

Judicial Training Project

***Roadmap to European Effective Justice (Re-Jus): Judicial Training
Ensuring Effective Redress to Fundamental Rights Violations***

RE-JUS CASEBOOK

EFFECTIVE JUSTICE IN CONSUMER PROTECTION



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Introduction: A Brief Guide to the Casebook

This REJUS Casebook on the impact of fundamental rights on consumer protection was drafted on the basis of collaboration between academics and judges from various European countries. This collaboration combines rigorous methodologies with judicial practices, and provides trainers with the sort of rich comparative material that should always characterize transnational training. We firmly believe that transnational training of judges should be based on rigorous analysis of judicial dialogue between national and European courts and, when the cases arises, among national courts. Training includes not only the transfer of knowledge, but also the creation of a learning community composed of different professional skills. This casebook evolved in both content and method over time, with additional suggestions accruing from its use in training events.

Judicial dialogue also remains a key dimension of the approach utilised in this casebook. We investigate the full life cycle of a case, from its origin 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 Court. We then analyse the judgments and distinguish them according to the degree of detail chosen when they provide guidance both to the referring court and to the other courts that have to apply the judgments in the various Member States.

The CJEU clearly signals the degree of specificity of the question and provides the answer accordingly. At times it gives a very context-specific answer, not easy to generalize or apply to other legal systems; at other times it may define general principles that can be flexibly applied to different legal systems. This is clearly the case of those judgments on *ex officio* power and *res judicata* where procedural laws differ significantly across Member States. We then offer a comparative perspective on the impact of a judgment or cluster of judgments addressing the same issue (for example *ex officio* power to examine unfairness in contract clauses) on the case law of Member States other than that of the referring court. In some cases, the impact can be examined through judgments expressly referring to the CJEU's decisions; in other cases, the Casebook suggests interpretative tools 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 adapt the judgment to their national legal context are often underestimated. While formally the CJEU judgments are binding on Member State courts, their application necessitates careful analysis to determine which substantive and procedural rules may be affected by the judgment, and in particular application of Article 47 of the Charter and the principle of effectiveness.

The judgments and their impact show that application of the Charter, and in particular Article 47, is promoting substantive and procedural changes in consumer protection. The principles of effectiveness and equivalence have stimulated innovative solutions for procedural rules that proved inadequate to meet the demands of justice and for judicial control over unfair practices. The more consolidated case law on *ex officio* powers and responsibilities has been complemented by recent judgments concerning the relationship between individual remedies and collective redress, and the interplay between administrative and judicial enforcement. The jurisprudence on Article 47 can produce similar results at national levels by enhancing consumer protection and at the same time balancing the rights of consumers and professionals.

Although Article 47 CFREU cannot be directly applied to administrative enforcement, similar principles are likely to emerge to coordinate different forms of consumer rights enforcement, including ADR and arbitration, to which EU secondary legislation has already extended important procedural safeguards. The courts will address the issue of coordination with other enforcement agencies, both to avoid overlapping and to ensure consistency. With no EU legislation on the point, the CJEU is likely to play a leading role in devising coordination tools. Judicial dialogue can be usefully deployed to guarantee homogeneity across Member States and so ensure that effective consumer protection is not undermined by excessive variation in procedural rules concerning individual and collective remedies.

Furthermore, the new directive proposals, going under the name of a “New Deal for Consumers” (COM/2018/0183 final), are designed to reform the unfair contractual terms directive (dir. 93/13), the unfair commercial practices directive, and the dir. 2000/22. The proposal on representative actions for the protection of the collective interests of consumers, which should repeal dir. 2009/22 (COM (2018) 184 final), confirms the trend towards enhancement of administrative enforcement. Moreover, it changes the EU approach on the distribution of functions and coordination between judicial and administrative enforcement. The proposal for a Directive expressly invokes art. 47 CFR as a criterion for coordination between administrative and judicial enforcement.

Furthermore, with regard to coordination between administrative and judicial enforcement, the new Reg. UE 2017/2394 should be borne in mind. With its broader contents, it provides investigatory powers to the administrative authorities. Furthermore, the new regulation lays down rules on the cooperation mechanisms between administrative authorities, aside from the cooperation mechanisms between administrative authorities and courts.

Unlike in previous projects (JUDCOOP and ACTIONES), we decided to cluster European judgments around common issues, instead of focusing upon a single judgment. CJEU judgments often touch on many questions depending upon how the preliminary references are framed, and it may well be more effective to choose a subset of complementary issues and examine them in sequence across several cases, rather than focus on a single judgment. This approach may entail a little more complexity, but it reflects the problem-solving approach, rather than the conventional doctrinal perspective. Thanks to the internal coordination of chapters judgments can be reconstructed across different chapters.

The casebook is complemented by a database that concurs with the methodological approach of judicial dialogue. It is organized around EU judgments and their impact on national legal systems. Two series of national judgments 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 CJEU case law when addressing national cases outside the context of referral procedure. Hence, the database is specific and reflects the conviction that judicial dialogue is a pillar of EU consumer protection.

In training courses organized by national schools we wish to encourage use of both the casebook and the database, which was subject to constant updating during the course of the project, thanks to contributions from both the Schools of the Judiciary and the workshop participants.

The casebook comprises seven chapters.

Chapter 1 deals with the core subject of *ex officio* powers of civil judges in consumer litigation, an issue deeply influenced by EU case law applying the principle of equivalence and effectiveness as a limitation to national procedural autonomy. By clustering several judgments we have been able

to observe the increasing impact on national case law and compare the different modes of *ex officio* powers during the several phases of civil proceedings: from the legal qualification of the case and ascertainment of the consumer status of the litigant to the identification of violations of EU law; from identification of the relevant facts and means of proof to consideration of them through the comparative assessment of litigants' views; from interpretation of the allegations to specification of parties' claims and defences; and from substantive review of consumer contracts to their enforcement in foreclosure procedures.

Chapter 2 examines the role played by the principle of effective judicial protection in CJEU competition cases involving consumers: 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 unfair commercial practices.

Chapter 3 addresses the relationship between judicial and administrative consumer protection. Although there is no direct application of Article 47 CFREU, to purely administrative enforcement procedures, the principles of effectiveness, proportionality and dissuasiveness are influencing the functioning of these proceedings when administrative enforcement proceeding is followed by judicial proceeding. Judicial review of administrative decisions enforcing fundamental rights has recently been viewed by the CJEU through the lens of Article 47 CFREU.

The impact of EU general principles on coordination among different types of enforcement procedures is at the core of Chapter 4, dedicated to the relationship between individual and collective redress mechanisms. Two perspectives are examined here: coordination through suspension of the procedure when pending a connected procedure, and coordination through extension of the legal effects of decisions rendered in collective redress procedures to the adjudication of individual cases concerning equivalent or connected claims based on the same grounds and facts.

