. Besides the asymmetry of the contractual position between business and consumers, contracts within digital platforms are off-premise and entered through electronic means.

Consumer protection, and hence consumer law, fully applies to contractual relationships in digital environments between businesses and consumers. This is of fundamental importance to generate trust in digital settings.

Businesses-to-consumer relationships are of utmost importance. Platform users, however, may be consumers but also users on either side of the transaction: as suppliers or as demanders of the products and services exchanged.

Consumer protection rules apply to business-to-consumer contracts. However, digital environments allow for business-to-business contracts where contractual asymmetry is also present.

The first text considered, **Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services entered into force on 11 July 2019**, addresses the contractual asymmetry present in business-to-business contracts entered into within digital platforms; and particularly in contracts between the digital platform – a business – and platform users when these are businesses.

Regulation 2019/1150 focuses on the suppliers in digital platforms and aims at regulating platforms by establishing a fair, predictable, sustainable and trusted online business environment. By creating a reliable and transparent environment for businesses and business-to-business contracts, consumers' trust and reliance in compliance with their rights in digital transactions are thought to be enhanced as well.

In light of the contracting advantage enjoyed by the digital platforms in contracts entered with business platform users, the Regulation seeks to prevent unfair and harmful behaviour by ensuring transparency, fairness and effective redress in their contractual relationships (Article 1). The driving force behind Regulation 2019/1150 is strengthening the position of business users with respect to online platforms while also avoiding disadvantages for consumers.

Regulation 2019/1150 applies to online intermediation services and online search engines (Article 1) that are provided to business users or corporate website users.

- A business user is considered to be any private individual acting in a commercial or professional capacity or any legal person who offers goods or services to consumers for purposes relating to its trade, business, craft or profession through an online intermediation platform. (Article 2.1)
- A corporate website user (Article 2.2) is any natural or legal person who uses an online interface to offer goods or services to consumers for purposes relating to its trade, business, craft or profession.
- Online Intermediation Services (OIS) (Article 2.2), must meet certain requirements. They must:
  - (i) constitute information society services under Article 1(1)b of Directive 2015/1535.
  - (ii) allow business users to offer goods or services to consumers, with a view to facilitating direct transactions between those business users and consumers and
  - (iii) provide business users with intermediation services based on a contractual relationship between the provider of those services and the business user.
- Scope of application (Article 1) – the Regulation applies to online intermediation services and online search engines provided, or offered to be provided, to business users and corporate website users that have their place or establishment or residence in the Union and that offer goods or services to consumers located in the Union, irrespective of the place of establishment or residence of the providers themselves.

The Regulation's provisions concern the general terms and conditions of providers of online intermediation services. Particularly, providers of online intermediation services shall ensure that the contractual terms and conditions meet certain requirements. They must:

- a. be drafted in plain and intelligible language,
- b. be easily available to business users at all contractual stages,
- c. set out the grounds regarding restriction, suspension or termination of their online intermediation services to business users,
- d. include information on any additional distribution channels and potential affiliate programmes through which providers of online intermediation services might market goods and services offered by business users;
- e. include information regarding the effects on the ownership and control of intellectual property rights, etc.

Terms and conditions that do not comply with such requirements will be deemed null and void. (Article 3.3).

At the same time, the Regulation further includes specific provisions for amendments to the general terms and conditions:

- a. The general terms and conditions may not be changed retroactively, unless those changes are to the user's advantage. (Article 8(a)).
- b. Whenever general terms and conditions have been substantially changed, the provider must inform business users of those changes (Article 11.4).
- c. Any change of general terms and conditions must be notified at least 15 days before the change is implemented (Article 3.2).

In order to provide certainty and a trustful business environment, the Regulation provides that online intermediation services to a given user may not be restricted, suspended or terminated with no reason. If the service is completely terminated, the business user has to be provided with a justification 30 days prior to the termination taking effect (Article 4.2) and in the case of restriction, suspension or termination of the online service, the provider of online intermediation services shall provide the business user with an effective, easily accessible and free of charge internal complaint-handling process (Article 11.1).

The Regulation itself does not provide for specific sanctions whenever the Regulation's provisions are violated. Member States, however, may prohibit or sanction unilateral conduct or unfair commercial practices in aspects not covered by the Regulation (Article 1.4).

## 9. Effective consumer and data protection: the intersections

### 9.1. Collective redress in data protection. The (possible) role of consumer protection associations

#### Relevant CJEU cases

- Judgement of the Court (Second Chamber) of 29 July 2019, *Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV*, Case C-40/17 (“**Fashion ID**”)
- Judgement of the Court (Third Chamber) of 25 January 2018, *Maximilian Schrems v Facebook Ireland Limited*, Case C-498/16 (“**Schrems**”)
- Judgement of the Court (Third Chamber) of 28 April 2022, *Meta Platforms Ireland Limited contre Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V.*, Case C-319/20 (“**Meta**”)

#### Main questions addressed

- Question 1 In light of the principle of effectiveness and of Article 47 of the Charter of Fundamental Rights, can a consumer protection association seek an action in the event of violations of data protection law?
- Question 2 What is the impact of Article 80 GDPR on the role of associations in data protection collective redress? How should Article 80 GDPR be interpreted in light of Article 47 of the Charter of Fundamental Rights and of the principles of proportionality, effectiveness and dissuasiveness?

#### 9.1.1. Question 1 – consumer protection associations and data protection law violations

In light of the principle of effectiveness and of Article 47 of the Charter of Fundamental Rights, can a consumer protection association seek an action in the event of violations of data protection law?

The analysis is mainly based on the *Fashion ID* case (C-40/17).

Judgement of the Court (Third Chamber) of 25 January 2018, *Maximilian Schrems v Facebook Ireland Limited*, Case C-498/16 (“**Schrems**”)

#### The case

Fashion ID, an online clothing retailer, embedded on its website the ‘Like’ social plugin from the social network Facebook (‘the Facebook “Like” button’). When a visitor consulted the website of Fashion ID, his/her personal data were transmitted to Facebook Ireland as a result of that website including that button. It seems that the transmission occurred without the visitor being aware of it regardless of whether or not he or she was a member of the Facebook social network or had clicked on the Facebook ‘Like’ button.

*Verbraucherzentrale NRW*, a public-service association tasked with safeguarding the interests of consumers, criticised Fashion ID for transmitting to Facebook Ireland personal data belonging to visitors to its website, first, without their consent and, second, in breach of the duties to inform set out in the provisions relating to the protection of personal data. *Verbraucherzentrale NRW* brought before the *Landgericht Düsseldorf* (Regional Court, Düsseldorf, Germany) legal proceedings for an injunction against Fashion ID to force it to stop that practice.

By decision of 9 March 2016, the *Landgericht Düsseldorf* (Regional Court, Düsseldorf) upheld in part the requests made by *Verbraucherzentrale NRW*, after having found that it had standing to bring proceedings under Paragraph 8(3)(3) of the UWG.

Fashion ID brought an appeal against that decision before the referring court, the *Oberlandesgericht Düsseldorf* (Higher Regional Court, Düsseldorf, Germany). The referring court put the following question to the CJEU because it had doubts as to whether Directive 95/46 gave public-service associations the right to bring or defend legal proceedings in order to defend the interests of persons who have suffered harm.

#### Preliminary questions referred to the CJEU

(1) Do the rules in Articles 22, 23 and 24 of Directive [95/46] preclude national legislation which, in addition to the powers of intervention conferred on the data-protection authorities and the remedies available to the data subject, grant public-service associations the power to take action against the infringer in the event of an infringement in order to safeguard the interests of consumers?

With its first question the referring court asked, in essence, whether Articles 22 to 24 of Directive 95/46 must be interpreted as precluding national legislation which allows consumer-protection associations to bring or defend legal proceedings against a person allegedly responsible for an infringement of the laws protecting personal data.

#### Reasoning of the CJEU

As a preliminary point, the Court noted that, under Article 22 of Directive 95/46, Member States are required to provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him/her by the national law applicable to the processing in question.

Article 28(3) of Directive 95/46 provides that the supervisory authority responsible for monitoring the application of the transposing measures within each Member State has the power to engage in legal proceedings when the national provisions adopted pursuant to that Directive have been violated or to bring those violations to the attention of the judicial authorities.

However, no provision of that Directive obliges Member States to provide, or expressly empowers them to provide, in their national law that an association can represent a data subject in legal proceedings or commence legal proceedings on its own initiative against the person allegedly responsible for an infringement of the laws protecting personal data.

Nevertheless, nothing in Directive 95/46 precludes national legislation allowing consumer-protection associations to bring or defend legal proceedings against the person allegedly responsible for such an infringement.

The Court then recalled that Member States are required, when transposing a directive, to ensure that it is fully effective in accordance with the objective which it seeks to attain, but they retain broad discretion as to the choice of ways and means of ensuring that it is implemented. In this regard, one of the underlying objectives of Directive 95/46 is to ensure effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data.

The fact that a Member State provides in its national legislation that it is possible for a consumer protection association to commence legal proceedings against a person who is allegedly responsible for an infringement of the laws protecting personal data in no way undermines the objectives of that protection and, in fact, contributes to the realisation of those objectives.

Since Directive 95/46 lays down rules that are relatively general and have a degree of flexibility, Member States have a margin of discretion in implementing that Directive. Although Article 22 of that Directive requires Member States to provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him/her by the national law applicable to the personal data processing in question, that Directive does not, however, contain any provisions specifically governing the conditions under which that remedy may be exercised. In addition, Article 24 of the Directive provides that Member States are to adopt ‘suitable measures’ to ensure the full implementation of its provisions, without defining such measures.

The Court then explained that a provision making it possible for a consumer-protection association to commence legal proceedings against a person who is allegedly responsible for an infringement of the laws protecting personal data may constitute a suitable measure, within the meaning of that provision, that contributes to the realisation of the objectives of that Directive.

Finally, the fact that Regulation 2016/679 (the General Data Protection Regulation, hereinafter the **GDPR**), which repealed and replaced Directive 95/46 and has been applicable since 25 May 2018, expressly authorises, in Article 80(2) thereof, Member States to allow consumer-protection associations to bring or defend legal proceedings against a person who is allegedly responsible for an infringement of the laws protecting personal data, does not mean that Member States could not grant them that right under Directive 95/46, but confirms, rather, that the interpretation of that Directive in the present judgement reflects the will of the EU legislature.

#### *Conclusion of the CJEU*

Articles 22 to 24 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data must be interpreted as not precluding national legislation which allows consumer-protection associations to bring or defend legal proceedings against a person allegedly responsible for an infringement of the protection of personal data.

#### *Impact on the follow-up case*

The referring court (*Oberlandesgericht Düsseldorf*) still has to deliver its decision.

### Elements of judicial dialogue

The *Schrems* case<sup>47</sup> is also relevant to answering the question of whether a consumer protection association can seek an action in case of violations of data protection law.

In that case, the plaintiff (Mr Schrems) had founded an association which sought to uphold the fundamental right to data protection. However, he brought the action against Facebook on the basis of his own rights and similar rights of seven other contractual partners of the defendant, who were also consumers in Austria, Germany and India. Austrian law indeed allows for one applicant to bring different claims against the same defendant and for these claims be heard jointly in the same proceedings. The plaintiff claimed that the defendant had committed numerous infringements of data protection provisions. After his actions were dismissed by the lower courts, Mr Schrems brought an appeal before the *Oberster Gerichtshof* (Supreme Court, Austria), which referred a question to the CJEU.

In its question, the referring court asked, in essence, whether Article 16(1) of Regulation No 44/2001 (related to jurisdiction over consumer contracts) must be interpreted as meaning that it does not apply to the proceedings brought by a consumer for the purpose of asserting, in the courts of the country in which s/he is domiciled, not only his/her own claims, but also claims assigned by other consumers domiciled in the same Member State, in other Member States, or in non-member countries. In other words, as AG Bobek put it in his opinion of the case, can Article 16(1) of Regulation no. 44/2001 establish an additional special jurisdiction in the country of the assignee's domicile, thus effectively opening up the possibility of collecting consumer claims from around the world?

The Court did not depart from its settled case law and held that the assignment of claims cannot, in itself, have an impact on the determination of the court having jurisdiction. It follows that the jurisdiction of courts other than those expressly referred to by Regulation no. 44/2001 cannot be established through the concentration of several claims in the person of a single applicant.<sup>48</sup>

By holding that the special rules of jurisdiction over consumer contracts do not allow consumers to seek redress jointly for their own claims and for claims assigned to them by consumers domiciled in the same Member State, in other Member States or in non-member countries, the CJEU interpreted Article 16(1) of Regulation 44/2001 strictly. Although the claim in these proceedings related to violations of data protection laws, the Court's conclusion applies to any claims related to consumer contracts.

While in *Schrems* the CJEU denied collective redress through the assignment of rights by consumers, it held in *Fashion ID* that Member States could allow consumer-protection associations to seek redress for violation of data protection laws. Consequently, if Austria had allowed such claims by consumer-protection associations, and if Mr Schrems had filed suit with his association, it is likely that he would have had standing to bring those third-party claims as

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<sup>47</sup> Judgement of the Court (Third Chamber) of 25 January 2018, *Maximilian Schrems v Facebook Ireland Limited*, Case C-498/16.

<sup>48</sup> On 28 February 2018, the Austrian Supreme Court upheld the Higher Regional Court's decision dismissing the appeal. Given the CJEU's preliminary ruling, the Austrian Supreme Court explained that the plaintiff could only rely on his personal claim and not on the other claims assigned to him. The Austrian Court did not depart from the CJEU's ruling and dealt with the issue rapidly.

well. In any event, it is worth noting that the CJEU does not generally exclude the possibility of collective redress for violations of data protection provisions. However, the issue in *Schrems* was rather specific, because it concerned the assignment of rights by consumers to a single plaintiff (a possibility under Austrian law). Therefore, the CJEU did not hold that consumers victims of violations of data protection law cannot obtain collective redress, but rather that multiple plaintiffs cannot circumvent the European rules on international jurisdiction by concentrating their claims in the person of a single applicant.

In the meantime, the GDPR entered into force and now provides in its Article 80 that data subjects have the right to mandate a not-for-profit body, organisation or association to lodge complaints and to exercise the right to receive compensation, where provided for by Member State law (see below). As explained below, the major drawback of Article 80 is that Member States are free to implement it or not, which leaves consumer-protection associations upholding the fundamental right to data protection with unharmonized collective redress mechanisms in the EU.

### 9.1.2. Question 2 - Representation of data subjects under Article 80 of Regulation 2016/679 (General Data Protection Regulation)<sup>49</sup>

What is the impact of Article 80 GDPR on the role of associations in data protection collective redress? How should Article 80 GDPR be interpreted in light of Article 47 of the Charter of Fundamental Rights and of the principles of proportionality, effectiveness and dissuasiveness?

Does the new legal framework leave any space for consumer protection associations in the field of data protection?

#### Article 80 GDPR

In the field of data protection, the GDPR repealed Directive 95/46/EC (the Data Protection Directive) and introduced a new collective redress mechanism. Its Article 80, titled ‘Representation of data subjects’, reads as follows:

*“1. The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.*

*2. Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a*

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<sup>49</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1, 4.5.2016.



*complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing.”*

This regulation introduced two new innovations for collective redress in the field of data protection.

First, it introduced the possibility for representative bodies to *claim compensation on behalf of data subjects*. In this case, the data subject’s rights of compensation are transferred to the representative body. This possibility is akin to an opt-in collective redress, in which data subjects voluntarily express their wish to claim compensation through the representative. The regulation only requires that the representative be a not-for-profit body, organisation or association, that its statutory objectives be in the public interest, and that it be active in the field of the protection of data subjects' rights and freedoms. This requirement notably excludes law firms and other for-profit litigators.

Second, this article introduced the possibility for representative bodies, *independently of a data subject's mandate*, to lodge complaints with supervisory authorities, but also to exercise the data subject’s rights to an effective judicial remedy against supervisory authorities, controllers, and data processors. In this case, representative bodies cannot claim compensation.

#### [The Meta case, C-319/2020, of 2 December 2021](#)

With regard to the application of Article 80 GDPR for protecting (also) economic interests, the CJEU decision on case C-319/20, *Facebook Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände* is of particular interest.

In its **preliminary reference**, the **German Federal Court of Justice** asked the CJEU whether the rules in Chapter VIII of the GDPR, in particular in its Article 80 concerning collective redress, and Article 84 concerning sanctions preclude national rules which – alongside the powers of intervention of the supervisory authorities responsible for monitoring and enforcing the Regulation and the options for legal redress for data subjects – empower, on the one hand, competitors and, on the other, associations, entities and chambers entitled under national law, to bring proceedings for breaches of Regulation (EU) 2016/679, independently of the infringement of specific rights of individual data subjects and without being mandated to do so by a data subject, against the infringer before the civil courts on the basis of the prohibition of unfair commercial practices or breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions.

The CJEU, **in its Decision of 28 April 2022 (Meta, C-319/20)**, stated that Article 80(2) GDPR does not preclude national legislation which allows consumer protection associations to bring legal proceedings against the person alleged to be responsible for an infringement of the protection of personal data, on the basis of the prohibition of unfair commercial practices, the infringement of a law relating to consumer protection or the prohibition of the use of invalid general terms and conditions, provided that the objective of the representative action in question is to ensure observance of the rights which the persons affected by the contested processing

derive directly from that Regulation. The CJEU recalled the principle of **dissuasiveness**, affirming that its interpretation of Article 80 was coherent with the deterrent nature and dissuasive purpose of actions for injunctions.

### *The implementation of Article 80 GDPR in Member States*

The major weakness of Article 80 is that it does not oblige Member States to act. Member States are free to choose whether to implement such collective redress mechanisms in their national legislation. The Commission's initial proposal included an obligation for Member States to provide for such a mechanism, but the Council amended the text to remove that obligation, despite the fact that the Parliament had approved it. The fact that Member States seem reluctant to implement collective redress mechanisms in general is reflected in their national legislations, since, as explained below, only six of them have adopted a functioning and efficient collective redress system (Belgium, France, Italy, Portugal, Spain and Sweden).<sup>50</sup>

Consumers soon took advantage of this new possibility at national level. In **France**, the UPF-Que Choisir consumer group brought a collective claim on 26 June 2019 before the *Tribunal de grande instance de Paris* (Tribunal of First Instance of Paris) to obtain an injunction against and claim compensation from Google for violation of the GDPR. The association wanted to obtain an injunction against Google to stop the illegal use by its Android system of the users' personal data and to mandate obtaining their express consent before collecting and treating their data. The association claimed a compensation of €1000 for any user of Google's Android system who had a Google account. Consumers who believe their rights have been violated will be able to join the case once the first-instance judge has decided on Google's liability.

In conclusion, the solution adopted by the Court in the *Fashion ID* case is important also in view of interpreting Article 80 GDPR, which introduced new possibilities for associations to claim effective judicial remedies and compensation on behalf of consumers whose personal data have been mishandled. However, the implementation of Article 80 depends on each Member State, and jurisdictional issues could still prevent consumer-protection associations from successfully representing data subjects in collective actions, as illustrated by *Schrems*.

### **9.1.3. The role of consumer associations in the field of data protection in light of the new Directive EU, 2020/1828, on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, adopted on 25 November 2020**

On 11 April 2018, the European Commission published a legislative proposal for the adoption of a new Directive on representative actions for the protection of the collective interests of

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<sup>50</sup> BEUC, *Why we need collective redress at EU level: a compelling collection of cases*, October 2019, accessible at: [https://www.beuc.eu/publications/beuc-x-2019-062\\_why\\_we\\_need\\_collective\\_redress\\_at\\_eu\\_level.pdf](https://www.beuc.eu/publications/beuc-x-2019-062_why_we_need_collective_redress_at_eu_level.pdf).

consumers.<sup>51</sup> The new Directive EU 2020/1828, on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC was adopted on 25 November 2020.

With regard to the role of consumer-protection associations in the field of data protection, Article 2 of the Directive stated that:

“This Directive applies to representative actions brought against infringements by traders of the provisions of Union law referred to in Annex I, including such provisions as transposed into national law, that harm or may harm the collective interests of consumers”.

The Regulation UE 2016/679 and some articles of Directive 2002/58 were included in Annex I. According to its recital 14, the Directive should cover infringements of the provisions of Union law referred to in Annex I *to the extent that those provisions protect the interests of consumers*, regardless of whether those consumers are referred to as consumers, travellers, users, customers, retail investors, retail clients, **data subjects**, or otherwise. **“However, this Directive should only protect the interests of natural persons who have been harmed or may be harmed by those infringements if those persons are consumers under this Directive. Infringements that harm natural persons qualifying as traders under this Directive should not be covered by it”** (see also recital 16).

Furthermore, according to recital 15, the Directive should be without prejudice to the legal acts listed in Annex I. Hence it should not change or extend the definitions laid down in those legal acts or replace any enforcement mechanism that those legal acts might contain. Furthermore, recital 15 of the Directive expressly states that “the enforcement mechanisms provided for in or based on Regulation (EU) 2016/679 (...) could, where applicable, still be used for the protection of the collective interests of consumers”.

To a certain extent, the Directive encourages the role of consumer-protection associations in data-protection cases. The coordination between collective redress in consumer and data protection cases has been an important issue for Member States in the implementation of the new Directive, also in light of Article 47, Article 8 CFR and of the principle of effectiveness. In this respect, the following question arises:

If the data subject is also a consumer, can Article 47 CFR lead to a concurrence of remedies that combines data protection and consumer law remedies?

Furthermore, comparison between the legislation on collective actions in consumer law and in data protection law shows that, within the latter, the collective redress system is less developed. To be noted in this regard is that the relationships between, on the one hand, the data subject and the data controller, and on the other hand, the consumer and the professional, are both characterized by an imbalance of power, although – at least partially – they are different in nature.

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<sup>51</sup> Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/0184 final - 2018/089 (COD). The Commission’s proposal was published on 11 April 2018.

The weaker position of the consumer vis-à-vis the seller or supplier concerns the consumer's level of knowledge and his/her bargaining power (e.g. *Costea*, 3 September 2015, C-110/14; *Siba*, C-537/13, 15 January 2015; *Powin*, C-590/17, 21 March 2019; *Vapenik*, C-508/12, 5 December 2013). The data subject's weaker position is due at least to the knowledge concerning the data subject that the data controller acquires in processing data, and to the fact that the ways and timing of that processing are put in place by the controller, with the consequence of an information asymmetry concerning the processing operations.

## 9.2. Lack of conformity of digital content or services and GDPR compliance

In light of the principles of effectiveness and dissuasiveness, and of Article 47 of the Charter of Fundamental Rights, could the consumer remedies against a lack of conformity of a digital content/service provided by Directive 2019/770 be used against a violation of data protection law?

### *New Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services*

Directive 2019/770 (the **Digital Content Directive**) was published in May 2019.<sup>52</sup> As part of the EU's Digital Single Market strategy, this Directive fully harmonised certain key contractual rules for the supply of digital content or services. Member States had until 1 July 2021 to adopt and publish the measures necessary to comply with this Directive. They should have applied those measures from 1 January 2022 onwards.

Among the measures that Member States had to transpose were remedies for lack of conformity of the digital content or service offered by a trader. In that case, Article 14 of the Directive provided three options for the consumer: (i) have the digital content or service brought into conformity; (ii) receive a proportionate reduction in price; or (iii) terminate the contract, in accordance with the conditions established by the Directive.<sup>53</sup> In regard to compensation, Article 3(10) of the Directive provided that Member States are free to regulate the right to damages in the case of violations of their national legislation transposing the Directive. However, it is beyond the scope of this note to detail these remedies extensively. Instead, the question at hand is whether these remedies for lack of conformity of a digital content or service can be used for violations of data protection law.

The scope of the Directive is rather broad, because it applies to any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price.<sup>54</sup> Furthermore, Article 3(1) of the Directive provides

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<sup>52</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, *O.J.E.U.*, 22.5.2019, L 136/1.

<sup>53</sup> Article 14 of Directive (EU) 2019/770.

<sup>54</sup> Article 3(1) of Directive (EU) 2019/770.

that it applies “where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader”.

The Directive also provides that Union law on the protection of personal data, especially the General Data Protection Regulation (the **GDPR**), shall apply to any personal data processed in connection with such contracts.<sup>55</sup> In the case of conflict between Directive 2019/770 and data protection law, the latter prevails.<sup>56</sup> In the same vein, Recital 48 of the Directive explicitly mentions that the lack of compliance with the GDPR may constitute a lack of conformity in the sense of the Digital Content Directive:

*“Facts leading to a lack of compliance with requirements provided for by Regulation (EU) 2016/679, including core principles such as the requirements for data minimisation, data protection by design and data protection by default, may, depending on the circumstances of the case, also be considered to constitute a lack of conformity of the digital content or digital service with subjective or objective requirements for conformity provided for in this Directive. One example could be where a trader explicitly assumes an obligation in the contract, or the contract can be interpreted in that way, which is also linked to the trader's obligations under Regulation (EU) 2016/679. In that case, such a contractual commitment can become part of the subjective requirements for conformity. A second example could be where non-compliance with the obligations under Regulation (EU) 2016/679 could, at the same time render the digital content or digital service unfit for its intended purpose and, therefore, constitute a lack of conformity with the objective requirement for conformity which requires the digital content or digital service to be fit for the purposes for which digital content or digital services of the same type would be normally used”.*

**Therefore, consumers whose personal data have been mishandled by a trader in the context of such a contract would be able to seek remedies available under the Digital Content Directive if that mishandling of personal data also constitutes a lack of conformity and all conditions laid down in the Directive are fulfilled.** Recital 48 of the directive confirms this finding:

*“Where the facts leading to non-compliance with requirements under Regulation (EU) 2016/679 also constitute a lack of conformity of the digital content or digital service with subjective or objective requirements for conformity as provided for in this Directive, the consumer should be entitled to the remedies for the lack of conformity provided for by this Directive, unless the contract is already void or voidable under national law”.*

In this respect, the **principle of effectiveness, Article 47 and Article 8 CFR**, should be taken into account by Member States in the implementation of Directive 2019/770 and by courts in its interpretation. In particular, it raises the question of whether compliance with data protection law by the service and digital content is to be qualified as an objective requirement for conformity, regulated by Article 8 of that directive.

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<sup>55</sup> Article 3(8) of Directive (EU) 2019/770.

<sup>56</sup> Article 3(8) of Directive (EU) 2019/770.

Another issue is the relationship between the information provided to the data subject in accordance with Regulation 2016/679 and Article 7 of Directive 2019/770, which regulates the subjective requirements for the conformity of digital content or service.

Moreover, this possibility is not reserved only for consumers who paid a price for the supply of a digital content or service. In fact, one of the main innovations of this Directive is that it acknowledges that consumers are often offered digital content and services for free, which is made possible by the processing of personal data concerning the data subject-consumer by the trader. In this regard, Recital 24 of the Directive states the following:

*“Such business models are used in different forms in a considerable part of the market. While fully recognising that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity, this Directive should ensure that consumers are, in the context of such business models, entitled to contractual remedies. This Directive should, therefore, apply to contracts where the trader supplies, or undertakes to supply, digital content or a digital service to the consumer, and the consumer provides, or undertakes to provide, personal data. The personal data could be provided to the trader either at the time when the contract is concluded or at a later time, such as when the consumer gives consent for the trader to use any personal data that the consumer might upload or create with the use of the digital content or digital service. Union law on the protection of personal data provides for an exhaustive list of legal grounds for the lawful processing of personal data. This Directive should apply to any contract where the consumer provides or undertakes to provide personal data to the trader. For example, this Directive should apply where the consumer opens a social media account and provides a name and email address that are used for purposes other than solely supplying the digital content or digital service, or other than complying with legal requirements. It should equally apply where the consumer gives consent for any material that constitutes personal data, such as photographs or posts that the consumer uploads, to be processed by the trader for marketing purposes. Member States should however remain free to determine whether the requirements for the formation, existence and validity of a contract under national law are fulfilled”.*

The recognition of the ubiquity of this type of business model (where consumers basically pay for digital content and services with their personal data) materialised in Article 3(1) of the Directive. In this case, consumers are entitled to have the digital content or digital service brought into conformity or to terminate the contract. Whereas consumers who pay a price for digital content or services are only entitled to terminate the contract when the lack of conformity is not minor, consumers who are supplied digital content or services and who provide their personal data are entitled to terminate the contract even if the lack of conformity is minor. Conversely, they obviously cannot claim a proportionate reduction of the price.

Consumers are not the only ones who can seek remedies for lack of conformity. In order to guarantee effective enforcement of the Directive’s provisions, Member States should include in their legislation the possibility for either public bodies, consumer organisations, professional organisations or not-for-profit bodies active in the field of data protection to take action under

national law before courts or administrative bodies.<sup>57</sup> Member States are free to choose which of these types of organisations (one or more) will be able to take action.

### 9.3. Unfair commercial practices and information provided to the data subject

#### Main questions addressed

- Question 1
- a. Shall, in light of the principles of effectiveness, proportionality, dissuasiveness, and of Article 47 of the Charter of Fundamental Rights, the Unfair Commercial Practices Directive (2005/29) be applied in the case of a **violation of the duty of information on data processing** provided by Articles 13 and 14 of the General Data Protection Regulation (2016/679)? Could, in light of the principles of effectiveness, proportionality, dissuasiveness, and of Article 47 of the Charter of Fundamental Rights, the Unfair Commercial Practices Directive (2005/29) be **used to interpret extensively the duty of information provided in the General Data Protection Regulation (2016/679)**?
  - b. What authority is **competent**? How should authorities coordinate with each other in light of the principles of effectiveness, good administration and duty of cooperation?

#### Relevant national cases in the cluster:

- Italian Consumer Protection Authority (Autorità Garante per la Concorrenza e il Mercato – AGCM), decision no. 26597, 11 May 2017, *Whatsapp-Trasferimento dati a Facebook*
  - Italian Consumer Protection Authority (Autorità Garante per la Concorrenza e il Mercato – AGCM), decision no. 27432, 29 November 2018, *Facebook- condivisione dati con terzi*
- Administrative court (T.A.R.) of Rome, 10 January 2020, no. 260 (judicial review of Italian consumer protection Authority, decision no. 27432, 29 November 2018)
- Administrative court (T.A.R.) of Rome, 10 January 2020, no. 261 (judicial review of Italian consumer protection Authority, decision no. 27432, 29 November 2018)
- Council of State, decisions nos. 2631 and 2630 of 29 March 2021

#### 9.3.1. Introduction: coordination and existence of parallel systems and authorities regulating the digital economy

Although unfair commercial practices linked to infringements of data protection laws are not limited to the digital economy, the best examples of such practices occur online. The most significant cases, in fact, involve online platforms, online traders and connected objects. Digital markets are characterized by a lack of informed consent by data subjects, leading to a lack of

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<sup>57</sup> Article 21(2) of Directive (EU) 2019/770.

transparency in how their data are collected and processed. These characteristics give rise to situations where a single conduct can potentially constitute infringements of data protection, consumer and/or competition law.

Another issue is determining what regulator is competent to investigate and sanction infringements of data protection law that also constitute infringements of consumer law and potentially restrict competition on the market. In February 2019, the German Competition Authority (*Bundeskartellamt*) issued a decision against Facebook for abusing its dominant position on the German market for social networks, based on the practice of collecting, using and merging data in user accounts. Similarly, the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*), also in charge of consumer protection, fined WhatsApp in May 2017 for violating consumer law because it shared its users' personal data with Facebook and forced its users to accept its new terms and conditions.

Both cases are discussed below because they involve practices prohibited by a mix of consumer, data protection and/or competition law. They illustrate the existence of parallel systems and authorities regulating the digital economy. Each system has its own legal bases, goals, procedures and remedies. But can those systems overlap, and if so, to what extent? This section will focus on the interplay between the General Data Protection Regulation (the **GDPR**) and Directive 2005/49 (the **Unfair Commercial Practices Directive**). In particular, it aims to answer the question of whether violations of information duties provided by the GDPR can also constitute unfair commercial practices under the Unfair Commercial Practices Directive, and whether this Directive could be used to interpret extensively the duty of information provided by the GDPR. This section also tries to determine which authorities are competent, and how they should be coordinated.

### 9.3.2. Question 1 a – Unfair commercial practices and information provided to the data subject

Shall, in light of the principles of effectiveness, proportionality, dissuasiveness, and of Article 47 of the Charter of Fundamental Rights, the Unfair Commercial Practices Directive (2005/29) be applied in the case of a **violation of the duty of information on data processing** provided by Articles 13 and 14 of the General Data Protection Regulation (2016/679)?