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. Well beyond the scope of Article 47 CFREU, these principles are shaping the national rules on the adjudication of civil remedies, raising continuous challenges for the daily working of civil courts.

Chapter 6 builds another bridge – 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 *Alassini* 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 was never resumed before the national court.

Chapter 7 concludes with consideration of the perspective of cross-border cases, the application of private international law, and the impact recently exerted by the CJEU with the lens of the principle of effectiveness as applied to consumer cases. Identification of both the competent jurisdiction and the applicable law call for due recognition of the role played by the principle of effectiveness and Article 47 in cross-border cases. Here application entails the need to rethink 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.

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

1.1. Consumer status.

Relevant CJEU case

- Judgment 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, is a judge *ex officio* to 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, is the judge to make this assessment on the basis of the available documents, or carry out investigation 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 '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/her 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* CJEU judgment:

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’.

Question 1 and Question 2 – *ex officio* ascertainment of consumer status

Following the combined approach of the CJEU, the two questions will be dealt with together.

1. In light of the principle of effectiveness in consumer protection, is a judge *ex officio* to 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, is the judge to make this assessment on the basis of the available documents or carry out 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. At the time Faber was travelling to a work appointment and was in the company of her daughter. She claims that the selling party, Hazet, is liable for the damage to the car caused by the fire. However, Hazet’s defence is 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 to fail to specify whether she had bought the vehicle as a consumer.



Fig. 1.1, *Faber*

Preliminary questions referred to the Court:

The Court of Appeal raised the question of whether it had a duty to assess *ex officio* whether Ms Faber had acted as a consumer and would, thus, be able to rely on the consumer protection offered by Dir. 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 imply a duty to carry out investigation 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, inasmuch as in that judgment no such assessment was (of its own motion) carried out, and the question of whether the purchaser may be deemed to be a consumer was expressly left open? [...]
- (7) Is the fact that Ms Faber was assisted by a lawyer in both instances in these proceedings still relevant when answering the foregoing questions?

The Court's Reasoning:

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

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

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

Just as, 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*, paras- 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 or provide sufficient evidence to indicate this status clearly and therefore forgo the opportunity of effective protection, should the court be bound by the specific contents of the claim and related 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*, para. 44).

The Court's Conclusion:

The principle of effectiveness guided the Court's conclusions:

"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*, para. 46).

Therefore, in the light of the principle of effectiveness, the national court is to:

- 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 and therefore consumer protection should be provided.

The Court did not distinguish within these respects between a first instance and an appeal judge. Moreover, it expressly rejected the thesis that the fact that the consumer was assisted by a lawyer was a specificity that should influence this conclusion (para 47).

Impact on the follow-up case

Following the CJEU’s judgment, the Court of Appeal invited the parties for a session in which they could reply to the consequences of the CJEU’s decision and to a number of specific questions by the Court of Appeal regarding the facts surrounding the conclusion of the sales contract.

The case was discontinued.

Elements of judicial dialogue:

The dialogue between the CJEU and the Dutch court of appeal aimed at providing national courts with clarification on the implications of EU law regarding 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 may have a direct impact on Italian case law.

Under Article 183(4), civil procedure code, in the hearing to discuss the case (“*udienza di trattazione*”) the judge requests clarification from the parties on the basis of the matters cited (“*Nell’udienza di trattazione ovvero in quella eventualmente fissata ai sensi del terzo comma, il giudice richiede alle parti, sulla base dei fatti allegati, i chiarimenti necessari [...]*”).

The *Faber* judgment suggests that these clarifications are necessary should the judge have any suspicions that one of the parties is a consumer.

In a recent judgment concerning the validity of an arbitration clause in a service contract concluded between a service supplier and a group of real estate co-owners (*condominio*), the Italian *Corte di Cassazione* held that this group, which does not represent a legal entity separate from the co-owners, is to be qualified as a consumer, and consumer law is to be applied to the contract

concerned (Cass. no. 10679/2015). From the decision it is not apparent whether this status had been expressly invoked by the co-owners.

In its decision n. 9252/2017 the Italian Banking and Financial Ombudsman, with regard to ascertainment of 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 or show any enterprise tax identification number. As a result, the Ombudsman qualified the plaintiff as a consumer.

POLAND

The *Faber* judgment did not have any direct impact on Polish case law. In particular, there are no direct references to this judgment 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 initiative, without any specific statements by the parties. Consequently, a court has to review whether a particular person is a consumer – and apply the 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 by Slovenian national courts. On the other hand, the *Faber* case is believed to have had some indirect impacts on Slovenian case law. The Ljubljana Higher Court in case no. I Cpg 664/2017 of July 20, 2017 *ex officio* deemed that the second defendant should be considered the producer, in line with Consumer Protection Act and Directive 85/374/EEC, although the parties did not expressly claim the definition. Thus, as in the *Faber* case, the court *ex officio* applied consumer law. In general, in Slovenian civil procedure the court is obliged to apply substantial law on its own initiative (*ex officio*) within the framework of the facts submitted as evidence by the parties in the proceedings. In principle the evidence within a case is collected by the parties themselves, and only in exceptional cases can the court collect evidence on its own initiative. Such procedural conduct is in line with article 7 and article 180 of Slovenian Civil Procedure Act.

1.2. Declaration of unfairness of contract terms.

Relevant CJEU cases in this cluster

- Judgment of the Court (Fourth Chamber) of 4 June 2009, *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi*, Case C-243/08 (“**Pannon**”)
- Judgment of the Court (First Chamber) of 6 October 2009, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, Case C-40/08 (“**Asturcom**”)
- Judgment of the Court (Grand Chamber) of 9 November 2010, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, Case C-137/08 (“**Pénzügyi**”)
- Judgment of the Court (First Chamber) of 21 February 2013. *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, Case C-472/11 (“**Banif**”)

- Judgment 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**”)
- Judgment of the Court (First Chamber) of 18 February 2016, *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others*, Case C-49/14 (“**Finanmadrid**”)
- Judgment of the Court (Third Chamber) of 21 April 2016, *Ernst Georg Radlinger and Helena Radlingerová v Finway a.s.*, Case C-377/14 (“**Radlinger**”)
- Judgment 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**”)
- Judgment of the Court (First Chamber) of 26 January 2017, *Banco Primus SA v Jesús Gutiérrez García*, Case C-421/14, (“**Banco Primus**”)
- Judgment of the Court (Fifth Chamber) of 7 December 2017, *Banco Santander SA v Cristobalina Sánchez López*, Case C-598/15;
- Judgment of the Court (Fifth Chamber) of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen VZW v Susan Romy Jozef Kuijpers*, 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. Tereź 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**”).

Main questions addressed

- Question 1 Based on the right to an effective consumer protection, on the principle of effectiveness and on article 47, CFREU, is a court to declare a consumer contract term unfair of its own motion, even though the consumer has not raised the question of unfairness of the terms?
- a. Under the principle of effective consumer protection, is a court also to carry out *ex officio* investigation to ascertain whether a contract term is unfair?
 - b. Is an appeal court to declare a consumer contract term unfair even though the consumer has raised no objections in this respect in first instance or appeal?
 - c. Is a court seized of the execution of a payment order issued by another court or an arbitration tribunal to declare a consumer contract term unfair, even though the consumer has not filed a claim in this respect within the proceedings aiming for adoption of the payment order and the latter has become final?
 - i. payment order by a court
 - ii. by an arbitration court
 - iii. by a non-judicial body
 - iv. mortgage enforcement procedure
 - d. Does the duty to examine terms for unfairness regard only the clauses that are supposedly enforced before the court or, based on the principle of effectiveness and Article 47, CFREU, is the court to 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, based on the right to a fair trial (Article 47, CFREU), is a judge to enable parties to present their views on the unfairness of the terms and even oppose declaration of a term as non-binding?

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 is to have the possibility of being advised, defended and represented.

Legal aid is to be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

Article 6(1), Unfair Terms Directive

1. Member States are to rule 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 is to 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 are to 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.

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

1. Based on the right to effective consumer protection, on the principle of effectiveness and on Article 47, CFREU, is a court to 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 issues in the box.

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

In this type of dispute, elements of unfairness in the terms included in the financing contract could emerge as a defence for the consumer. In reality, the consumer omits resort to such defence. The issue is whether the judge (1) can, or (2) shall raise the issue and ascertain the unfairness of contract terms, whose validity is relevant to adjudication of the case.

In the cases examined here, the issue concerns:

- clauses on jurisdiction (*Pannon; Pénzügyi*): the question is therefore whether the court is competent to adjudicate the case if the contracts assign such competence to the court based upon the place of business of the professional when this place is distant from, and poorly connected to, the place of residence of the consumer;
- arbitration clauses (*Asturcom; Tomášová*): in the case examined the issue of unfairness of terms emerges when the arbitration award, which requires the consumer to pay the sum due, is executed within an enforcement procedure and, by means of opposition, the controversy is brought before a court;
- early termination clauses enabling the creditor to require immediate and full payment in case of breach of one or more instalments (*Banjif; Radlinger; Finanmadrid; Banco Primus*): here the contested term more directly influences the ground for the professional's claim and relevant enforcement procedure;
- penalty clauses or clauses on default interest (*Radlinger; Finanmadrid; Banco Primus; De Grote*): here the unfairness of the terms negatively affects the amount of credit and thus, again, the ground for the professional's claim and relevant enforcement procedure.

Preliminary question referred to the Court:

The general aspects of the issue concerning the *ex officio* power of the court to raise the question of a term's unfairness will be addressed here, mainly with regard to the *Pannon* case. Starting from 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 declaration 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 whether or not they are contentious – to determine that the contract before it contains unfair terms, even when no application has been lodged, thereby of its own motion carrying out a review of the terms introduced by the seller or supplier in the context of exercising control over its own jurisdiction?

Thus, first the referring court raises the question of the need for an explicit claim by the consumer regarding the non-binding nature of the unfair term. Second, it asks whether the Directive *requires* the court to review *ex officio* the relevant contract terms from the point of view of fairness.

By referring to the contentious or non-contentious nature of judicial proceedings, the national judge also invites the European court to specify in some way the reach of the *ex officio* power with regard to the existence of proceedings that are not contentious in nature, as may be the case under national procedural law in relation to the issue of orders of payment without the necessary involvement of the debtor.

The Court's Reasoning:

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)”.

Again referring to the *Océano* case, it went on to conclude 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 terms is conceived as a necessary step towards effective consumer protection. Moreover, it emphasised that the non-binding nature of the provision on unfair terms is mandatory, aiming “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 conclusion, for the consumer it is not necessary to have successfully contested the unfair term (in answer to the first preliminary question), but rather the judge is **obliged** to evaluate the unfairness of the terms 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 linked with the **consumer's right to oppose** the declaration of a term as non-binding insofar as the declaration does not meet the concrete interest of the consumer. This may be precisely the case of a jurisdiction clause, when the consumer prefers proceedings to continue before the court determined by the unfair term, rather than the action being transferred to a different court with further delay.

The Court's Conclusions:

These are the conclusions of the Court in the *Pannon* case:

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 for the consumer to have successfully contested the validity of the term beforehand.
2. The national court is required to examine, of its own motion, the unfairness of a contractual term where it has the legal and factual elements necessary for that task available. Should it consider the term to be unfair, it is not apply to it, unless the consumer opposes the non-application. This duty is also incumbent on the national court when ascertaining its own territorial jurisdiction.

The Court did not address the issue of the contentious nature of proceedings, but it did confirm that the *ex officio* power to ascertain a term's unfairness is a matter of territorial jurisdiction, and one may wonder whether this extends to contentious proceedings that are not strictly entered into by the consumer as defendant. We shall return to this point below, under 1.*b*.

Impact on the follow-up case:

Not available.

Elements of judicial dialogue:

As far as the *Pannon* case is concerned, judicial dialogue was developed horizontally within the CJEU itself, as evidenced by the references to the *Oceano* case. This approach will be confirmed in the analysis below and will not need further emphasis in this respect.

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

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

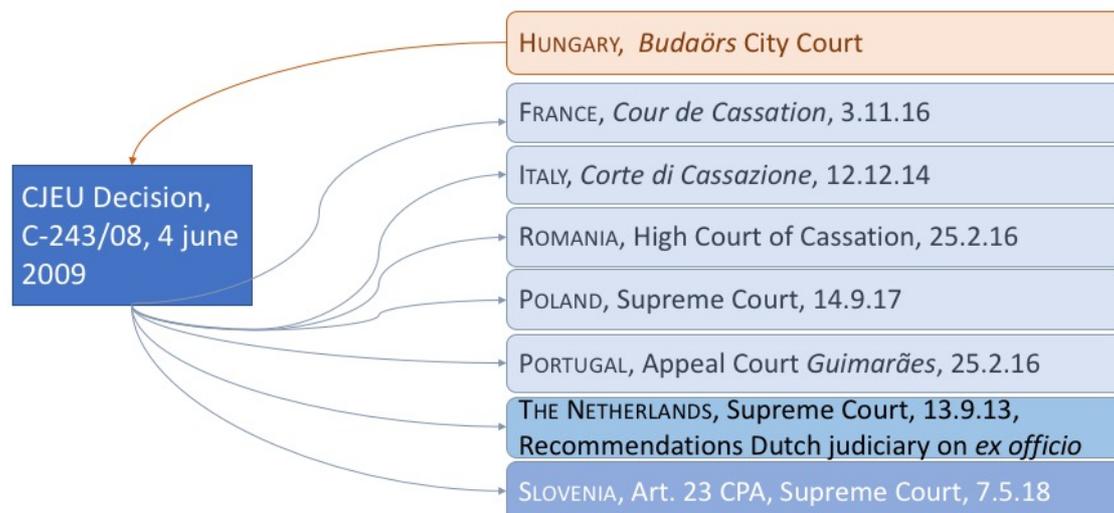


Fig. 1.2, *Pannon*

Without any pretence to completeness, references are provided here concerning the following jurisdictions. This disclaimer applies to all equivalent sections below.