Could, in light of the principles of effectiveness, proportionality, dissuasiveness, and of Article 47 of the Charter of Fundamental Rights, the Unfair Commercial Practices Directive (2005/29) be **used to interpret extensively the duty of information provided in the General Data Protection Regulation** (2016/679)?

#### EU law perspective

The European Commission **Guidance on the Implementation/Application of the Unfair Commercial Practices Directive**<sup>58</sup> provides that:

<sup>58</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0163&from=IT>



- A trader's violation of Data Protection rules will not, in itself, always mean that the practice is also in breach of Directive 2005/29, but such **data protection violations should be considered when assessing the overall unfairness of commercial practices**, particularly in the situation where the trader processes consumer data in violation of data protection requirements, (*i.e.* for direct marketing purposes or any other commercial purposes like profiling, personal pricing or big data applications).

- Personal data, consumer preferences and other user generated content, have a "de facto" economic value and are being sold to third parties. Depending on the circumstances, this could also be considered a violation of the EU data protection requirements to provide the required information to the individual concerned as to the purposes of the processing of the personal data.

Furthermore, the European Commission affirmed in the Guidance that:

“According to its Article 51(1), the EU Charter of fundamental rights applies to the Member States when they implement Union law, thus also when they implement the provisions of the UCPD. The Charter contains provisions, among others, on the **protection of personal data (Article 8)**, the rights of the child (Article 24), consumer protection (Article 38) and the **right to an effective remedy and a fair trial (Article 47)**. The Court has stressed the significance of Article 47 of the Charter on access to justice in relation to remedies available to consumers in connection with consumer rights granted under EU directives. **The principle of effectiveness**, as referred to by the Court, means that national rules of procedure may not make it excessively difficult or impossible in practice for consumers to exercise rights conferred by EU law.”

The statement on the economic value of certain uses of personal data, such as those for commercial purposes should be coordinated with the impossibility of their qualification as “mere commodities”. In this respect, recital (24) of Directive 2019/770 states:

“Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader. (...) While fully recognising that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity, this Directive should ensure that consumers are, in the context of such business models, entitled to contractual remedies”.

According to the EDPB's Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, personal data cannot be regarded as commodities. In this Opinion, the EDPB states:

“The EDPS warns against any new provision introducing the idea that people can pay with their data the same way as they do with money. Fundamental rights such as the right to the protection of personal data cannot be reduced to simple consumer interests, and personal data cannot be considered as a mere commodity”.

## National case law

### **Italy**

In two decisions, the Italian Consumer Protection Authority (*Autorità Garante per la Concorrenza ed il Mercato*, hereinafter: **AGCM**) has considered the conduct of professionals concerning information about the data subject in light of Directive 2005/29 on unfair commercial practices.

In both **decisions** (no. 27432, 29 November 2018, and no. 26597, 11 May 2017), the AGCM affirmed that **the unfair commercial practices discipline is to be applied** where **personal data** concerning Facebook's users acquire economic value because they are **used for commercial purposes**, also in the absence of a price paid for the commercial use of those data.

Furthermore, in the decision no. 27432, 29 November 2018 the AGCM considered:

- a) as a **misleading commercial practice**, the professional's conduct consisting, during the first registration phase of the user on Facebook Platform, of the non-provision of clear, complete and immediate **information concerning the professional's activity of collecting and using, for commercial purposes, the data of its users**. The AGCM considered that the information provided by Facebook is generic and incomplete and that it does not adequately distinguish between, on the one hand, the use of data for the customization of the service with the aim of facilitating socialization with other users ("consumers"), and on the other hand, the use of data to carry out targeted advertising campaigns. **The misleading character of the practice is aggravated by the circumstance that, in the use of Facebook, the commercial purposes are mixed and presented as confused with the social and cultural purposes typical of the social network.**
- b) as an **aggressive commercial practice**, the professional's conduct whereby it applies, in relation to its registered users, a mechanism that, through various steps, involves the **transmission of user data from the platform of the social network to third-party websites/apps and vice versa**, without the prior express consent of the person concerned, for the use of the data for profiling and commercial purposes. The option available to the user to authorise or not this method is pre-set on the consent to the technical integration between Facebook and third-party websites/apps (so-called "Platform activation"), which implies, by default, a generic predisposition to the reciprocal transmission (Facebook/third parties) of Facebook users' data, and users' right to opt out. Moreover, Facebook affirms that the deactivation of the above-mentioned integration produces penalizing consequences for the users, both in the use of Facebook, and in the accessibility and use of third-party websites and apps. **The AGCM considered that this practice, by means of undue influence, is to be considered liable to considerably restrict the freedom of choice or conduct of the average consumer, thus inducing him/her to take a decision of a commercial nature that s/he would not otherwise have taken: in particular, the decision to integrate the functionalities of Facebook with those of third-party websites/apps, including games, and to transfer, consequently, his/her data from Facebook to third parties and vice versa.** According to the AGCM decision, the professional exercises undue influence on registered

consumers, who, without express and prior consent, therefore unconsciously and automatically, suffer the transmission and use by Facebook/third parties, for commercial purposes, of the data concerning them (information deriving from the use of Facebook and from their own experience on third party websites and apps). Undue conditioning derives from the application of the pre-selection system of the widest consent to the transmission of one's own data from/to third parties, described above, together with the description of significant limitations in the usability of the social network and of the websites/apps of third parties due to the deselection of the transmission option.

With regard to **decision no. 26597, 11 May 2017**, the proceeding concerned WhatsApp's conduct towards its customers (consumer users) which had induced users to accept in full the changes made to the Terms of Use of the WhatsApp Messenger application, which provided the option, pre-selected, of sharing certain personal data from their WhatsApp with Facebook so that the company could use such data for commercial profiling and advertising purposes. In the event of non-acceptance of those changes, the information given to the user/consumer suggested that the service would be discontinued. It should also be noted that for those who were already users of the application at the time of the update, WhatsApp allowed them to accept its contents even "partially". The existence of this option was not stated on the main screen dedicated to the acceptance of the new Terms of Use. Only on the next screen, which was accessed by clicking on the link to the Terms and Privacy Policy, would the user have realized that s/he had an alternative choice – which was, however, pre-set – by checking the box provided, to consent to the sharing of data. If the user had wanted to continue to use the application, without sharing his/her data with Facebook, s/he would have to uncheck the checkbox.

The commercial practice is classified by the AGCM as **aggressive because, through undue influence, it is likely to significantly restrict the average consumer's freedom of choice or conduct, thereby causing him/her to take a transactional decision that s/he would not have taken otherwise**. This undue influence stemmed from the fact that WhatsApp Messenger users were effectively forced to accept the new contractual terms in full, in particular with regard to the sharing of data with Facebook, making them believe that it would otherwise have been impossible to continue using the application whilst those who were already users at the date of the amendment of the Terms instead had the opportunity to "partially" accept its contents.

In July 2019 the **Italian Consumer Protection Authority (AGCM), the Italian Data Protection Authority (GPDP) and the Media Authority (AGCOM)** issued a **joint statement entitled "Big Data. Joint Investigation, Guidelines and Policy Recommendations"**, in which they set out some shared guidelines and policies, which stated that it is necessary (point no. 10):

“To strengthen the powers of AGCM and AGCom to acquire information outside the investigation procedures and to increase the maximum level of sanctions in order to ensure an effective deterrent effect of the consumer protection rules”.

In this respect, the Authorities affirmed that **consumer protection** can affect a variety of factors related to the relationship between operators and users in the acquisition and processing of data. According to the statement, the fact that the **legislation on the protection of personal data** is

applicable to the conduct of companies does not exempt them from complying with the rules **on unfair commercial practices; the two disciplines are seen as complementary and not alternative**. The authorities considered that consumer protection and privacy protection are undoubtedly important components of a fair competitive system.

As to the case law, the **Italian administrative court of Rome in its judgement no. 260, 10 January 2020**, which constituted the judicial review of the AGCM decision no. 27432/2018, stated that the economic value of the personal data of users requires the professional to inform the consumer that the information obtained from such data will be used for commercial purposes that go beyond its use in the “social network”. The practice may be qualified as misleading in the case of a lack of adequate information, or in the case of misleading statements. The court confirmed the AGCM’s decision, stating that the claim used by Facebook on the registration page in order to encourage users to subscribe (“Subscribe. It’s free and it will be forever”) suggested the absence of a counter-performance required from the consumer in exchange for the use of the service. Therefore, according to the court’s judgement, the practice was to be sanctioned because of the incompleteness of the information provided, where the claim of the service’s gratuitousness did not allow the consumer to understand that the professional would use his/her data for remunerative and commercial purposes.

Furthermore, the **Council of State, in its decisions nos. 2631 and 2630 of 29 March 2021**, stated that the rules on unfair commercial practices apply where the data subject provides personal data to the controller and a third party processes such data for commercial purposes, without the data subject being fully aware of such processing. However, the Council of State highlighted that the case should be interpreted, not as a case of commercialization of personal data by the data subject, but as a case where a data subject made information available to a third party, which used it for commercial purposes, without the data subject being fully aware of such purposes, also considering that s/he was misled by terms and conditions drafted by the professional.

Considering the Italian case law, and in light of the principle of effectiveness and dissuasiveness, the following questions can be raised:

In light of Article 47 of the Charter of Fundamental Rights, when there is a violation of data protection law and the conduct is qualified also as a commercial practice, taking into account Article 8 of the Charter of Fundamental Rights, what are the cases in which the practice is not to be considered unfair?

Could a decision of the Data Protection Authority declaring a violation of data protection rules be relevant to the Consumer Authority’s assessment concerning the existence of an unfair practice? If so, is it decisive in that assessment?

### **9.3.3. Question 1b – Competent administrative authorities and their coordination**

b. What authority is competent? How should authorities coordinate themselves in light of the principles of effectiveness, good administration and duty of cooperation?

## National cases

### Italy

The Consumer Protection Authority examined the question of its **competence** in Decisions 27432, 29 November 2018 and no. 26597, 11 May 2017. The AGCM stated that the data protection and the commercial practices disciplines have different material scopes and pursue different interests. As a result, the Authority affirmed that there is no conflict between the two disciplines; rather, they are complementary. On this basis, the authority stated that the conducts analysed in the proceeding were considered in light of the rules on unfair commercial practices. Therefore, the Italian Consumer Protection Authority affirmed its competence.

It should be noted that in both proceedings (related to decision no. 27432, 29 November 2018 and decision no. 26597, 11 May 2017), the Italian Consumer Protection Authority requested an **opinion from the Italian Media Agency** (*Autorità per le Garanzie nelle Comunicazioni*, AGCOM), in accordance with **article 27(6) of the Consumer Code**, which states that when a commercial practice has been or is intended to be disseminated in the periodical or daily press, or by radio or television or any other telecommunications medium, before issuing a decision, the Consumer Protection Authority shall request the opinion of the Communications Regulatory Authority.

In July 2019 the **Italian Consumer Protection Authority (AGCM), the Italian Data Protection Authority (GPDP) and the Media Authority (AGCOM)** issued a **joint statement entitled “Big Data. Joint Investigation, Guidelines and Policy Recommendations”**, in which they elaborated some shared guidelines and policies, and according to which (point no. 11) **it is necessary to create a permanent coordination among the three Authorities**. In particular, the Authorities considered that:

“The challenges posed by the development of the digital economy and Big Data require full use to be made of the synergies between ex ante and ex post instruments for protecting privacy, competition, consumers and pluralism.

AGCM, AGCOM and the GPDP, each within their own sphere of competence, can best guarantee their own institutional objectives, insofar as they will be able to take full advantage of the opportunities offered by fruitful cooperation.

To this end, the three Authorities, in the exercise of the complementary competences assigned to them and which contribute to tackling the critical issues of the digital economy, are committed to close forms of collaboration in interventions that affect the digital markets, including through the signing of a memorandum of understanding.”

The Authorities considered also that in order to allow a full understanding of the new phenomena in the digital economy, it seems appropriate to strengthen the powers of acquisition of information by AGCM and AGCOM outside the investigative procedures (investigations, pre-instructive activities), including the possibility to impose administrative sanctions in case of refusal or delay in providing the information.

In the judgement of the **Italian administrative court of Rome no. 260, 10 January 2020**, which constitutes the judicial review of the AGCM decision 27432/2018, the court addressed the

question of the consumer protection authority's competence, which was denied by the claimant. The court stated that the plaintiff's arguments presupposed that the protection of personal data only concerns fundamental rights. The national court considered that this approach did not take into account the economic value of personal data. The court stated that personal data are to be protected as an expression of an individual's right to privacy, and as such subject to specific and not renounceable forms of protection, such as the right to revoke consent, access, rectification, erasure.

In the court's view, a different kind of protection of personal data should be developed, because of the economic value of personal data. The court affirmed that the existence of an economic value of personal data, typical of the new economies of digital markets, requires operators to respect, in the relative commercial transactions, those obligations of clarity, completeness and non-deceptiveness of the information imposed by the legislation for protection of the consumer, who must be made aware of the exchange related to the adhesion to a contract for the fruition of a service, such as the use of a "social network". The court recalled the *Guidance on the Implementation/ Application of Directive 2005/29/ec on Unfair Commercial Practices* released by the EU Commission on 25 May 2016, where the economic value of personal data and the possible relevance of Directive 2005/29 was affirmed.

Moreover, the Italian administrative court stated that the omission of information about the exploitation for commercial purposes of user data is not a matter entirely regulated and sanctioned within data protection law. The court recalled also *Wind Tre* (C-54 and C-55/17), concerning the coordination among multiple administrative bodies competent in relation to the same conduct.

Then, according to the court in the present case, there was no incompatibility or antinomy between the provisions of data protection and consumer law, since they are complementary, imposing, in relation to the respective purposes of protection, specific information obligations, in one case functional to the protection of personal data, understood as a fundamental right, and in the other to the correct information to be provided to the consumer in order to allow him/her to make an informed economic choice.

Furthermore, the court highlighted that there was not a risk of over-deterrence consisting in a double sanction for the same conduct, considering that the object of investigation by the competent authorities concerned different conducts by the operator, the correct processing of personal data and the clarity and completeness of the information about the exploitation of the data for commercial purposes.

Similar arguments and the same conclusion were adopted by the **administrative court of Rome in the judgement 10 January 2020, no. 261.**

The **Italian Council of State, in its decisions nos. 2631 and 2630 of 29 March 2021,** confirmed the decision of the Tribunal. In its reasoning, the Council of State considered that the special EU discipline of personal data protection has a very extensive scope also due to the broad notion of "processing" (Article 4 GDPR), but that the application of data protection rules does not exclude the application of other disciplines, such as consumer law. Therefore, according to the Council of State, there is not a principle of the speciality of data protection law that excludes

the application of other provisions. In this regard, the Council of State considered that, when the processing involves behaviours and situations regulated by other legal sources for the protection of other values and interests, the legal system – first at the EU level and then at the national level – cannot exclude the application of other sectoral disciplines, such as that of consumer protection, to reduce the protection guaranteed to natural persons. Accordingly, the Council of State affirmed the need to ensure "multi-level protections" that can enhance the protection of individuals' rights. As to the merits of the case, the Council of State affirmed that not at stake was the commercialization of personal data by the data subject, but instead the exploitation of personal data made available by the data subject in favour of a third party who will use it for commercial purposes, without the data subject being fully aware of the data uses.

## Germany

On 6 February 2019, the German Competition Authority (*Bundeskartellamt*), which was also granted competences in the area of consumer protection, issued a decision against Facebook for abusing its dominant position on the German market for social networks, based on violations of data protection law. In its summary of the decision,<sup>59</sup> the Authority explained that the GDPR does not rule out the possibility for authorities other than the national data protection authorities (including competition and/or consumer protection authorities) to apply substantive data protection law.

The Authority also explained that the GDPR explicitly states that data protection law can also be enforced under civil law, i.e. that full consistency is not aspired to. More importantly, the Authority specified that:

“This applies in particular to consumer protection organisations and competitors and their associations. These entities can enforce data protection based on stipulations of the Act Against Unfair Competition (UWG) or regulations on business terms linked to data protection and also based on Section 19 GWB. A large part of the ECJ’s case law which data protection authorities and the data protection board have to consider has been obtained from civil law proceedings. Civil law proceedings promote rather than threaten the consistent implementation of data protection law, especially as the ECJ can be involved at an early stage as part of the preliminary ruling procedure”.

The *Bundeskartellamt* explained that, in the course of its proceedings against Facebook, it had maintained regular contact with data protection authorities, none of which has considered that it had exclusive competence. This is consistent with the approach taken by the Italian competition, data protection and telecom authorities in their joint statement.

### EU law perspective

The AGCM decision of May 2017 fining WhatsApp for data transfer to Facebook came three years after the European Commission approved the merger between the two companies.<sup>60</sup> In its

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<sup>59</sup> [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3)

<sup>60</sup> European Commission, Case COMP/M.7217 Facebook/Whatsapp 3 October 2014.

merger decision, the Commission had concluded that the merged entity would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. However, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities. This led the Commission to fine Facebook €110 million for providing misleading information during the merger process.<sup>61</sup>

Therefore, the Italian authority issued a decision against WhatsApp based on consumer law, but the problem originated in the Commission's decision not to oppose the merger. Since then the Commission has been criticised for not taking sufficient account of data-protection concerns in its review of the merger. In its decision, the Commission indeed stated that:

“For the purposes of this decision, the Commission has analysed potential data concentration only to the extent that it is likely to strengthen Facebook's position in the online advertising market or in any sub-segments thereof. Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules”.

Nothing in the Commission's decision suggests that it had coordinated its investigation with national data or consumer protection authorities. This illustrates the fact that there is a lack of coordination among the different national and European authorities in the field of consumer, data protection and competition enforcement.

In this respect, **the Advocate General, in its opinion on case C-319/20 of 2 December 2021,** has recently stated that “in the modern economy, marked by the boom in the digital economy, personal data processing is liable to affect individuals not only in their capacity as natural persons enjoying the rights conferred by Regulation (EU) 2016/679, but also in their capacity as consumers”.

The following questions therefore arise:

In light of the principles of effectiveness and good administration, is it necessary to provide a system of coordination between data protection and consumer authorities at national and European level? Could the documents and the investigations made by an authority be used in proceedings of another authority?

## 9.4. Information to be provided to the data subject and consumer protection

### Main questions addressed

Question 1      Could, in light of the principles of effectiveness, proportionality, dissuasiveness, and of Article 47 of the Charter of Fundamental Rights, the **Unfair Contractual Terms Directive** (93/13) and the **Consumer Rights Directive** (2011/83) be

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<sup>61</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_1369](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369)



applied in the case of missing or wrongful information to be provided to the data subject?

Question 2 In light of the principles of effectiveness, proportionality, equivalence, dissuasiveness and Article 47 of the Charter of Fundamental Rights, what is the **relationship between the information duties provided in Articles 5 and 6 of the Consumer Rights Directive (2011/83) and in Articles 13 and 14 of the General Data Protection Regulation (2016/679)**? Could the information duties provided in the Consumer Rights Directive be interpreted, in certain cases, as covering also those of the General Data Protection Regulation? What are the consequences on remedies available under the Consumer Rights Directive?

Question 3 In light of Articles 41 and 47 of the Charter of Fundamental Rights, what is the relationship between the administrative authorities and the judicial ones? Is there an impact of the principles of effectiveness, proportionality and dissuasiveness on organizing the coordination between data protection authorities ascertaining a data protection violation and judicial authorities in proceedings concerning the ascertainment of a consumer law violation?

Relevant national cases in the cluster:

- LG Berlin, 30/04/2013, (2013) *Neue Juristische Wochenschrift* 2605, 2606 – Apple
- LG Berlin, 19/11/2013, (2014) *MultiMedia und Recht* 563, 565 – Google
- LG Frankfurt a.M., 10/06/2016, (2016) *Beck Rechtsprechung (BeckRS)* 10907 – Samsung

#### 9.4.1. Question 1 – Unfair contractual terms and information provided to the data subject

Could, in light of the principles of effectiveness, proportionality, dissuasiveness, and of Article 47 of the Charter of Fundamental Rights, the **Unfair Contractual Terms Directive (93/13)** and the **Consumer Rights Directive (2011/83)** be applied in the case of missing or wrongful information provided to data subject?

With regard to this question, there are no European-level cases.

This sub-section will therefore focus on German national cases.

National case law

**Germany**

On **30 April 2013**, the **Landgericht Berlin** (District Court of Berlin) issued a decision against **Apple**.<sup>62</sup> The plaintiff, a consumer-protection association, requested an injunction against non-transparent clauses in the defendant's terms and conditions. The defendant sold computer hardware and communication devices. It also operated a telemedia service, which was available

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<sup>62</sup> Registration no. 15 O 92/12.

in German at ‘[www.apple.com/de](http://www.apple.com/de)’. On this website, the defendant published its terms and conditions, as well as its ‘Apple privacy policy’. The plaintiff claimed that clauses of the privacy policy and the terms and conditions were problematic under § 307 BGB and requested an injunction against their use.

The district court held that the clauses of a privacy policy also constitute terms and conditions. Under § 305 German Civil Code, terms and conditions are pre-formulated conditions for numerous contracts which one party stipulates with the other. On the basis of the presentation of the privacy policy as part of the order process (as a one click-wrapping option with the terms and conditions), the court adopted the least consumer-friendly interpretation of that clause. It held that consumers would assume the privacy policy to be part of the terms and conditions of the order. Consequently, the privacy policy formed part of the terms and conditions and was subject to the same control.

On **19 November 2013**, the **Landgericht Berlin** (District Court of Berlin) issued a decision against **Google**.<sup>63</sup> The defendant offered numerous services on its website, i.e. a well-known internet search engine, specialised search engines for images, maps, books, movies, e-mail and calendar services. Many of these services could be used without registration and free of charge, whereas some of them (i.e. the email service) required registration, and some were chargeable.

The plaintiff, a registered consumer-protection association, first successfully requested an injunction regarding the terms of use and its privacy policy against the defendant in 2008.<sup>64</sup> In the case considered, the plaintiff requested an injunction against the defendant’s updated Terms of Use and privacy policy (as used on the website in July 2012).

One of the issues dealt with by the District Court of Berlin was the extent of the possibility to control privacy policies and terms of services, and whether certain clauses of the terms and conditions are void.

First, the court decided that the defendant’s terms of use and privacy policy constituted terms and conditions and were, thus, subject to the same level of control. It was decisive that the defendant’s conditions of contract were pre-formulated for a multitude of contracts and stipulated in a one-sided manner. Adopting the least consumer-friendly interpretation of the website, the privacy policy was included in the analysis because it was impossible to sign up for the defendant’s services without consenting to that policy and the terms of use via a single click-wrapping link. Consequently, the terms of use and the privacy policy constituted terms and conditions. In addition, the defendant’s services did not constitute ‘gifts’, but rather a reciprocal relationship because the defendant made use of information collected in exchange for the services offered.

Second, the court declared several clauses of the defendant’s terms and conditions void on the grounds that the clauses were worded too broadly and that some of them were too one-sided. For example, it was unclear to the consumer how the defendant examined the uploaded content

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<sup>63</sup> Registration no. 15 O 402/12.

<sup>64</sup> LG Hamburg, judgement of 19.05.2011 - 10 U 32/09.

and what constituted infringements, because the clauses were phrased too generally and did not contain restrictions regarding conduct entailing criminal responsibility. The defendant also assumed continuing obligations although it should have been possible to terminate the relationship in the case of misconduct by either party. The privacy policy was similarly declared void because the consumer could not understand from it how his/her data would be processed. Lastly, the clauses regarding the ‘android market’ were illegal insofar as the defendant was authorized to access the devices owned by the consumer, to unilaterally change the conditions of the contract, and to terminate the use of services. Therefore, the court stressed that it did not matter whether the clauses were currently in use. Due to the abstract danger of re-offending, an official court injunction was necessary.

On **10 June 2016**, the **Landgericht Frankfurt** (District Court of Frankfurt) issued a decision against **Samsung Electronics**.<sup>65</sup> The plaintiff was the consumer-protection association of North Rhine-Westphalia. It acquired a ‘smart TV’ produced by the defendant Samsung Electronics. These ‘smart TVs’ feature the ‘Smart Hub’ user surface, where consumers can access third-party applications, but also upload their own movies and receive recommendations regarding a TV programme. In the assembly instructions, there was reference neither to the terms and conditions, nor to the privacy policy. The terms and conditions related to the privacy policy could be accessed after the assembly of the television set. During the first use of the television, it uses the consumer’s IP address to download and present the terms and conditions, as well as the appropriate privacy policy according to the region of the purchaser. The purchaser can then read the terms and conditions and the privacy policy displayed without sub-sections or headings, and then issue a blanket approval regarding them. The plaintiff complained that the HbbTV function was activated without the consent of the consumer, and that this function transferred data to the producer without previously informing or obtaining the consumer’s consent.

Addressing the points raised by the plaintiff, the Frankfurt district court concluded that there was no obligation on the defendant to inform the consumer about the activated HbbTV function, and the possible transfer of information. While this function transmits IP-addresses, §13(1) TMG is aimed at service providers who use data collected during the provision of the service. The defendant was not in a position where it had active knowledge of the data or the authority to dispose of the collected data. Hence, §13(1) TMG was not applicable to the defendant.

While the Frankfurt district court addressed the points raised by the plaintiff, its focus was on controlling the terms and conditions, including the privacy policy without explicit discussion. The district court raised this issue on its own motion and decided that the privacy policy lacked transparency. Due to its length and unclear presentation (56 TV pages in running text without sections or headings), the district court found that the privacy policy was not a suitable basis for agreeing to the collection and use of data. Furthermore, the court deemed the phrasing of the privacy policy unsuitable. At the beginning of the use of the product, the provider had to inform the consumer about the form, extent and purpose of collecting and using the data in an understandable manner.

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<sup>65</sup> Registration no. 2-03 O 364/15.

Therefore, it was necessary to inform the consumer about what kind of data would be collected. By using phrases including ‘for example’ and ‘possibly’ regarding the data used, the provider did not present an exhaustive list of what kinds of data were collected, and the consumer could not validly agree.

#### EU law perspective

Article 3(1) of the **Unfair Contractual Terms Directive** (the *UCTD*) provides that terms that have not been negotiated individually should be considered as unfair if they cause “a significant imbalance in the parties’ rights and obligations arising under the contract”. This provision gives courts the possibility to consider if violations of information requirements under the GDPR cause a significant imbalance in the parties’ rights and obligations.

Nevertheless, **in the case of conflict between the UCTD and the GDPR**, the latter should be considered the *lex specialis* because it regulates the specific sector of data protection. Indeed, it could be argued that Recital 42 of the GDPR provides indications on how to apply the UCTD in the area of data protection, (and therefore has *lex specialis* value) by providing that “in accordance with Council Directive 93/13/EEC a declaration of consent pre-formulated by the controller should be provided in an intelligible and easily accessible form, using clear and plain language and it should not contain unfair terms. For consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended. Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment”.

In July 2019, the Commission adopted a **Guidance Notice on the interpretation and application of the Unfair Contractual Terms Directive**.<sup>66</sup> The Guidance was remarkably silent about the interplay of transparency requirements under the Directive and similar information duties under data protection provisions. However, concerning the interplay of transparency requirements under the Directive and those in other EU instruments in general, the Guidance stated as follows:

- “Where other EU provisions apply in addition to the UCTD, one will, in general, favour an interpretation that preserves as much as possible the *effet utile* of the UCTD and of a potentially conflicting provision. For instance, rules of procedure should not jeopardise the effectiveness of the protection against unfair contract terms under the UCTD” (p. 16).
- “Various EU acts regulate in a detailed fashion the pre-contractual information that traders have to provide to consumers in general or with regard to specific kinds of contracts. [...] The UCTD is without prejudice to such provisions and the consequences of the failure to comply with them as set out in such specific instruments” (p.28).
- “Insofar as specific pre-contractual and contractual information requirements apply, they will also have to be taken into account for the transparency requirements under the

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<sup>66</sup> Commission notice — Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, OJ C 323, 27.9.2019, pp. 4–92.

UCTD, on a case-by-case basis, and in light of the purpose and scope of those instruments” (p. 28).

- “The fact of whether a seller or supplier has complied with sector-specific requirements is an important element when assessing compliance with the transparency requirements under the UCTD. However, given the parallel applicability of the UCTD with sectorial legislation, compliance with such instruments does not automatically indicate compliance with all transparency requirements under the UCTD” (p. 29).

Since this guidance was published after the entry into force of the GDPR, it is reasonable to assume that the Commission foresaw the interaction of the transparency requirements provided for in the UCTD and the GDPR when drafting these guidelines.

Regarding the relationship between information duties under the Consumer Rights Directive and the GDPR, see Section 9.4.2 below.

### 9.4.2. Question 2 – Relationship between information duties under the Consumer Rights Directive and the GDPR

In light of the principles of effectiveness, proportionality, equivalence, dissuasiveness and Article 47 of the Charter of Fundamental Rights, what is the **relationship between the information duties provided in Articles 5 and 6 of the Consumer Rights Directive (2011/83) and in Articles 13 and 14 of the General Data Protection Regulation (2016/679)**? Could the information duties provided in the Consumer Rights Directive be interpreted, in certain cases, as covering also those of the General Data Protection Regulation? What are the consequences for remedies available under the Consumer Rights Directive?

#### EU law perspective

In this area, the maxim *lex specialis derogat legi generali* is confirmed by Article 3(2) of the **Consumer Rights Directive**, which provides that in the case of conflict with another Union act governing specific sectors, the provision of that other Union act shall prevail and shall apply to those specific sectors.

In June 2014, the Commission adopted a **Guidance document concerning the Consumer Rights Directive**. This Guidance stated that, in the case of conflicts about information requirements provided for in Directive 95/46/EC (the Data Protection Directive) or Directive 2002/58/EC (the ePrivacy Directive), these sector-specific requirements prevail. In online sales, this is especially relevant to issues such as information about data processing and data subjects' consent to the tracking and use of personal data supplied. By extension, this may also hold true for the General Data Protection Regulation. Therefore, information duties stated in both the Consumer Rights Directive and the GDPR apply in parallel, but the ones from the latter prevail in the case of conflict. This is consistent with the fact that the GDPR contains more detailed transparency requirements than the Consumer Rights Directive does.

However, the fact that the European legislator has adopted sector-specific requirements and specifies that they prevail in the case of conflict means that the **information duties provided in the Consumer Rights Directive cannot automatically cover those of the GDPR.**

It is true that both consumer protection and data protection pursue **common purposes**, such as the free movements of goods and services in the internal market, transparency, and fair treatment. However, a teleological interpretation of both instruments arguing that information duties from the Consumer Rights Directive also cover those of the GDPR would be difficult to reconcile with the textual interpretation set forth above.

Hence, the **remedies** available under the Consumer Rights Directive cannot be used against violations of information duties provided in the GDPR alone. Violations of information duties under the GDPR can only be remedied with the Consumer Rights Directive if they also constitute violations of information requirements under that Directive.

### 9.4.3. Question 3 – Relationship between the administrative and judicial authorities

In light of Articles 41 and 47 of the Charter of Fundamental Rights, what is the **relationship between the administrative authorities and judicial ones**? Is there an impact of the principles of effectiveness, proportionality and dissuasiveness on organizing the coordination between data protection authorities ascertaining a data protection violation and judicial authorities in proceedings concerning the ascertainment of a consumer law violation?

This question concerns the possible impact of an administrative decision issued by a data protection authority which ascertains a data protection violation on a judicial proceeding concerning ascertainment of a consumer law violation. In this respect, the new Directive 2020/1828, on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC was adopted on 25 November 2020, and the new **Directive 2019/2161 on the better enforcement and modernisation of Union consumer protection rules** should be considered.

As explained above, Directive EU 2020/1828, on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC was adopted on 25 November 2020. With this new Directive, the EU legislator set out rules to ensure that representative actions aimed at the protection of the collective interests of consumers are available in all Member States.

It should first be noted that the Directive allows Member States to decide whether the representative action can be brought in judicial or administrative proceedings. Recital 19 of Directive 2020/1828 provides:

“Since both judicial proceedings and administrative proceedings could effectively and efficiently serve to protect the collective interests of consumers, it is left to the discretion of the Member States whether a representative action can be brought in judicial proceedings, administrative proceedings, or both, depending on the relevant area of law or

the relevant economic sector. **This should be without prejudice to the right to an effective remedy under Article 47 of the Charter, whereby Member States are to ensure that consumers and traders have the right to an effective remedy before a court or tribunal, against any administrative decision taken pursuant to national measures transposing this Directive. This should include the possibility for a party in an action to obtain a decision ordering the suspension of the enforcement of the disputed decision, in accordance with national law**".