FRANCE

In the case *Cour de cassation*, 3 November 2016 (ECLI:FR:CCASS:2016:C101227), the French *Cour de cassation* annulled the judgment of the Court of Appeal inasmuch as the latter had failed to declare a term non-binding *ex officio*, enabling the return of advance payment for an elderly residential service within a term fixed by law:

« Qu'en statuant ainsi, alors que la Cour de justice des Communautés européennes a dit pour droit que le juge national est tenu d'examiner d'office le caractère abusif d'une clause contractuelle dès qu'il dispose des éléments de droit et de fait nécessaires (CJCE, 4 juin 2009, arrêt *Pannon*, n° C-243/08), et qu'elle avait constaté que le délai de restitution du dépôt de garantie contractuellement prévu était de deux mois, quand l'article R. 314-149 du code de l'action sociale et des familles prévoit une restitution dans les trente jours du départ du résident, de sorte que cette clause est illicite et que, maintenue dans le contrat, elle est abusive, **la cour d'appel a violé les textes susvisés** »

In fact, the Court of Appeal had rejected the unfair clause claim, disregarding its duty to identify *ex officio* the legal grounds for such a declaration although it had all the factual and legal elements to do so.

ITALY

The Italian Supreme Court (*Corte di cassazione*), Joint Chambers, made reference to the principles applied in *Pannon* in a couple of cases.

In judgment no. 14828/2012, though not referring to a consumer dispute and expressly addressing solely the general rules on nullity of contract, the Court acknowledged that the principles expressed in *Pannon* confirmed the interpretation according to which ascertainment of

nullity is an obligation and not a mere power of the judge, as provided for by the black letter rule in article 1421, Italian Civil Code. The same Italian judgment referred to *Asturcom* (see below) to support this view. On this basis, the Court concluded that the duty also exists when the claimant seeks contract termination for breach, since contract termination (as well as contract execution) presupposes contract validity, which is to be *ex* own motion ascertained by the court.

The implications of the *Pannon* case in Italian case law were taken further with the twin judgments 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 should 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 is to act in the interest of the consumer and not of the counterparty, so enacting the guarantee of effective protection of values fundamental to the social order (“*irrinunciabile garanzia della effettività della tutela di valori fondamentali dell'organizzazione sociale*”).

It is worth mentioning that the Court identified the rationale of the *ex officio* power not only in the need to ensure effective consumer protection but also to deter abuses in prejudice of a weak contracting party. These twin judgments have become a milestone of Italian case law in the area of nullity (in both general contract law and consumer law), leading to evident extension of the judicial duties of *ex officio* ascertainment of nullity at any stage of the civil process.

THE NETHERLANDS

The Supreme Court affirmed in the case of Heesakkers/Voets (judgment 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 on the basis of the necessary (factual and legal) evidence available. This entails an examination of law 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 inquiry measures 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*”) the unfair term 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 the requirements of EU law 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 such is the case. In B2B contracts, Article 6:233 is still understood as necessitating request by a party.

With respect to the *ex officio* examination of unfair contract terms in the context of Directive 93/13/EEC, a report was 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*, henceforth LOVCK) containing guidelines on the *ex officio*

application of European consumer law (first report of February 2010 (*Ambtshalve toepassing van Europees consumentenrecht*) and a second report in November 2014 (*Ambtshalve toetsing II*); both reports have been published online). See Dutch judiciary recommendations 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 aimed at determining a common position for 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 emphasized 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 (explicitly) mentioned.

POLAND

In Poland the general consequence of unfairness of a contract clause – i.e. the fact that it becomes non-binding for a consumer – has been established 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 also pertains to its *ex officio* effect, which is considered as following the general pattern of nullity.

This interpretation has been acknowledged in multiple cases. The first milestone in this process came with a resolution by 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 is 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 the matter can 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 one step further and affirmed that a national court must make *ex officio* 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 raised by a request, or to adjudge on 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

With its decision of 25 February, 2016, the Appeal Court of Guimarães, addressing the clauses of an insurance contract, referred to CJEU case law, pointing out the court's duty to examine of its own motion the possible unfairness of a clause. The Court subsequently went on to examine the notions of "good faith" and "significant imbalance" concerning the concept of unfairness as laid down in Article 3(1) of Directive 93/13. Thus, the Court pointed out 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 judgment 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 voidance of the clause could be asserted *ex officio*. The High Court decided the case making explicit reference to the CJEU *Pénzügyi* (C-240/98) and *Oceano* (C-244/98) cases, as well as Article 6 of the ECHR. The same conclusions were reached in a similar case with the judgment 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 *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

In line with the Slovenian Consumer Protection Act, the general consequence of a contract term which is unfair to a consumer is *ex officio* declaration of nullity (article 23 of Consumer Protection Act, see also article 86 et seq. of Obligations Code). In decision no. II Ips 201/2017 of May 7, 2018 the Supreme Court of the Republic of Slovenia, referring to the *Andriciuc* case (C-186/16) and the *Kásler* case (C-26/13), concluded that an unfair contractual term constitutes prohibited contractual content, for which 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 be 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 directly referred to the *Pannon* case so far, Slovenian case law has obviously referred to some principles applied in the *Pannon* case.

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

<p>1.a. Under the principle of effective consumer protection, is a court also to carry out <i>ex officio</i> investigations to ascertain whether a contract term is unfair?</p>

The case

The issue is addressed in *Pénzügyi*. This is, again, a Hungarian case dealing with consumer credit involved in the purchase of a car. The consumer ceased to fulfil his obligations under the credit agreement and the bank sought an order for payment which was rendered by the court without the involvement of the debtor, in application of national procedural law. The court accessed was the one identified in a contract term regarding the place of business of the professional party. This term was not reviewed by the court (which raised no questions concerning jurisdiction) – neither before issuing the order for payment, nor 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 Court

The original question referred to the CJEU in respect of *ex officio* power is very similar to the one presented in the *Pannon* case:

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?