The Directive further deals with the coordination between administrative and judicial authorities. In particular, Article 15 of Directive 2020/1828 states:

"Member States shall ensure that the final decision of a court or administrative authority of any Member State concerning the existence of an infringement harming collective interests of consumers can be used by all parties as evidence in the context of any other action before their national courts or administrative authorities to seek redress measures against the same trader for the same practice, in accordance with national law on evaluation of evidence."

On 27 November 2019, the European Parliament and the Council also adopted the new **Directive on the better enforcement and modernisation of Union consumer protection rules**, 2161/2019. The amending Directive modernized Directive 2005/29/EC (unfair commercial practices), Directive 93/13/EEC (unfair contract terms), Directive 2011/83/EU (consumer rights), and Directives 98/6/EC (indication of prices).

The new Directive states that consumers have the right to bring individual actions if they are harmed by unfair commercial practices, such as aggressive marketing. Member States shall provide contractual and non-contractual remedies. At minimum, contractual remedies should include the right to obtain a price reduction or to terminate the contract. Non-contractual remedies should, as a minimum, include the right to compensation for damages. To that effect, the new Directive inserts a new Article 11a entitled 'Redress' to Directive 2005/29/EC, which states:

1. "Consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.
2. Those remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law"

This right to individual remedies was introduced in Directive 2005/29/EC because the Commission considered that consumers harmed by unfair commercial practices did not have

access to effective remedies. Indeed, while Directive 2005/29/EC did ban aggressive and misleading commercial practices, it did not harmonise the rules on remedies.

Taken together, both Directives would allow consumers, who in some cases may also be data subjects, harmed by unfair commercial practices to initiate representative actions and seek the new remedies available for infringements of unfair commercial practices. While individual consumers should not be able to interfere with the procedural decisions taken by the qualified entities allowed to initiate the action, the consumers concerned by a representative action should be entitled to benefit from that representative action. In representative actions for redress measures, the benefits should take the form of remedies, such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid. In representative actions for injunctive measures, the benefit for the consumers concerned would be the cessation or prohibition of a practice that constitutes an infringement (recitals 36 and 37).

### **9.5. Guidelines emerging from the analysis**

The general issue addressed in this chapter concerns the intersections between consumer and data protection.

#### *Collective redress between collective and data protection*

With regard to collective redress, national legislation could allow consumer-protection associations to bring or defend legal proceedings against a person allegedly responsible for an infringement of the protection of personal data (*Fashion ID*, C-40/17).

Furthermore, when a violation of the GDPR violate the interests of consumers, and the person harmed is a consumer, Directive 2020/1828 on representative actions for the protection of the collective interests of consumers, which repealed Directive 2009/22 is to be applied. In any case, the relationship between collective redress in consumer and data protection should be carefully assessed; the existence of collective redress in consumer law, applicable to consumers who seek action for a data protection claim, may not be sufficient for ensuring effective data protection, especially within the digital context (e.g. where the parties are a small business and an online platform).

On the extension of collective redress, Article 80 GDPR does not preclude national legislation which allows a consumer-protection association to bring legal proceedings, in the absence of a mandate conferred on it for that purpose and independently of the infringement of specific rights of the data subjects. The legal proceedings can be brought against the person allegedly responsible for an infringement of the laws protecting personal data because of the infringement of the prohibition of unfair commercial practices, a breach of a consumer protection law, or the prohibition of the use of invalid general terms and conditions, where the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that regulation.



### Unfair commercial practices and information provided to the data subject

According to the EU Commission's *Guidance on the implementation/application of the Unfair Commercial Practices Directive*, although a trader's violation of Data Protection rules will not, in itself, always mean that there is an unfair commercial practice, data protection violations should be considered when assessing the overall unfairness of commercial practices, particularly in the situation where the trader processes consumer data in violation of data protection requirements. The Italian decisions of the Consumer Protection Authority and the related case law are examples of the interplay between data protection rules and Directive 2005/29.

### Information to be provided to the data subject and consumers' rights (Directive 2011/83)

The amendments of Directive 2011/83 provided in Directive 2019/2161 show the importance of the relationship between data and consumer law. In fact, the Directive applies when the trader supplies or undertakes to supply digital content which is not supplied on a tangible medium or a digital service to the consumer and the consumer provides or undertakes **to provide personal data** to the trader, except in some specific cases (Article 3 Directive 2011/83). Moreover, before the consumer is bound by a distance or off-premises contract the trader shall provide the consumer with the information concerning the fact that the price was personalized on the basis of automated decision-making.

However, the **remedies** available under the Consumer Rights Directive cannot be used against violations of information duties provided in the GDPR alone. Violations of information duties under the GDPR can only be remedied with the Consumer Rights Directive if they also constitute violations of information requirements under that Directive.

### Information to be provided to the data subject and unfair contractual terms

National case law (especially French and German) shows the importance of the interplay, with regard to information duties, between the GDPR and the UCTD Directive. There are not EU case law or documents in that regard. Nevertheless, the principle of effectiveness and Article 47 and 8 CFR may give important guidance in interpreting the relationship between the notion of unfairness under Directive 1993/13 and breaches of data protection law.

### Competent administrative authorities and their coordination

As explained in a joint statement of July 2019 by the Italian consumer, telecom, and data protection authorities, **data protection and consumer protection are complementary, and not mutually exclusive.**

**The same conduct can constitute an infringement of consumer, data protection and competition law.** At least at the European level, there is a **lack of coordination between the national and European authorities** in charge of consumer, data protection and competition enforcement, which may have negative consequences on the principles of effectiveness, good administration and the duty of cooperation.

*Lack of conformity of digital content or services and the GDPR compliance*

In light of Article 47 8 CFR, and of recital 48 of Directive 2019/770 on digital contents and services, the remedy which consists in the bringing-into-conformity of a service with regard to data protection compliance could be a means to grant consumers the right to data protection.

## 10. Effective Consumer Protection and the Right to Health and Safety: The Case of Product Liability

### 10.1. Effective protection and the use of presumption in the ascertainment of causal links

#### Relevant CJEU case

- Judgement of the Court (Second Chamber) of 21 June 2017, *N.W., L.W., C.W v. Sanofi Pasteur MSD SNC, Caisse primaire d'assurance maladie des Hauts-de-Seine, Carpimko.*, Case C-621/15 (“**Sanofi**”) - [link](#) to the database for analysis of the lifecycle of the case

#### Main question addressed

Question 1      What is the impact of the Charter of Fundamental Rights and related general principles of EU law on the application of the Defective Product Liability Directive? More specifically, could the principles of effective consumer protection, dissuasiveness, proportionality, equivalence, Article 47 CFR, and the right to health have an impact on the use of presumptions in the ascertainment of the causal link in relation to the liability rules related to defective products when they could be dangerous to health?

#### Relevant legal sources:

##### EU level

1st, 2nd, 6th, 7th and 18th recitals, Directive 85/374.

##### Article 1, Directive 85/374:

“The producer shall be liable for damage caused by a defect in his product.”

##### Article 4, Directive 85/374:

“The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.”

##### Article 6(1), Directive 85/374:

“A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

- the presentation of the product;
- the use to which it could reasonably be expected that the product would be put;
- the time when the product was put into circulation.”

##### National legal sources

Article 1386-1, French Civil Code:

“The producer shall be liable for the damage caused by a defect in his product, whether or not he is bound to the victim by contract.”

Article 1386-9, French Civil Code:

“The plaintiff is required to prove the damage, the defect and the causal relationship between defect and damage.”

Furthermore, case-law of the *Cour de Cassation* holds that in relation to the extra-contractual liability of pharmaceutical laboratories resulting from vaccinations produced by them, proof of a causal relationship between the defect in the product and the damage suffered by the injured person can be derived from “serious, specific and consistent presumptions” (see two judgements dated 22 May 2008 (Cass. Civ. 1ère, Bull. Civ. I, No 148 and No 149).

### **10.1.1. Question 1 – Effective protection and the use of presumptions in ascertainment of the causal link**

Question 1. Could the principles of effective consumer protection, dissuasiveness, proportionality, equivalence, Article 47 CFR, and the right to health have an impact on the use of presumptions in the ascertainment of the causal link in relation to the liability rules related to defective products when they could be dangerous to health?

The case

Mr W was vaccinated against hepatitis B by means of three injections, administered between December 1998 and July 1999, of a vaccine produced by Sanofi Pasteur. In August 1999, Mr. W began to suffer various physical problems, which led to a diagnosis of multiple sclerosis in November 2000. As from January 2001 he was no longer fit to work. Mr W’s state of health continued to deteriorate until it recorded a functional disability of 90%. He died in October 2011.

In 2006, Mr W, his wife and two daughters brought proceedings on the basis of Article 1386-1 et. seq. of the Civil Code, seeking to have Sanofi Pasteur ordered to pay compensation for the damage they claimed to have suffered. They argued that the short period between the vaccination and the appearance of the first symptoms of multiple sclerosis, in conjunction with the lack of any personal or family history of the disease, gave rise to serious, specific and consistent presumptions of a defect in the vaccine, and a causal link between the defect and Mr W.’s illness.

They relied in this regard on the case-law of the *Cour de Cassation*, according to which, in the area of liability of pharmaceutical laboratories for the vaccines that they produce, proof of a causal link between the defect in the product and the damage suffered by the person injured can be derived from “serious, specific and consistent presumptions”.

In particular, that case-law is very clear on the point that the court ruling on the merits, in the exercise of its exclusive jurisdiction to appraise the facts, may consider that the short period between the injection of the hepatitis B vaccine and the appearance of the first symptoms of multiple sclerosis, in conjunction with the lack of any personal or family antecedent of the disease, constituted serious, specific and consistent presumptions capable of proving the defect in the

vaccine and the existence of a causal relationship between it and the disease in question. This can be the case even if medical research does not, in general, confirm the existence of such a link.

The action was upheld at first instance by the *Tribunal de Grande Instance de Nanterre*, in a judgement of 4 September 2009. It was subsequently overturned on appeal by the *Cour d'Appel de Versailles* in a judgement of 10 February 2011. The latter court held that the evidence relied on by the claimants was sufficient to establish a presumption of a causal link but was insufficient to establish a defect in the vaccine. An appeal against that judgement was then brought before the *Cour de Cassation*, which quashed it by a judgement of 26 September 2012 holding that the *Cour d'Appel de Versailles* had not given a legal basis for its decision in relation to the absence of a defect in hepatitis vaccines.

The case was sent before the *Cour d'Appel de Paris*, which again overturned the first-instance judgement of the *Tribunal de Grande Instance de Nanterre* by judgement of 7 March 2014. The court held that there was no scientific consensus to support a causal relationship between the vaccination against hepatitis B and multiple sclerosis. It considered, secondly, that according to numerous medical studies, the aetiology of multiple sclerosis is currently unknown. Thirdly, a recent medical publication had concluded that, at the time when the first symptoms of the disease appear, the pathophysiological process probably commenced many months, or many years, earlier. Fourthly and lastly, the court noted that epidemiological studies show that 92 to 95% of persons with multiple sclerosis have had no antecedent of the disease in their family. In light of these elements, the court concluded that the criteria relating to temporal proximity between the vaccination and the first symptoms and the lack of personal and family antecedents could not establish serious, specific and consistent presumptions supporting the conclusion that there was a causal link between the vaccination and the disease in question.

A new appeal on a point of law was finally brought by W and Others against that judgement before the *Cour de Cassation*, which requested a preliminary ruling regarding the legitimacy and the eventual parameters of application of the “serious, specific and consistent presumptions” method of proof.

#### *Preliminary questions referred to the CJEU*

The *Cour de Cassation* referred the following three questions to the CJEU for a preliminary ruling:

1. “Must Article 4 of [Directive 85/374] be interpreted as precluding, in the area of liability of pharmaceutical laboratories for the vaccines that they manufacture, a method of proof by which the court ruling on the merits, in the exercise of its exclusive jurisdiction to appraise the facts, may consider that the facts relied on by the applicant constitute serious, specific and consistent presumptions capable of proving the defect in the vaccine and the existence of a causal relationship between it and the disease, notwithstanding the finding that medical research does not establish a relationship between the vaccine and the occurrence of the disease?”
2. If the answer to Question 1 is in the negative, does Article 4 of Directive 85/374 [...] preclude a system of presumptions by which the existence of a causal relationship between the defect

attributed to a vaccine and the damage suffered by the injured person will always be considered to be established where certain indications of causation are found?

3. If the answer to Question 1 is in the affirmative, must Article 4 of Directive 85/374 ... be interpreted as meaning that proof, the burden of which rests on the person injured, of the existence of a causal relationship between the defect attributed to a vaccine and the damage suffered by that person cannot be considered to have been adduced unless the causal relationship is established scientifically?"

#### Reasoning of the CJEU

In France, case-law of the *Cour de Cassation* holds that, in relation to extra-contractual liability of pharmaceutical laboratories resulting from vaccinations produced by them, proof of a causal relationship between the defect in the product and the damage suffered by the injured person can be derived from 'serious, specific and consistent presumptions' (see two judgements dated 22 May 2008 (Cass. Civ. 1ère, Bull. Civ. I, No 148 and No 149).

In the case considered, the national court's first question was whether Article 4 of Directive 85/374 precludes a method of proof whereby certain facts can give rise to a factual presumption that a vaccine is defective and caused a disease, even if medical research does not establish a relationship between the vaccine and the occurrence of the disease. The term 'factual presumption' is used to refer to a situation where the possibility exists for the judge to infer B from A, but only as part of his/her free assessment of the evidence.<sup>67</sup>

In its judgement, the CJEU emphasised that Article 4 of Directive 85/374 imposes on the injured party the burden of proving defect and damage, and the causal link between them. However, the Directive does not harmonise rules of proof and evidence to determine how the injured party can discharge its burden of proof. It is therefore for the national legal order of each Member State, in accordance with the principle of procedural autonomy, to establish the ways in which evidence is to be elicited, what evidence is to be admissible before the appropriate national court, or the principles governing the court's assessment of the probative value of the evidence adduced before it, and also the level of proof required. However, national rules of proof and evidence must respect the principles of equivalence and effectiveness.

The CJEU especially stressed the importance of the principle of effectiveness, which requires – in terms of the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from EU law – that those rules do not make the exercise of rights conferred by EU law impossible in practice or excessively difficult.

The CJEU concluded that Article 4 does not in itself preclude national evidentiary rules under which a national court may consider that certain factual presumptions constitute serious, specific and consistent evidence of a product's defect and constitute the causal link with the damage, even if there is no conclusive scientific evidence. National evidentiary rules must, however, not be applied by national courts in such a way that in practice they introduce, to the detriment of the producer, unjustified presumptions liable to infringe Article 4 of Directive 85/374, or even

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<sup>67</sup> Opinion of Advocate General Bobek delivered on 7 March 2017 (34).

undermine the effectiveness of the system of liability introduced by Article 1 of the Directive. This eventuality could arise:

- Firstly, in a situation where national courts apply those evidentiary rules in an overly rigorous manner by accepting irrelevant or insufficient evidence.
- Secondly, if the national courts were to apply such evidentiary rules in such a way that, if one or more types of factual evidence were presented together, there would ensue an immediate and automatic presumption that there is a defect in the product and/or a causal link between the defect and the damage.

Therefore, national courts must first ensure that the evidence adduced is sufficiently serious, specific and consistent to warrant the conclusion that, notwithstanding the evidence produced and the arguments put forward by the producer, a defect in the product appears to be the most plausible explanation for the occurrence of the damage, with the result that the defect and the causal link may reasonably be considered to be established.

The principle of effectiveness and the fundamental right to health and safety play an important role in the CJEU's reasoning in banning a stricter approach to causality that could exclude the use of presumptions. Indeed, as the Court stated in paragraphs 31 and 32, "such a high evidentiary standard, which amounts to excluding any method of proof other than certain proof based on medical research, could make it **excessively difficult** in many situations or, as in the present case, where it is common ground that medical research neither confirms nor rules out the existence of such a causal link, **impossible to establish producer liability**, thereby undermining the effectiveness of Article 1 of Directive 85/374 (...). Such a limitation as to the types of admissible evidence would also be inconsistent with the objectives pursued by Directive 85/374, seeking to ensure, in particular, as is apparent from the second and seventh recitals thereof, a fair apportionment of the risks inherent in modern technological production between the injured person and the producer (see, to that effect, judgment of 5 March 2015, *Boston Scientific Medizintechnik*, C 503/13 and C 504/13, EU:C:2015:148, paragraph 42) and, as evidenced by the first and sixth recitals thereof, that of protecting **consumer health and safety** (see, to that effect, judgment of 5 March 2015, *Boston Scientific Medizintechnik*, C 503/13 and C 504/13, EU:C:2015:148, paragraph 47)."

In its second question, the national court asked if the answer to that question would change if the presumption were legal as opposed to factual. The term 'legal presumption' is used to refer to a presumption that a judge is legally obliged to follow.<sup>68</sup> The CJEU once again recalled the importance of the correct allocation of the burden of proof, as well as the principle of the legal certainty and effectiveness of the system of liability.

The conclusion reached by the CJEU was that the use by the national legislature or, as the case may be, the supreme judicial body, of a method of proof such as that referred to in the second question, would *inter alia* have the consequence that the burden of proof provided for in Article 4 of Directive 85/374 is undermined. If the presumption was irrefutable, it would have the consequence that the producer is deprived of any opportunity to adduce facts or put forward

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<sup>68</sup> Opinion of Advocate General Bobek delivered on 7 March 2017 (34).

arguments in order to rebut that presumption. Consequently, the court would not have any opportunity to assess the case in light of those facts or arguments. Even if the presumption were refutable, the fact would remain that, since the facts pre-identified would be proven, the existence of a causal link would be automatically presumed, with the result that the producer could find itself in the position of having to rebut that presumption in order to successfully defend itself against the claim.

In regard to whether the causal link between a vaccine and a disease must be established using scientific evidence, the CJEU stated that excluding any kind of proof other than certain proof based on medical research could make it excessively difficult to establish the aforesaid link in many situations. Or, as in the present case, medical research neither confirms nor rules out the existence of such a causal link, so that it is impossible to establish producer liability, which would undermine the effectiveness of Article 1 of Directive 85/374. This limitation would also be inconsistent with the objectives pursued by the Directive, which seeks to ensure a fair apportionment of the risks inherent in modern technological production between the injured person and the producer (2<sup>nd</sup> and 7<sup>th</sup> recitals, Directive 85/374).

#### Conclusion of the CJEU

On those grounds, the CJEU (Second Chamber) ruled as follows:

“1. Article 4 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products must be interpreted as not precluding national evidentiary rules such as those at issue in the main proceedings under which, when a court ruling on the merits of an action involving the liability of the producer of a vaccine due to an alleged defect in that vaccine, in the exercise of its exclusive jurisdiction to appraise the facts, may consider that, notwithstanding the finding that medical research neither establishes nor rules out the existence of a link between the administering of the vaccine and the occurrence of the victim’s disease, certain factual evidence relied on by the applicant constitutes serious, specific and consistent evidence enabling it to conclude that there is a defect in the vaccine and that there is a causal link between that defect and that disease. National courts must, however, ensure that their specific application of those evidentiary rules does not result in the burden of proof introduced by Article 4 being disregarded or the effectiveness of the system of liability introduced by that directive being undermined.

2. Article 4 of Directive 85/374 must be interpreted as precluding evidentiary rules based on presumptions according to which, where medical research neither establishes nor rules out the existence of a link between the administering of the vaccine and the occurrence of the victim’s disease, the existence of a causal link between the defect attributed to the vaccine and the damage suffered by the victim will always be considered to be established when certain predetermined causation-related factual evidence is presented.”

#### Impact on the follow-up case

The *Cour de Cassation* issued its decision on 18 October 2017. Taking into account the instructions of the CJEU, it applied the ‘method of proof’ as interpreted in accordance with the principles of EU law. After having analysed the various factors and the scientific data available, it concluded



that the lower court had not erred in considering that the ‘serious, specific and consistent presumptions’ needed to establish a causal link between the product and the disease did not exist.

The *Cour de Cassation* recalled the factors that had led the lower court to consider that there was no presumption of a causal link. In particular, the short period between the vaccination and the appearance of the first symptoms of sclerosis was irrelevant because scientific studies have found that the pathophysiological process probably starts several months or even several years before the onset of the disease. Additionally, scientific ignorance about the aetiology of sclerosis precludes consideration that the absence of other possible causes of that disease and the lack of personal or family history of the disease could constitute elements of a presumption in the victim’s favour. Finally, the lack of a personal or family history of the disease is irrelevant because between 92 and 95% of patients affected by sclerosis have no personal or family history whatsoever.

The *Cour de Cassation* then held that the lower court had not deduced the absence of a ‘serious, specific and consistent’ presumption *solely* on the basis of a lack of scientific consensus on the aetiology of sclerosis. The lower court had rightfully exercised its judicial discretion by considering that these factors could not constitute a causal link between the defective vaccine and the disease. Therefore, the ‘serious, specific and consistent’ presumption to establish a causal link between the product and the disease could not be applied. The appeal was consequently dismissed.

#### Elements of judicial dialogue

In the *Sanofi* case there was a vertical judicial dialogue. The *Cour de Cassation* (France) requested a preliminary ruling to determine a potential incompatibility between Articles 1 and 4 of Directive 85/374 and Articles 1386-1 and 1386-1 of the French Civil Code (specifically, the *Cour de Cassation* case-law regarding the application of those Articles in cases of the extra-contractual liability of pharmaceutical laboratories resulting from vaccines produced by them). The CJEU provided guidelines for the interpretation of these provisions in light of the principle of effective consumer protection and the fundamental right to health; indeed, these principles should influence the balancing between scientific uncertainty and evidentiary rules in liability cases. Apparently, their impact has been limited, since the French court has adopted a relatively strict approach to presumptions without specific consideration of the fundamental rights involved.

#### Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

##### **France**

In January 2018, the *Sanofi* case was referred to by the Court of Appeal of Bordeaux in support of its reasoning in regard to a similar case (Cour d’appel de Bordeaux 1e civ., 23 January 2018, 17-01816).

The set of facts was very similar to the *Sanofi* case because the plaintiff also claimed that the three injections of a Sanofi vaccine against hepatitis B had caused him to contract multiple sclerosis. To establish Sanofi’s liability, the plaintiff had to prove the damage, the defect, and the causal relationship between defect and damage. The court held that the damage was established because

it was not disputed that the plaintiff suffered from multiple sclerosis. Similarly, it was not disputed that the vaccine was defective because multiple sclerosis had been identified as one of the unintended side-effects of the vaccine.

However, the *Cour d'appel de Bordeaux* drew conclusions regarding the causal link between the defect and the damage different from those of the *Cour de Cassation* in the *Sanofi* case. Just like the *Cour de Cassation*, the appellate court used the CJEU's decision in *Sanofi* to hold that the lack of established scientific evidence proving the existence of a causal link could not affect the effectiveness of the liability regime in place. However, the appellate court found a causal link between the vaccine and the damage based on the following elements, which it considered "serious, specific and consistent presumptions":

- The expert report neither established nor ruled out the existence of a link between the administering of the vaccine and the occurrence of the victim's disease;
- The plaintiff had no personal or family history of neurological conditions;
- The rarity of the causal link between the vaccine and the sclerosis does not rule out the existence of such a causal link;
- The fact that the plaintiff suffered from another disease (because of which he realised that he had sclerosis) six months after the last injection of the vaccine does not rule out the existence of a causal link because, although the expert report mentioned a period of two months between the injection and the onset of sclerosis, that period is only an average;
- The fact that the sclerosis was only detected six months after the vaccination does not exclude the possibility that the disease was already present during that six-month period;
- A study has shown that the risk of contracting sclerosis is multiplied by three if the patient has been vaccinated against hepatitis B within three years before the onset of the sclerosis.

Consequently, the *Court d'Appel* found that Sanofi was liable for the disease that the plaintiff had contracted as a result of the company's defective vaccine. Although the facts were very similar to those of the *Sanofi* case examined by the Court of Justice and then by the *Cour de Cassation*, the *Cour d'Appel de Bordeaux* drew a different conclusion from them. Whilst the *Cour de Cassation* in *Sanofi* had held that the short period between the vaccination and the appearance of the first symptoms of sclerosis was irrelevant, the appellate court found to the contrary: the fact that the sclerosis was not detected sooner did not exclude the possibility that the plaintiff had already contracted the disease during those six months. Moreover, whereas in *Sanofi* the *Cour de Cassation* had ruled that ignorance about the aetiology of sclerosis and the lack of history of the disease could not be interpreted in the plaintiff's favour, the *Cour d'Appel* made precisely that interpretation in this case. Therefore, although both cases had very similar facts, the two courts ruled rather differently, and they interpreted the indications of the CJEU differently. Interestingly, the *Cour d'Appel de Bordeaux*, contrary to the *Cour de Cassation* in the *Sanofi* case, expressly stated that the lack of scientific certainty could not be an obstacle to the effectiveness of the liability regime as indicated by the CJEU.

## 10.2. Effectiveness of the rights established by the Product Liability Directive and the right to retrieve information from producer

### Relevant CJEU case

- Judgement of the Court (Fourth Chamber) of 20 November 2014, *Novo Nordisk Pharma GmbH v S.*, Case C-310/13 (“**Novo Nordisk**”) - [link](#) to the database for analysis of the lifecycle of the case

### Main questions addressed

- Question 1      Could the principle of effectiveness have a role in interpretation of the Directive on defective products (85/374/CEE) in relation to a special national legal regime, for medicinal products, which guarantees a consumer’s right to retrieve from the producer information about a medicinal product?
- Question 2      Could the principle of effectiveness have a role in interpretation of the Directive on defective products (85/374/CEE) in relation to national laws which guarantee the general right of consumers to retrieve information about any product from its producer?

### Relevant legal sources

#### EU level

13<sup>th</sup> and 18<sup>th</sup> Recitals in the preamble to Directive 85/374/CEE, of 30 July 1985:

“[U]nder the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; ..., in so far as effective protection of consumers in the sector of pharmaceutical products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain possible; (...)

(...) the harmonisation resulting from this cannot be total at the present stage, but opens the way towards greater harmonisation; ... it is therefore necessary that the Council receive at regular intervals, reports from the Commission on the application of this Directive, accompanied, as the case may be, by appropriate proposals”.

#### Article 4 Directive 85/374/CEE, of 30 July 1985:

see p. 4.

#### Article 7

“The producer shall not be liable as a result of this Directive if he proves:

- (a) that he did not put the product into circulation; or

- (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or
- (c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
- (d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
- (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
- (f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product”.

Article 13 Directive 85/374/CEE, of 30 July 1985:

“This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified”.

**National legal sources**

Section 84a – Right to disclosure – of the German Medicinal Product Act, of 24 August 1976 (*Arzneimittelgesetz*, AMG), as amended by the Law amending the legislation on compensation for damages, of 19 July 2002 (entered into force on 1 August 2002)::

“(1) Where facts exist to justify the assumption that a medicinal product has caused the damage, the injured party can request information from the pharmaceutical entrepreneur unless such information is not necessary to verify a right to compensation pursuant to Section 84. The right refers to effects, adverse reactions and interactions known to the pharmaceutical entrepreneur as well as suspected adverse reactions and interactions brought to his/her attention and all further knowledge which could be of significance in assessing the justifiability of harmful effects. Sections 259 to 261 of the Civil Code shall be applied *mutatis mutandis*. A right to disclosure shall not exist where statutory provisions require that the data remain secret or when non-disclosure is justified by an overriding interest of the pharmaceutical entrepreneur or a third party.

(2) A right to disclosure also exists, under the conditions laid down in sub-section 1 vis-à-vis the authorities responsible for the authorisation and supervision of medicinal products. The authority is not obliged to disclose the information where provisions require that the data remain secret or when non-disclosure is justified by an overriding interest of the pharmaceutical entrepreneur or a third party. This shall be without prejudice to claims under the Freedom of Information Act”.

### 10.2.1. Questions 1 and 2 – Effective protection and the right to retrieve information from the producer

Question 1: Could the principle of effective consumer protection have a role in interpretation of the compatibility of the Directive on defective products (85/374/CEE) with a special national legal regime, for medicinal products, which guarantees the consumer's right to retrieve information about a medicinal product from the producer?

Question 2: Could the principle of effective consumer protection have a role in interpretation of the compatibility of the Directive on defective products (85/374/CEE) with national laws which guarantee a general right of consumers to retrieve information about any product from the producer?

#### The case

During the period from 2004 to June 2006, Ms S., who suffers from diabetes, was prescribed and administered Levemir, a medicinal product manufactured by Novo Nordisk Pharma, which caused her to suffer lipoatrophy, which is the loss of subcutaneous fat tissue at the injection sites.

Ms S. brought proceedings before the *Landgericht Berlin* (Regional Court, Berlin) seeking the disclosure by Novo Nordisk Pharma, pursuant to Paragraph 84a of the Arzneimittelgesetz (AMG), of information on the adverse and other effects of Levemir inasmuch as they relate to lipoatrophy.

The *Landgericht Berlin* upheld the claims made by Ms S. Novo Nordisk Pharma's appeal against that judgment was dismissed by the *Kammergericht Berlin* (Higher Regional Court, Berlin), whereupon that company lodged an appeal on a point of law before the *Bundesgerichtshof* (Federal Court of Justice; or 'the referring court'), arguing that article 84a of the German Act infringed Directive 85/374.

In those circumstances, the *Bundesgerichtshof* decided to stay the proceedings and request a preliminary ruling on the interpretation of Article 13 of Directive 85/374/CEE.

#### Preliminary question referred to the CJEU

"Must Article 13 of Directive 85/374 be interpreted as meaning that, as a "special liability system", the German system of liability for pharmaceutical products is not affected by that directive, with the result that the national system of liability for pharmaceutical products may be further developed or must that provision be interpreted as meaning that the situations covered by the liability system for pharmaceutical products existing at the time when the directive was notified (30 July 1985) may not be extended?"

#### Reasoning of the CJEU

The main issue was whether Article 13 of the Directive on products liability precludes rules of a special national liability system introduced after the Directive had been notified to the Member State concerned.

The German system of liability for pharmaceutical products, established under the German Law on Medicinal Products, constitutes such a special liability system for the purposes of Article 13

of Directive 85/374 insofar as it is limited to a specific manufacturing sector and it existed on 30 July 1985, the date on which the Directive was notified to the Federal Republic of Germany. However, the right to retrieve information from the producer of a medicinal product was introduced into the German Act on Medicinal Products in 2002, after the Directive had been notified to Germany.

First, the CJEU analysed whether the right to retrieve information on the adverse effects of a medicinal product is one of the imperative matters governed by the Directive, because, according to the eighteenth recital of the Directive and settled case law (see e.g. the judgement in *Dutruieux and caisse primaire d'assurance maladie du Jura*), the Directive does not seek full harmonization. The CJEU acknowledged that neither the right to, nor the scope of, the information that the consumer could require the manufacturer of that product to provide were covered by the Directive. **Moreover, the CJEU examined whether a statutory right to information, established by the legislation of a Member State, could undermine the allocation of the burden of proof as specified by Article 4 of the Directive or introduce a change in the circumstances listed in Article 7 in which the manufacturer was to be exempt from liability.** That right may make it easier for the victim to produce the requisite evidence enabling him/her to establish liability on the part of the manufacturer. However, such national legislation did not bring about a reversal of the burden of proof, which was for the victim to discharge, and it did not introduce any change in the circumstances listed in Article 7. The CJEU concluded that the consumer's right to obtain information about the adverse effects of a product falls outside the scope of the Directive.

The CJEU also analysed whether the national legislation establishing such a right undermined or compromised the effectiveness of the system of liability provided for under the Directive or the objectives pursued by the EU legislator by means of that system. It decided that such national legislation intends to eliminate the significant imbalance which exists between the manufacturer and the consumer, and does not change either the nature or the basic elements of the manufacturer's liability established by Directive 85/374.

#### *Conclusion of the CJEU*

The CJEU concluded that Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999, must be interpreted as not precluding national legislation – such as that at issue in the main proceedings, establishing a special liability system for the purposes of Article 13 of that Directive – under which, in consequence of an amendment to that legislation made after the Directive was notified to the Member State concerned, the consumer has the right to require the manufacturer of the medicinal product to provide him/her with information on the adverse effects of that product.