When the CJEU judgment in the *Pannon* case was issued, the *Pénzügyi* case was still pending. Therefore, the referring court considered the above question as already answered in the former judgment, while adding the following question that had not been answered by the CJEU in the *Pannon* case:

If the national court itself, the parties to the dispute having made no application to that effect, observes that a contractual term is potentially unfair, can it undertake, of its own motion, an examination, determining the factual and legal elements necessary for the examination whereas the national procedural rules permit the procedure only if the parties so request?

The Court's Reasoning:

The CJEU totally endorsed the reasoning presented in the *Pannon* case. The need to ensure effective consumer protection remained the main argument. The European judge also observed, 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*, paragraph 31)”.

The Court's Conclusion:

On this basis, the CJEU extends the duty to ascertain a term's unfairness entailing the judge's obligation to carry out investigation to evaluate the unfairness of a term. These are the conclusions of the Court in the *Pénzügyi* case:

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 such a term is unfair.

One might wonder whether the same conclusion could apply to other types of clauses, calling for more onerous investigation, e.g. into the imbalance created by complex mechanisms of liquidation of default interest in loan agreements, such as those discussed in *Radlinger* and in *Banco Primus*.

Impact on the follow-up case:

Not available.

Elements of judicial dialogue:

On the basis of the available information, the CJEU mainly interacts horizontally, having regard to judgments in other preliminary reference proceedings, and vertically, dealing with the referring court in the preliminary reference proceeding concerned. However the issue, as more broadly considered, is subject to wider debate in national jurisprudence, opening up wider room for judicial dialogue beyond the boundaries of preliminary reference procedures.

It is worth recalling the *Online Games* case (C-685/15), in which the CJEU, relying also on art. 47 CFR, stated that a national procedural system can provide that, in administrative offence proceedings, the court called upon to rule on compliance with EU law regarding legislation restricting the exercise of a fundamental European Union freedom is required to examine of its own motion the facts of the case before. In the case, this will entail determining whether administrative offences arise. These conditions apply **provided that the system does not entail that the court is required to substitute itself for the competent authorities of the Member State concerned**, whose task it is to provide the evidence necessary to enable that court to determine whether the restriction is justified.

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 court to carry out *ex officio* examination of contract clauses is considered to be an intrinsic element of the consequences of the unfairness of a clause. It follows from this general principle that domestic courts are obliged to use all the material of the case (all the facts and evidence available) to carry out examination. It can also collect new evidence on its own motion (under Article 232 sentence 2 of the Code of Civil Procedure). In this respect, however, it is significantly constrained, as under Polish case law the court can

intervene in collecting evidence only exceptionally, so as not to destabilise the equality of arms between parties. There are no noteworthy cases regarding this issue from the perspective of consumer protection and, in particular, of unfair contract terms.

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

1.b. Is an appeal court to declare a consumer contract term unfair, even though the consumer has not filed a claim in this respect in first instance, nor in the appeal brief?

The case(s)

This issue is addressed in the *Asbeek* case. The case concerns 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 system applicable in case of default. When the consumers failed to pay the rent, the real-estate company brought a claim for payment before a court. The first instance court upheld the claim. Once the case was brought into appeal, the consumers claimed a reduction of the penalty due to a discrepancy between the penalty and the detriment suffered by the landlord. The Court then raised the question as to whether in such circumstances an appeal court should *ex officio* examine the unfairness of the term and which 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 Court

This is the question referred to the CJEU in *Asbeek* 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 find that term to be void if it comes to 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*. In fact, on the one hand Dutch law requires a national court hearing appeal proceedings 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 a court hearing the appeal must apply of its own motion the relevant public policy provisions, even if they have not been invoked by the parties.

The Court's Reasoning:

The CJEU started from the principles already applied in *Banco Español de Crédito* and *Banif*, 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, but also consists in the obligation to examine the issue of its own motion, where it has available to it the legal and factual elements necessary for the task (para. 41). The Court added that the implementation of these obligations in appeal proceedings is a matter of national procedural autonomy. However, this autonomy is to be exercised within the limits set by the principle of effectiveness and equivalence.

Moreover, the Court observed that Article 6, Unfair Terms Dir., is a mandatory provision and, due to the public interest underlying the consumer protection provided with 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 *Pohotovost’* [2010] ECR I 11557, paragraph 50).” (para. 44).

The Court's Conclusions:

These are the conclusions of the Court in the *Asbeek* case with 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 the light of the criteria laid down by the directive. (para. 51)

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 is to extend to application of the Unfair Terms Directive, with special regard to ascertaining the unfairness of the terms, and the non-binding nature of unfair terms.

Impact on the follow-up case:

Not available.

Elements of judicial dialogue:

The CJEU took into consideration previous judgments concerning the *ex officio* power of the court to ascertain the unfairness of terms and to set aside unfair terms (part. *Banco Español de Crédito*, *Banif*). When referring to these judgments, it also confirmed that both parties’ right to be heard should be respected and that a consumer may oppose the declaration of nullity once 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

Albeit without reference to EU principles and case law, the Italian Supreme Court (*Corte di Cassazione*) has long upheld the principle by which contract nullity may be acknowledged also in appeal proceedings and without a claim or 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, n. 14248). The same principle holds 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 a claim – being detectable *ex officio* – does not fall under procedural preclusion (Court of Cassation, Decision n. 2910 of 15 February 2016).

With decision n. 923/2017 the Italian Court of Cassation laid down the principle according to which protection nullity in consumer contracts may be detected by the judge even in the appeal proceeding as long as no inner *res iudicata* concerning the nullity claim has 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 on it was not challenged before the Court of Appeal, then an inner *res iudicata* is formed, thus preventing the judge from detecting the nullity *ex officio*. Nevertheless, the judge has to examine carefully whether or not there is an inner *res iudicata*, since, for instance, in the case of such a decision, the Court of Cassation pointed out that in the first instance proceeding the Tribunal rejected the plaintiff’s claims on the grounds that the transaction challenged had not, in fact, been concluded at all. Therefore, the first instance judge did not address the question concerning the nullity, but based the decision solely on the alleged non-occurrence of the transaction. As a consequence, no inner *res iudicata* was developed and the Court of Appeal, according to the Court of Cassation, was able *ex officio* to detect the nullity of the contract.

In judgment no. 26242/2014, examined above, the Supreme Court upheld the same principle (see sec. 7.1) in the context of an analysis starting from consideration of the CJEU case law as a driver for expansion of the role of *ex officio* powers of the court in the case of contract nullity (see sec. 3.13.2).

THE NETHERLANDS

As seen above, in the case of Heesackers/Voets (judgment of 13 September 2013, ECLI:NL:HR:2013:691) the Supreme Court affirmed 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*”). Such an obligation also applies to the Court of Appeal, even if this were to lie outside 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*”). The grounds must then 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 accomplished, the court will only assess whether the claim is manifestly wrongful or unfounded in order to pass judgment 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 judgment in first instance. Until recently, it was still contested in the Netherlands whether the obligation of *ex officio* control of unfair contract terms extended to the Court of Appeal, if this were to lie outside the ambit of the dispute. The Supreme Court held 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 contract term at issue (Supreme Court judgment 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 reassess the case entirely in terms of substantial law and verify any infringements *ex officio*. Only the procedural law issues can be examined in an appeal, under 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 affects 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 represent the limits of the case, which cannot be exceeded by the court. However, as noted above, the court is obliged to identify the nature of the case, which means it has to find a substantial law to 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*, i.e. from the very outset, and has to correct any legal errors made by the lower instance court.

As a result, the court of second instance is able to make examination of a consumer contract a new and declare the unfairness of any clause *ex officio*. This pertains both to the “negative” and “positive” effects of the review. The court of second instance can, hence, either find that the clause is fair (although it has been declared abusive by a court of first instance) or review it for abusiveness (when the court of the first instance found it fair or made no examination whatsoever). It can also supplement the evidence (e.g. collect new documents, acquire expert witness opinions), if necessary to ascertain the abusiveness of a clause. The court of second instance is expected to make its own judgment *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 398¹³ § 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 initiative. From the perspective of abusive clauses, the Supreme Court can, therefore, reassess fairness only if the issue has been pointed out in the cassatory claim and so long as it does not mean supplementing the factual findings or evidence (Article 398¹³ § 1 of the Code of Civil Procedure). In the majority of cases, the Supreme Court – when finding the judgment faulty – refers the case back to the court of second or first instance. As a result, it would relatively rarely make its own final declaration of 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* reassess the case in terms of the correctness of application of the substantive law and *ex officio* inquires into 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 Slovenian Civil Procedure Act. Thus, the court of second instance has the power to make 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 Slovenian Civil Procedure Act). On the other hand, in the revision proceeding the Supreme Court of the Republic of Slovenia is not entitled to review the case *ex officio* and consequently does not have the power to declare *ex officio* the unfairness of any clause. The Supreme Court has the power to reassess the fairness of contract terms only if the issue has been raised in the revision claim by the parties (see article 371 of Slovenian Civil Procedure Act).

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

The case

The decision examined here (Karel de Grote case) concerned a proceeding initiated by an educational institute against a student for the payment of registration fees and costs of a study trip. More specifically, 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 Court:

The referring Court formulates three different questions regarding, in essence, two major issues: i) the *ex officio* assessment of Directive 93/13 on applicability and unfairness of terms when giving judgment 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 and that court, under national procedural rules, have the power only to examine of its own motion whether the claim is contrary to national rules of public policy, or have the power to examine in the same manner, of its own motion whether the contract in question comes within the scope of [Directive 93/13] as implemented in Belgian law, even if the consumer does not appear at the hearing?
- (2) Is a free educational establishment which provides subsidised tuition to a consumer to be regarded, in respect of the contract for the provision of that tuition in return for payment of a registration fee – increased, as it may be, by amounts for the reimbursement of costs incurred by the educational establishment – , as an undertaking within the meaning of EU law?
- (3) Does a contract between a consumer and a subsidised free educational establishment relating to the provision of subsidised tuition by that establishment come within the scope of [Directive 93/13] and is a free educational establishment which provides subsidised tuition to a consumer to be regarded, in respect of the contract for the provision of that tuition, as a seller or supplier within the meaning of that directive?

The Court's Reasoning:

With regard to the first question, the Court pointed out that the system of protection introduced by Directive 93/13 follows the idea that the consumer is in a weaker position than the seller/supplier “*as regards both his bargaining power and his level of knowledge*”. The assessment carried out by the judge upon the applicability of the Directive as well as the unfairness of the clauses constitutes a positive action aimed at establishing a correct balance between the consumer and the seller/supplier, should the balance have first been disrupted by exploiting the weaker position of the consumer. On such grounds, the established case law of the CJEU empowered national judges to assess of their own motion the aforementioned issues.

With regard, specifically, to in-default proceedings, the Court pointed out that it is for the national legal system of each member state to determine procedural rules for safeguarding 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 judgment 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 *ex officio* assessment when giving in-default judgments, it is only when a claim is contrary to public policy rules that the classification is to “[*extend*] to all the provisions of the directive which are essential for the purpose of attaining the objective pursued by Article 6 thereof”.

With regard to the second and third questions, the Court pointed out that the EU legislature intended to follow a broad notion of “seller” and “supplier”, so that “*Directive 93/13 does not exclude from its scope of application entities that pursue a task in the public interest, nor those that are governed by public law*”. Therefore “*the notion of ‘seller or supplier’, within the meaning of Article 2(c) of Directive 93/13 is a functional concept, requiring determination of whether the contractual relationship is amongst the activities that a person provides in the course of their trade, business or profession*”.

The Court's Conclusions

Following extensive reference to its already established case law, the Court ruled that, even when giving judgment in default, the national court can assess of 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 judgment 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.

As far as the second and third questions are concerned, the Court ruled that:

Subject to verifications to be carried out by the referring court, Article 2(c) of Directive 93/13 must be interpreted as meaning that a free educational establishment, such as that at issue in the main proceedings, which, by contract, has agreed with one of its students to provide repayment facilities for sums due by the latter in respect of registration fees and costs connected with a study trip, must be regarded, in the context of that contract, as a 'seller or supplier', within the meaning of Article 2(c) of Directive 93/13, with the result that that contract falls within the scope of application of that directive.

Impact on the follow up case:

Not available

Elements of judicial dialogue

The Court extensively referred to its previous case law in the first place to highlight that the asymmetrical contractual relationship between the consumer and the seller/supplier leads the consumer to agree to previously drawn-up terms (*Pénzügyi, Banif, Banco Santander*). The same case law, and in particular the *Pénzügyi* and *Banif* decisions, were also referred to in order to point out the scope and purpose of the *ex officio* assessment in terms of contractual balancing and effective judicial protection of the consumer. When stressing that national procedural rules should comply with the principles of equivalence and effectiveness, the Court referred to the *Asbeek* decision.

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

Not available

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

1.d. Is 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 to declare a consumer contract term unfair, even though the consumer has not filed a claim in this respect within the proceedings for 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*, *Pannon*, *Pénzügyi*, *Finanmadrid*, *Banco Primus*, *Banco Santander*, *Profi Credit*) have been brought before the CJEU in order to address the issue in the box above.