#### *Impact on the follow-up case*

The German Supreme Court issued a judgement on May 12, 2015 which dismissed the appeal of the manufacturer and confirmed the Court of Appeal's judgement in which it endorsed the right of the consumer to obtain information about the adverse effects of the drug according to Article

84a of the German Medicinal Products Act. The Supreme Court argued that the plaintiff had proved the existence of a plausible association between the consumption of the drug and the damage, and the defendant had not proven the lack of necessity of the information to support a product liability claim. The Court established that the request for information can be considered unnecessary if it is obvious that there is no basis for a design-defect claim or a failure-to-warn defect claim against the manufacturer of the product. However, this was not the case under discussion.

#### *Elements of judicial dialogue*

The German Supreme Court's judgement, issued on May 12, 2015 referred, in legal point 2, to the judgement of the CJEU and argued that the European Court had acknowledged that neither the right nor the scope of the information that the consumer could require the manufacturer of that product to provide were covered by the Directive. The Supreme Court accepted, as the European Court of Justice had observed, that the German legislation intends to eliminate the significance imbalance between the manufacturer and the consumer to access the information which is necessary to assess whether the consumer has a right to obtain compensation. According to the CJEU, such legislation does not undermine the burden of proof regulated by the Directive, and the effectiveness of the European legislation. The Supreme Court concluded that, according to the European judgement, Article 84a of the German Act does not alter the nature or the basic elements of the manufacturer liability established by Directive 85/374.

#### *Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

The Spanish Supreme Court decision no. 392/2019, 4 July 2019, decided whether the probabilistic causation applied by the appellate court to sustain the liability of the supplier resulted in a violation of the principle of effectiveness of the rules on burden of proof of the Directive on products liability. The plaintiff suffered a workplace accident when the cable that held the jib of an overhead crane broke, causing an 8,000 kg block of marble to fall on him. According to the Court of Appeal decision: "the fact that the defendant did not prove that the installation of the defective cable would have been without his intervention, it must be understood that he intervened, given the qualified probability that leads to such a conclusion after evaluating the behaviours and circumstances that good sense or common sense indicate in the present case as an index of responsibility within the normal chain of behaviors, causes and effect". The defendant argued that the appellate decision imposed on him the burden to prove that he did not supply the cable, resulting in a reversal of the burden of proof. The Supreme Court confirmed the appellate decision: "We cannot understand that the burden of proof has been reversed, but based on objective evidence, it is declared that the cable was supplied by [the defendant] Jaso, corresponding to [him] the proof of the facts that prevent, undermine or extinguish the legal effectiveness of the facts (Article 217.3 Civil Proceeding Act), which [he] did not do", referring in the [appellate] judgement to the doctrine of qualified probability, collected among others in Judgements 425/2009 of June 4, and 357/2011 of June 1: "although absolute certainty is not always required, since a qualified probability judgment is sufficient, which corresponds to the court of first instance, whose appreciation can only be attacked in cassation if it is arbitrary or contrary to logic or good sense".

Moreover, the Supreme Court referred to the CJEU doctrine established in the *Novo Nordisk* case and in the *Sanofi* case:

“The burden of proof of the elements of responsibility is harmonized. However, as the Court of Justice of the European Union has established, the Directive does not regulate any other aspect of regulation of the burden of proof (judgments of 20 November 2014, *Novo Nordisk Pharma GmbH*, case C-310/13, and June 21, 2017, *Sanofi Pasteur MSD SNC*, C-621/15), paragraphs 25 at 27 of this last decision) (...) As regards, more specifically, Directive 85/374, it follows from the Court of Justice's jurisprudence that the national regulation of the practice and the assessment of the evidence must not undermine the distribution of the burden of proof established in Article 4 of the Directive, nor, more generally, the effectiveness of the liability regime established by it or the objectives pursued by the European Union legislator through this regime (see, in this sense, the judgment of 24 November 20, *Novo Nordisk Pharma*, C-310/13, paragraphs 26 and 30 and cited case law).”

Finally, the Supreme Court concluded that the plaintiff had proved the failure of the cable due to a defect, damage and causation link. It was not under dispute that the defective cable had caused the heavy block of marble to fall on the plaintiff's legs.

### 10.3. Effective protection and the definition of damage: is the risk of damage relevant? Are replacement costs included?

#### Relevant CJEU case

- Judgement of the Court (Fourth Chamber) of 5 March 2015, *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE*, Case C-503/13 and C-504/13 (“**Boston Scientific Medizintechnik**”) - [link](#) to the database for analysis of the lifecycle of the case

#### Main question addressed

- Question 1 In light of the principle of effective consumer protection and of the fundamental right to health, in assessing liability, is the existence of a mere risk of damage a sufficient element to establish that a product is defective?
- Question 2 In light of the principle of effective consumer protection and of the fundamental right to health, is the Product Liability Directive to be interpreted as enabling recovery of damages consisting in those caused by the need for replacement of the product, when replacement is needed to prevent the risk of future damage to health?

#### Relevant legal sources

##### EU level

First, second, sixth, seventh and ninth recitals of Directive 85/374/CEE:



“Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may ... entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property;

Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production; (...)

Whereas, to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances;

Whereas a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances; (...)

Whereas the protection of the consumer requires compensation for death and personal injury as well as compensation for damage to property (...)”

Article 1 of the Directive 85/374/CEE:

See p. 4

Article 6 of the Directive 85/374/CEE:

See p. 4.

### **National legal sources**

Article 1 of the German Law on liability for defective products, of 15 December 1989:

“If, due to a defect in a product, a person dies, is injured or his health is impaired or there is damage to an item of property, the producer of the product shall compensate the injured person for the damage which arises as a result thereof. In the case of damage to an item of property, this shall apply only if an item of property other than the defective product is damaged and this other item of property is of a type ordinarily intended for private use or consumption and was used by the injured person mainly for private use or consumption”.

Article 3 of the German Law on liability for defective products, of 15 December 1989:

“A product has a defect when it does not provide the safety which may reasonably be expected, taking all circumstances into account, including:

- (a) its presentation,
- (b) the use to which it could reasonably be expected to be put,

(c) the time when it was put into circulation”.

Article 8 of the German Law on liability for defective products, of 15 December 1989:

“Where a person has been injured or his health impaired, compensation shall be made in respect of the costs incurred in restoring the injured person’s health and also the pecuniary loss which the injured person suffers because, as a result of the injury, his earning capacity is permanently or temporarily brought to an end or reduced or his needs are increased on a temporary or permanent basis”.

### **10.3.1. Question 1: Effective protection and the definition of damage: is the risk of damage relevant? Are replacement costs included?**

Question 1: In light of the principle of effective consumer protection and of the fundamental right to health, in assessing liability, is the existence of a mere risk of damage a sufficient element to establish that a product is defective?

#### The case

“G. Corporation, now B. S. Corporation, a company established in Saint Paul (United States), manufactures and sells pacemakers and implantable cardioverter defibrillators.

G. imported and marketed in Germany ‘Guidant Pulsar 470’ and ‘Guidant Meridian 976’ pacemakers, which are manufactured in the United States by G. Corporation, and ‘G. Contak Renewal 4 AVT 6’ implantable cardioverter defibrillators, manufactured by the latter in Europe (...)

In a letter of 22 July 2005 sent, *inter alia*, to treating physicians, G. indicated that its quality control system had established that a component utilised to hermetically seal the pacemakers which it marketed may experience a gradual degradation. That defect could lead to premature battery depletion, resulting in loss of telemetry and/or loss of pacing output without warning.

As a consequence, G. recommended physicians to consider, *inter alia*, replacing such pacemakers for the patients affected. Notwithstanding the fact that the warranty for the pacemakers may have expired, G. undertook to make replacement devices available free of charge for pacemaker-dependent patients and those deemed by their physicians to be best served by replacement.

Following that recommendation, the pacemakers previously implanted in B and W, who both had medical insurance cover with AOK, were replaced in September and November 2005, respectively, by other pacemakers provided free of charge by the manufacturer. The pacemakers that had been removed were destroyed without any expert opinion being obtained on their functioning.

AOK, on the basis of the devolved rights of B and W, brought proceedings before the Amstgericht Stendal (Local Court, Stendal) seeking an order that Boston Scientific Medizintechnik pay compensation in respect of the costs relating to the implantation of the

original pacemakers, updated to the dates on which those pacemakers were replaced. Those costs were EUR 2 655.38 in respect of B and EUR 5 914.07 in respect of W.

The Amstgericht Stendal upheld that claim by judgment of 25 May 2011. As Boston Scientific Medizintechnik's appeal against that decision was dismissed by the Landgericht Stendal (Regional Court, Stendal), that company lodged on appeal on a point of law before the referring court [Case C-503/13] (...)

By letter of June 2005, G. informed treating physicians that its quality control system had established that the functioning of implantable 'G. Contak Renewal 4 AVT 6' defibrillators might be affected by a defect in one of its components which could limit the device's therapeutic efficacy. It was apparent from the scientific analysis carried out that a magnetic switch in those defibrillators might remain stuck in the closed position.

As is apparent from the order for reference in Case C-503/13, if the 'enable magnet use' mode was activated and the magnetic switch became stuck in the closed position, treatment of ventricular or atrial arrhythmias would be inhibited. As a consequence, any cardiac dysrhythmia that could be fatal would not be recognised by the defibrillators and no life-saving shock would be given to the patient.

In those circumstances, G. recommended treating physicians to deactivate the magnetic switch in the defibrillators concerned.

On 2 March 2006, the implantable cardioverter defibrillator implanted in F, who was covered for insurance purposes by Betriebskrankenkasse RWE, was replaced prematurely.

By letter of 31 August 2009, Betriebskrankenkasse RWE requested Boston Scientific Medizintechnik to reimburse the costs incurred in respect of F's treatment, amounting to EUR 20 315.01 and EUR 122.50, in connection with the operation to replace the defibrillator.

An action was brought by Betriebskrankenkasse RWE for an order that Boston Scientific Medizintechnik reimburse the sums in question before the Landgericht Düsseldorf (Regional Court, Düsseldorf), which upheld that claim by judgment of 3 February 2011. After Boston Scientific Medizintechnik appealed against that judgment, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) varied that decision in part, ordering that company to pay the sum of EUR 5 952.80, together with interest. Boston Scientific Medizintechnik lodged an appeal on a point of law before the referring court, contending that Betriebskrankenkasse RWE's claim should be dismissed in its entirety" (C-504/13).

#### *Preliminary questions referred to the CJEU*

"1. Is Article 6(1) of Directive 85/374 to be interpreted as meaning that a product in the form of a medical device implanted in the human body (in this case, a pacemaker [and an implantable cardioverter defibrillator]) is already defective if [pacemakers] in the same product group have a significantly increased risk of failure [or where a malfunction has occurred in a significant number of defibrillators in the same series], but a defect has not been detected in the device which has been implanted in the specific case in point?"

2. If the answer to the first question is in the affirmative:

Do the costs of the operation to remove the product and to implant another pacemaker [or another defibrillator] constitute damage caused by personal injury for the purposes of Article 1 and section (a) of the first paragraph of Article 9 of Directive 85/374?”

### Reasoning of the CJEU

Question 1: the risk of defect also violates the reasonable expectations of safety of consumers.

The reasoning of the CJEU was based on three main considerations:

First, according to the Directive, the safety which the public at large is entitled to expect must be based on the objective characteristics and properties of the product and on the specific requirements of the group of users for whom the product is intended. In the cases of pacemakers and defibrillators, the safety requirements expected by the consumers are particularly high because of their function and the particularly vulnerable situation of patients using such devices.

Secondly, the potentially unsafe condition of such products stems from the abnormal potential for damage which those products might cause to the person concerned in the case of failure, as observed by the Advocate General. Consequently, **“where it is found that such products belonging to the same group or forming part of the same production series have a potential defect, it is possible to classify as defective all the products in that group or series, without there being any need to show that the product in question is defective”**.

This interpretation is consistent with the aims of the Directive, which seeks to ensure **a fair apportionment of the risks inherent in modern technological production between the injured person and the producer.**

The CJEU assumed the conclusion of the Advocate General. However, it did not share the reasoning of the Advocate General regarding the human health protection concern in European Union policy:

The Advocate General pointed out that “the defect for the purposes of Article 6(1) of Directive 85/374 is a risk of damage of such a degree of seriousness that it affects the public’s legitimate expectations in so far as concerns safety”. To support this definition, the Advocate General gives three arguments: the concept of product defect can exist irrespective of any internal fault in the product concerned; this definition of defect is also dictated by consumer protection requirements and the protection which Directive 85/374 seeks to grant consumers would be seriously undermined if, in the event that a number of products of the same model were placed on the market and a safety defect occurred in only some of those products, the probability that the defect was present in other products could not be taken into consideration. Finally, this approach is corroborated by the need for the integration of health concerns in European Union policy: “account must be taken of Article 168(1) TFEU and the second sentence of Article 35 of the Charter of Fundamental Rights of the European Union, which require a high level of human health protection in the definition and implementation of all Union policies and activities (...), such protection must be regarded as an objective that also forms part of the policy calling for the harmonisation of the Member States’ rules on liability for damage caused by defective products”.

### 10.3.2. Question 2: compensation for damage must cover the costs relating to the replacement of the defective product if the replacement is a necessary treatment to overcome the defect

Question 2: In light of the principle of effective consumer protection and of the fundamental right to health, is the Product Liability Directive to be interpreted as enabling the recovery of damages consisting in those caused by the need for replacement of the product, when replacement is needed to prevent the risk of future damage to health?

The CJEU gave a broad interpretation to the concept of “damage caused by death or personal injuries”, having regard to the **objective of protecting consumer health and safety pursued by the Directive**. Again, the nature of the fundamental rights affected (health and safety) influences judicial interpretation so as to ensure effective consumer protection. Thus, according to the CJEU, compensation for damage relates to all that is necessary to eliminate harmful consequences and to restore the level of safety which a person is entitled to expect. Consequently, in the case of implantable medical devices which are defective according to Article 6 of the Directive, compensation for damage must cover the costs relating to the replacement of the defective product.

According to paragraph 63 of the opinion of the Advocate General, “the exclusion of loss or injury caused by a surgical operation to remove a defective medical device would be entirely contrary to the general objective of protecting consumer health and safety pursued by Directive 85/374”. In conclusion, all material loss or damage resulting from personal injury must be compensated for in full (paragraph 66). The CJEU introduced a final distinction between pacemakers and implantable defibrillators because, in the case of implantable defibrillators, the manufacturer only recommended deactivating the magnetic switch of those medical devices. Hence, the Court concluded that it is for the national court to determine whether the deactivation of the product is sufficient to eliminate the defect and the risk of damage or whether surgery or product replacement was also necessary. By clarifying the notion of damages, in fact, the CJEU enlarged the function of liability, which is aimed at providing consumers with redress in kind rather than simply providing for monetary compensation. Indeed, one could observe that only enabling the replacement of a defective pacemaker would ensure effective protection of the consumer’s health.

It is apparent that, whereas in the Sanofi case examined above, the notion of proof concerning the causal link was interpreted broadly by taking into consideration the high level of *uncertainty* related to scientific research findings, in this case the notion of a defective product was interpreted broadly by taking into consideration the high level of *risk* of damage to the patient’s health. In both cases, the need for effective protection of consumers, whose health is put in danger, induced the CJEU to adopt a broader interpretation of EU law. The same reasoning applied to the notion of damages, as examined above.

#### Conclusion of the CJEU

“1. Article 6(1) of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for

defective products must be interpreted as meaning that, where it is found that products belonging to the same group or forming part of the same production series, such as pacemakers and implantable cardioverter defibrillators, have a potential defect, such a product may be classified as defective without there being any need to establish that that product has such a defect.

2. Article 1 and section (a) of the first paragraph of Article 9 of Directive 85/374 are to be interpreted as meaning that the damage caused by a surgical operation for the replacement of a defective product, such as a pacemaker or an implantable cardioverter defibrillator, constitutes ‘damage caused by death or personal injuries’ for which the producer is liable, if such an operation is necessary to overcome the defect in the product in question. It is for the national court to verify whether that condition is satisfied in the main proceedings”.

#### *Impact on the follow-up case*

In the case of the pacemakers, on 9 June 2015 the German Supreme Court issued a judgement stating that, according to the reasoning and judgement of the CJEU, the pacemakers produced by the defendant were defective in the sense of Article 3 of the German Product Liability Act because they belonged to a category of products that have a higher risk of failure, with a serious impact on consumers’ health. Moreover, the concept of damage caused by personal injuries must include the cost of the replacement of the product, because compensation for damage relates to everything that is necessary to eliminate harmful consequences and to restore the level of safety which a person is entitled to expect, in accordance with Article 6(1) of Directive 85/374.