In fact, the issue of unfairness of a term often arises when the professional, as creditor, intends to exercise, in an execution proceeding, 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 for obtaining 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 opposition to the payment order to prevent foreclosure of goods. Lacking this opposition (or once a court has rejected this opposition), the title will normally become final (*res judicata*).

National procedures diverge to a large extent. However, in most cases the “fast procedure” does not allow for review of the fairness of the contract terms, or, if allowed, it may be omitted, particularly when the consumer has not taken part in the procedure.

Therefore, the issue of an unfair term may emerge later on, 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 unfairness of terms could also arise in mortgage enforcement procedure or during proceedings brought by the successful bidder in an auction of immovable property, in order to come into 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 Court:

Based on the premises described above, the referring courts doubt whether they should *ex officio* review contract terms constituting the grounds for the professional’s 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 the preliminary questions vary according to the type of procedure used to issue the payment order. We will distinguish the following cases:

a. Payment order issued by a court

This is the case of *Pannon* and *Pénzügyi*, where the order sought had been made in ‘*ex parte*’ proceedings, which do not require the court to hold a hearing or to hear the other party, and in which the court has not raised 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 para. 17-18, *Pénzügyi*).

In *Pénzügyi* the referring court raised 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 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* case, the referring court raised the question as to whether Directives 93/13 and 2008/48 preclude 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.

b. Payment order issued by a non-judicial body

This is the case of *Finanmadrid* and *Banco Primus*. Here we will refer to the former.

As explained in the judgment,

[t]he referring court states that Spanish procedural law provides for intervention by the court in enforcement proceedings only where 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 where 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 (para 43).

Thus, the referring court raised the following questions:

- (1) Is Directive [93/13] to 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 either for 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) Is Directive [93/13] to 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) Is the [Charter] to 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, which 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*?

c. Payment order issued by an arbitration court

This is the case of *Asturcom*, in which 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] should 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 brought on by the successful bidder of an auction

In the *Banco Santander* case, 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, applied for an order of possession of the dwelling and 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 ordering 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 above-mentioned 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?

The Court's Reasoning:

a. Payment order issued by a court

In *Pénzügyi* the decision had been anticipated by the conclusion of the *Pannon* case, the results of which had been considered conclusive for the preliminary question formerly presented by the referring court in *Pénzügyi*. The reasoning and conclusions of the CJEU are presented above and are mainly based on the **principle of effectiveness**.

In the *Profi Credit* case, the Court ruled out applicability of dir. 2008/48 in the present case. With regard to dir. 93/13, the reasoning of the CJEU was mainly based on the principle of effective protection of consumer rights, and on the right to an effective remedy, relying also on art. 47 CFR.

b. Payment order issued by a non-judicial authority

The **principle of effectiveness** was also the main driver of the Court's reasoning in *Finanmadrid*:

‘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 (para. 45-46).

It should be noted that before the *Banco Español de Crédito* case (Case C-618/10, see below for further reference), *ex officio* control of unfair contract terms was not possible in the '*procedimiento monitorio*', an order-for-payment procedure. The *secretario judicial* was only required to monitor 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 correct. Once formal ascertainment was completed, and in the absence of objection by the debtor, the payment order was issued and subsequently became final (*res judicata*). The referring court in *Finanmadrid* 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 ascertainment of unfair terms was no longer possible and the request for execution could not be denied. This rule, as held by the Court, appears to run against the principle of effectiveness (paras. 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 no such review had taken place during the order-for-payment procedure itself.

On the one hand, the CJEU acknowledges that the legal principles underlying national legal systems should be taken into consideration, including: protection of the rights of the defence, the principle of legal certainty and 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 here) and effectiveness.

The case of *Finanmadrid* concerned a systemic problem in the judicial protection of consumers. However, Spanish law had already been changed prior to the CJEU's judgment. Ley 42/2015, designed 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*) which explicitly provides for *ex officio* control in the order-for-payment procedure. The court has the power to deny the order if the claim is based on unfair terms (e.g. accelerated payment clauses).

c. Payment order issued by an arbitral tribunal

In *Asturcom* the relation between effective consumer protection and *res judicata* referred to the nature of arbitral awards becoming final in the absence of opposition on the part of a consumer to whom the payment order provided by the award is directed.

As (later) in the case of *Finanmadrid*, the CJEU upheld the principles underlying the rules of *res judicata* in national legal systems as rules to “ensure stability of the law and legal relations, as well as sound administration of justice” (para. 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, however, be respected.

In *Asturcom*, analysis was carried out taking both principles into account. The principle of effectiveness was found to be compliant with current Spanish legislation, particularly in consideration of the rules on time limits, since these are not liable to make it virtually impossible or excessively difficult to exercise rights conferred by EU law (para. 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 (para. 47).

As for the **principle of equivalence**, the CJEU provides 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 CJEU considers the provisions of the Unfair Terms Directive mandatory and equivalent to national public policy rules. 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 (para. 53).

d. Mortgage enforcement procedure and proceeding brought on by the successful bidder of an auction

In the *Banco Santander* case, 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 extrajudicially and, where relevant, whether the national court is required to disapply that national legislation*”.

The Court pointed out that, in mortgage enforcement procedures, “*failing effective review of the potential unfairness of contractual terms in the instrument on the basis of which the property is seized*” means failing to guarantee observance of the rights conferred under Directive 93/13. This observation seems to imply that, in light of the principle of effective judicial protection, even in the mortgage enforcement procedures, an *ex officio* assessment of the mortgage loan agreement’s terms’ unfairness 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 distinguishes 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 consideration is concerned, the Court points 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 extrajudicially*”. In other words, the proceeding to evict 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.

The Court's Conclusions:

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 the payment order has been issued within procedures that have not allowed for earlier assessment at previous stages, thereby obstructing the effective protection of consumer rights.

a. In cases in which the consumer has filed opposition against a payment order issued by a court (*Pannon, Pénzügyi*), the scope of opposition does not transfer to the consumer the entire burden of ascertaining the unfairness of term. Indeed, in these circumstances the principle of effectiveness requires “positive action” by the court to address the imbalance between consumer and professional and positive action *requires* the exercise of *ex officio* powers.

Recently, in the *Profi Credit* case (C-176/17), the CJEU stated that, in accordance with Article 7(1) of on unfair contractual terms Directive, national legislations in 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, should the court dealing with an application for an order for payment 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.

b. Nor in cases in which the order has been issued by non-judicial authorities (such as the Spanish Secretario General) in rapid procedures conducted in the absence of the consumer as debtor (*Finanmadrid*), does the lack of opposition close the scope for consumer protection. Here, the principle of effectiveness raises 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 effectiveness (when the non-judicial authority itself may, for example, assess the unfairness of the terms and the consumer has an effective possibility in terms of both time and information to file opposition) and equivalence (in the 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 charged with execution of the payment order, though provided by the non-judicial authority with 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.