In the case of the implantable cardioverter defibrillators, the German Supreme Court also issued a judgement, on 9 June 2015, which considered the product defective according to the reasoning of the CJEU, because any unit of this type of product could potentially fail and be potentially deadly for the consumer. As a consequence, the Supreme Court reversed the Court of Appeal’s judgement and referred to that Court its assessment of the existence of damage according to the CJEU’s decision.

#### *Elements of judicial dialogue*

The Supreme Court totally accepted the reasoning of the CJEU and referred the assessment of the causation of any damage to the Court of Appeal. There is no further information about the history of the case available at present.

According to the CJEU’s decision, the cost of a surgical operation is considered “damage caused by personal injuries” if, given the circumstances of the case, the surgery is necessary to overcome the defect. Otherwise, the costs of the surgery shall not be compensated.

#### *Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU*

##### **Spain**

The decision of the First Instance Court no. 2 of Orihuela (Alicante), of 1 September 2021, is the first product liability judgment related to the Essure® medical device, which is a permanent birth control device for women which causes bilateral occlusion of the fallopian tubes. A Spanish

patient brought a product liability claim against the Spanish supplier for adverse effects related to the product and for the damages associated with the surgery necessary to remove it.

In 2017, the German manufacturer Bayer AG stopped the commercialization of Essure® in the European Union market. Essure was designed as an alternative to tubal ligation, it was less invasive, and apparently had infrequent and limited adverse effects (basically, tubal perforation, expulsion, or misplacement of the device at the time of the procedure). In Spain, hundreds of women reported new and severe adverse effects leading to surgical extraction. In 2018 the Spanish Association of Gynecology and Obstetrics published complete safety information guidelines about the risks and the surgical procedures to remove the product. The most frequent symptoms reported were: pelvic, joint or lumbar pain, abdominal swelling, bleeding, tiredness, headaches, alopecia. Allergic symptoms (urticaria, itching) and mood changes (depression) had also been reported. The judicial decision considered that the information provided by the manufacturer to patients and physicians was insufficient and deemed the supplier liable, because it had continued to supply the product despite knowing the existence of the defect (Article 146 of the Spanish Consumer Rights Act of 2007). The decision referred to the interpretation of Article 6 of the Directive provided by the CJEU in the Boston Scientific Medizintechnik case:

“Article 6(1) of Directive 85/374 must be interpreted as meaning that, where it is found that products belonging to the same group or forming part of the same production series, such as pacemakers and implantable cardioverter defibrillators, have a potential defect, such a product may be classified as defective without there being any need to establish that that product has such a defect”.

The Spanish Supreme Court decision, n. 495/2018, of 14 September 2018 also refers to the concept of consumer expectations defined by the ECJ and particularly to the idea that the “the safety which the public at large is entitled to expect must be based on the objective characteristics and properties of the product and on the specific requirements of the group of users for whom the product is intended”. This judgment decides a case of property damages caused by defective elbows intended for installation in a heating circuit:

“It is true that, depending on the useful life of the product, the passage of time can lead to the conviction that it is not legitimate to expect that the product will continue to offer a sufficient level of security so as not to cause damage, but these circumstances do not occur in the present case.

If there is no element of judgment added to the mere circumstance of the elapsed time, it cannot be concluded that the product is not defective. If there had been any added circumstance, such as the nature of the product, its useful life, its exhaustion, the consideration of the Court [of Appeal, that rejects the defectiveness of the product,] could have been considered appropriate. As there is no element or circumstance added to the elapsed time, it is correct to assess, as the first instance judgment did, that the result produced is a manifestation that the elbows did not offer the safety that could be expected, taking into account the nature of the product and your destiny. It is legitimate for the public to trust that some copper elbows intended for installation in a heating circuit will withstand high temperatures and pressures without risk of leaks for a

reasonable period of time, therefore, in the absence of proof of another probable cause of the cracking, it cannot be accepted that in six years it is no longer possible to expect that the product does not offer security to continue using it according to its intended use.”

## 10.4. Combination of defective product and service liability

### Relevant CJEU case

- Judgement of the Court (Grand Chamber) of 21 December 2011, *Centre hospitalier universitaire de Besançon v Thomas Dutrueux, Caisse primaire d'assurance maladie du Jura*, Case C-495/10 (“**Dutrueux**”).

### Main question addressed

- Question 1 To what extent do the principle of effective consumer protection and the rights enshrined in Article 47 CFR influence the admissibility of concurring liabilities of producer and service providers?
- Question 2 To what extent do these principles influence the admissibility of a strict liability for those service providers that use a defective product during the performance of the service?

### Relevant legal sources

#### EU level

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products:

Article 1:

See p. 4. Article 3:

“1. ‘Producer’ means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

(...)

3. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated”.



Article 13:

“This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified”.

### **National legal sources**

Articles 1386-1 to 1386-18 of the *Code Civil* (French Civil Code). The provisions of the French Civil Code are the result of transposition to the French legal framework of the Articles of Directive 85/374. Those most relevant to the analysis of the case at hand are the following:

Article 1386-1:

“A producer is liable for the damage caused by a defect in his product, whether he was bound to the victim by a contract or not”.

Article 1386-6:

“Is a producer, when he acts in a professional capacity, the manufacturer of a finished product, the producer of a raw material and the manufacturer of a component part.

Under this Title, any person acting in a professional capacity is considered a producer when:

1° He presents himself as the producer by affixing his name, trademark or other distinguishing sign on the product;

2° He imports a product into the European Community to sell it, lease it, with or without a promise of sale, or to carry out any other form of distribution.

Under this Title, the persons whose liability may be at stake on the basis of Articles 1792 to 1792-6 and 1646-1 are not to be considered producers”.

#### **10.4.1. Questions 1 and 2 – validity of the existence of two concurring liability regimes for producers and service providers, being the later not based upon the fault of the service provider**

1. To what extent do the principle of effective consumer protection and the rights enshrined in Article 47 CFR influence the admissibility of concurring liabilities of producer and service providers?

2. To what extent do these principles influence the admissibility of a strict liability for those service providers that use a defective product during the performance of the service?

#### *The case*

On 3 October 2000, Mr Dutreux – who was then 13 years old – underwent surgery at the *Centre hospitalier universitaire* of Besançon (Besançon CHU). During the operation, he suffered burns due

to the overheating of the mattress on which he had been laid caused by a defect in the temperature-control mechanism of the mattress.

The case was heard by the *Tribunal administrative de Besançon*, which ordered Besançon CHU to compensate Mr Dutreux for the injuries that he had suffered by paying 9,000 euros to him and 5,974.99 euros to the *Caisse primaire d'assurance maladie du Jura*. This ruling was appealed against by Besançon CHU before the *Cour administrative d'appel de Nancy*, which dismissed the appeal. Finally, Besançon CHU appealed on a point of law to the *Conseil d'État*.

#### Preliminary questions referred to the CJEU

The *Conseil d'État* referred two questions to the CJEU for a preliminary ruling:

“1. Having regard to the provisions of Article 13 thereof, does Directive permit the implementation of a system of liability based on the special situation of patients in public healthcare establishments, in so far as it recognises, inter alia, that they have the right to obtain from such establishments, even when those establishments are not at fault, compensation for damage caused by the failure of products and equipment which they use, without prejudice to the possibility for the establishment to bring third-party proceedings against the producer?”

2. Does Directive limit the ability of the Member States to define the liability of persons who use defective equipment or products while providing services and, in so doing, cause damage to the recipient of those services?”

#### Reasoning of the CJEU

Without express mention of Article 47 CFREU, the CJEU addressed the particular issue before it by focusing on the principle of effective consumer protection. When answering the second question, the only one which was analysed by the CJEU, it stated that:

“35. Finally, since any no-fault liability on the part of service providers is thus, at the very most, additional to producer liability as deriving from Directive 85/374, it can, as the Advocate General has stated in points 45 and 46 of his Opinion, contribute to enhancing consumer protection”.

To reach this conclusion, the Court interpreted Articles 1 and 3 of Directive 85/374 and considered that Besançon CHU was solely a service provider and, therefore “[...] is not among the matters regulated by Directive 85/374 and hence does not fall within the directive’s scope” (paragraph 27). Moreover, given the absence of EU law on this issue, the Member States are the subjects entitled to regulate the liability of service providers. France had opted for a no-fault liability system that, in the opinion of the CJEU, was not against the objectives pursued by Directive 85/374:

“29. Moreover, the mere fact that there exists, alongside the system of producer liability established by Directive 85/374, a body of national rules which provide for the no-fault liability of a service provider which has, in the course of providing hospital treatment, caused damage to the recipient of the service because it has used a defective product does

not undermine either the effectiveness of that system of producer liability or the objectives pursued by the EU legislature by means of the system”.

The CJEU considered that this system of liability was compatible with the EU law when it did not impair the effectiveness of the Directive, meaning that there must always remain open the possibility to claim the producer’s liability when “the conditions laid down by the directive for such liability to exist are fulfilled” (paragraph 30). Moreover, the injured person shall always be entitled to claim this liability, and the service provider must thus be entitled to seek the producer’s involvement in the judicial proceedings so that its liability may be established (paragraph 30).

### Conclusion of the CJEU

The conclusion of the CJEU in the *Dutreux* case was:

“The liability of a service provider which, in the course of providing services such as treatment given in a hospital, uses defective equipment or products of which it is not the producer within the meaning of Article 3 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999, and thereby causes damage to the recipient of the service does not fall within the scope of the directive. Directive 85/374 does not therefore prevent a Member State from applying rules, such as those at issue in the main proceedings, under which such a provider is liable for damage thus caused, even in the absence of any fault on its part, provided, however, that the injured person and/or the service provider retain the right to put in issue the producer’s liability on the basis of the directive when the conditions laid down by the latter are fulfilled”.

This conclusion reached by the CJEU was preceded by analysis of why a no-fault liability regime on the side of the service provider is allowed under Directive 85/374.

According to the CJEU, given that Directive 85/374 has to do with products, which are defined as “movables” (Article 2), and the liability that may arise for the production, importation and supply of the products covered by the Directive, the legal regime as outlined in this Directive was “clearly likely to have an impact on the free movement of goods” (paragraph 33).

At the same time, the CJEU specified that the activity of a producer, importer or supplier has a purpose different from the activity developed by the service provider that acquires a product that may be defective (“there are, in that regard, appreciable differences so far as concerns the activity of service providers who, having acquired goods, use them in the provision of services to third parties and, consequently, that activity cannot be equated with the activities of producers, importers and suppliers”, see paragraph 33).

The CJEU also concluded that the no-fault liability regime for service providers would be admissible provided that it “does not [...] distort competition between operators in the production and marketing chain” (paragraph 34) because such an alternative liability regime on

the side of the service providers which acquire a product that causes a harm to the recipient while the service is being performed “contributes to enhancing consumer protection”.

#### Impact on the follow-up case

On 12 March 2012, the *Conseil d'État* issued its decision (ECLI:FR:CESSR:2012:327449.20120312), in which, considering the CJEU's conclusion, the position of the *Cour administrative d'appel de Nancy* concerning the decision of the *Tribunal administratif de Besançon* to award damages to Mr Dutreux was upheld.

“Considering the result of the interpretation given by the Court of Justice of the European Union that the Directive of 25 July 1985 is not an obstacle for the application of a principle according to which, without prejudice to the actions that may be exercised against the producer, the public hospital service is liable, even in the absence of liability by its side, of the damages that may result from the use of a defective health product that it uses; and that the Administrative Court of Appeal of Nancy did not commit an error of law [...]”.

#### Elements of judicial dialogue

Given that the CJEU issued a preliminary ruling arisen because of the doubts expressed by the highest court of a Member State regarding the interpretation of Directive 85/374, there was a vertical judicial dialogue.

On the other hand, there was an important component of horizontal dialogue (i.e., within the CJEU's jurisprudence), because Besançon CHU argued in the proceedings before the CJEU that the *Veedfald* case had already dealt with the same case as the one being discussed before the CJEU. The Court, following the opinions of the Advocate General and the French government, dismissed the allegation made by Besançon CHU because it considered that the cited case dealt with a very different question, which was whether a public administration owning two public hospitals (one of them producing a defective fluid to be used during kidney transplants, and the other using this fluid, so that the kidney was useless for its purpose) may be held liable when, in the opinion of the public administration, the exceptions provided by Articles 7(a) and 7(c) of Directive 85/374 do not apply.

Hence, as the CJEU stated in *Dutreux*, the cases were different because in *Veedfald* the legal person sued was the producer and the service provider.

### **10.5. The guidelines emerging from the analysis**

Chapter 10 concerns effective consumer protection and the right to health and safety.

#### Effective protection and the use of presumption in the ascertainment of causal link

The first issue assessed in the chapter has been whether the principles of effective consumer protection, dissuasiveness, proportionality, equivalence, the Article 47 CFR, and the right to health could have an impact on the use of presumptions in the ascertainment of the causal link in relation to the liability rules related to defective products when they could be dangerous for health.

As acknowledged in the Sanofi Case (Case C-621/15) by the CJEU with special regard to the principle of effectiveness, Directive 85/374 does not preclude national evidentiary rules under which a national court may consider certain factual presumptions to constitute serious, specific and consistent evidence of a defect of a product and to constitute the causal link with the damage, even if there is no conclusive scientific evidence. Such evidentiary rules do not bring about a reversal of the burden of proof, which, as provided for in Article 4 Directive 85/375, is for the victim to discharge. Indeed, the use of presumptions plays an important role in ensuring effective consumer protection in the case of high uncertainty from a scientific point of view and a fair apportionment of risk between the injured person and the producer.

Precisely because a fair apportionment is needed, however, national evidentiary rules must not be applied by national courts in such a way that in practice they introduce, to the detriment of the producer, unjustified presumptions liable to infringe Article 4 of the Directive 85/374 or even undermine the effectiveness of the system of liability introduced by Article 1 of the Directive. Therefore, national courts must first ensure that the evidence adduced is sufficiently serious, specific and consistent to warrant the conclusion that, notwithstanding the evidence produced and the arguments put forward by the producer, a defect in the product appears to be the most plausible explanation for the occurrence of the damage, with the result that the defect and the causal link may reasonably be considered to be established.

Regarding whether the causal link between vaccine and disease must be established using scientific evidence, the court indicated that excluding any method of proof other than certain proof based on medical research could make it excessively difficult in many situations to establish producer liability, which would undermine the effectiveness of Article 1 of Directive 85/374. Such a limitation would also be inconsistent with the objectives pursued by the Directive in relation to the need to ensure a fair apportionment of the risks inherent in modern technological production between the injured person and the producer (2<sup>nd</sup> and 7<sup>th</sup> recitals, Directive 85/374).

#### *Effective protection and the right to retrieve information from producer*

The main conclusion reached by the CJEU was that the effectiveness of the Directive on products liability does not prevent national legislation from regulating the right of the consumer of medicinal products to obtain information from the producer if it is important for seeking protection against violations of consumer rights affecting his/her health.

The CJEU not only recognized that the right of information is not part of the matters imperatively covered by the Directive, but it also analysed the implications of the national law for accomplishment of the nature and objectives of the Directive.

#### *Effective protection and the definition of damage: is the risk of damage relevant? Are replacement costs included?*

Although in the absence of an explicit reference to the principle of effective consumer protection, the CJEU made it clear that the notion of defect and that of damage must be compatible with the high level of safety expected by the consumers of products sensitive for their health, such as pacemakers and implantable defibrillators: the mere risk of the device's malfunctioning can be considered a defect according to the Directive, and it is not necessary to prove that, in the case at issue, the product malfunctioned effectively.

In the CJEU's view, the abnormal risk of damage to which the defect subjects the patients concerned should be taken into account when ascertaining the existence of damage and therefore when assessing whether the liability covers the costs incurred by consumers to replace pacemakers, if that is necessary to remedy the defect.

*Combination between defective product and service liability*

The effective consumer protection pursued under Directive 85/374 is not only compatible with the autonomy of MSs to establish a concurrent regime of service provider liability to be combined with the one established at the EU level concerning producer's liability. This concurrence of liability regimes may also contribute to enhancing the effectiveness of the EU Directive and the pursuit of its objectives in the area of product safety and consumer health (Dutruieux, C-495/2010). In the case of concurring liabilities established at the national level, the principle of effectiveness requires a special coordination so that consumers can always be able to sue the liable producer, or the sued service provider can always request that the producer's intervention be deemed harmless.