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

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

e. The concept of the effectiveness of the judicial remedy is also addressed by the Court. In other words, the CJEU refers to the principle also in order to justify a specific legal framework that may be held to violate Article 47 of the Charter. In particular, in the *Sziber* case (C-483/16) the Court refers directly to *Banco Primus* (§ 47) when assessing the boundaries and limits of the consumers' judicial protection, ruling that when a national provision lays down 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, though imposing additional duties on the consumers, satisfy a general interest in the good and proper functioning of the judicial system.

Impact on the follow-up case:

Not available.

Elements of judicial dialogue:

The CJEU builds on previous judgments concerning the *ex officio* power of the court to ascertain unfairness in the terms and set aside unfair terms. In *Pénzügyi*, the link with the *Pannon* case was explicitly addressed since the first two questions, as formerly presented, were considered (by the referring court during the procedure) as answered through the *Pannon* judgment. Moreover, in all three judgments examined here, the cases of *Océano*, *Asturcom*, *Mostaza Claro*, *Pannon*, *Banco Español de Crédito* were taken into account.

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, and in particular Article 47 of the EUCFR – in cases concerning arbitration clauses in general terms and conditions, which were declared unfair because they withheld from consumers the protection of the State courts assigned to them by law. Article 47 was used here 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 (judgment 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 their 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 (“*onredelijke bezwarend*”), which means 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* and *Pénzügyi*. 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 arrived at 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 farther-reaching protection than the Directive. Before the Supreme Court, the Advocate-General had tentatively concluded that arbitration clauses are not as such unacceptable, but that in consumer contracts they should in principle be considered 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 resorting to 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* and *Asturcom*, and to the above-mentioned Supreme Court judgment in *Van Marrum/Wolff*.

POLAND

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

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 terms for unfairness regard only the clauses that are supposedly enforced before the court or, based on the principle of effectiveness and article 47, CFREU, is the court to 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 was addressed in *Banco Primus*, a case recently initiated in Spain involving a mortgage established on a consumer's home securing a loan. The loan agreement included accelerated payment clauses and clauses concerning the calculation of default interests, which are considered possibly unfair by the referring court. In the present 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 yet to be 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 ascertained 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 focuses on whether a court is to 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 question 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 where 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* enter into possible tension with the objective of effective consumer protection.

The Court's Reasoning

The CJEU began by considering 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 due to replace the formal balance between rights and obligations of the parties with an **effective balance**. These provisions were deemed to have a standing equal to that of national public policy provisions. In accordance with the CJEU case law (particularly *Asturcom*, *Sanchez Morcillo*, *Gutiérrez Naranjo*), these premises led to recognition of the court's duty to assess terms for unfairness of its own motion.

On the other hand, the CJEU highlighted the role of the national rules on *res judicata* as having “to ensure stability of the law and legal relations, as well as the sound administration of justice” (para. 46). This explains why, as already held in the case of *Asturcom*, “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” (para. 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 but, according to the reasoning of the CJEU, this is not to hamper the effective consumer protection envisaged by article 7, Unfair Terms Directive. More particularly, this should apply 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 that effect, judgment of 14 March 2013, *Aziz*, C 415/11, EU:C:2013:164, paragraph 60).

The Court's Conclusion:

For the purposes of our analysis, here is the conclusion of the CJEU in the *Banco Primus* case:

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 where 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 potential 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**, whether at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose

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

Impact on the follow-up case:

Not available.

Elements of judicial dialogue:

As seen above, the CJEU establishes a direct continuity with previous case law, from *Aziž* to *Sanchez Morcillo*, from *Asturcom* to *Naranjo*. Building on these decisions, the conclusions reached in *Banco Primus* lead 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

The decision is too recent to determine any impact on national case law. Therefore, the analysis below will address the trends currently emerging in some examples of national case law with respect to the issue addressed. This may enable us to anticipate the future impact of the *Banco Primus* case either in terms of providing further support to existing interpretative approaches or towards a possible change in light of EU principles and case law.

ITALY

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

- (i) the judge *shall* assess the validity of the disputed contract on **grounds other than 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 of the specific ground for invalidity); indeed, as the Court specifies, 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 para. 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”, para. 6.13.4);

- as a consequence, once the decision becomes *res judicata*, the issue of the invalidity of that contract could not be brought before a court on any other grounds; otherwise, the functioning of the process and stability of decisions would be undermined (see para. 6.14);
- (ii) when the claimant invokes **partial nullity** (i.e. with respect to a “separable” clause), the judge retains the power/duty to ascertain the nullity of the entire contract (and reject the claim for partial nullity) while, on the other hand, when the claimant invokes total nullity, the judge shall ascertain the partial nullity if she/he believes so (and then reject the total nullity). However, due to the different scope of partial v. total nullity, the judicial ascertainment – if diverging from the claimant’s request - is not to constitute *res judicata* (see paras. 6.16, 6.17).

In this part of the analysis, the judgment refers to partial nullity from the perspective of general contract law, without considering the specificity of partial nullity of unfair consumer contract terms and the specific case of nullity of clauses other than those already subject to judicial review in decisions that have become *res judicata*.

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

- *ex officio* assess the validity of clauses other than those contested by the consumer with the consequence that, lacking this judicial review at any stage of the process, *res judicata* applies, thereby precluding future judicial review, or
- in light of the principle of effectiveness as applied by the CJEU in *Banco Primus*, review of any single clause should be considered a “separate matter” and, although subject to *ex officio* review by the court in previous proceedings, could therefore take place in subsequent procedures without violating the *res judicata* principles.

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), is a judge to enable the parties to present their views on the unfairness of terms and even oppose the declaration of a term’s non-bindingness?

The case

A Hungarian consumer concluded a credit agreement including, among other things, a termination clause obliging the debtor to pay the entire outstanding capital plus interest immediately should there be any type of breach of the agreement. The consumer defaulted and the bank filed a claim against him. The first instance judge ascertained the unfairness of the term in question, informed the parties of it, and invited them to present their views on the matter.

Whereas the professional contested the alleged unfairness of the term as such, 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 aside the clause and obliged the debtor to pay a sum calculated regardless of the clause. The bank filed an appeal.

Preliminary question referred to the CJEU:

The Hungarian Court of Appeals raised the following preliminary questions (two of the three are relevant here):

1. Are the procedures of a national court consistent with Article 7(1) of [the Directive] if, where 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(1)(c) 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 legislation, like the Hungarian legislation, providing for procedural safeguards, such as fair hearing rules, as specifically applicable to *ex officio* judicial powers. More precisely, Hungarian procedural law provides that the court, which has held, of its own motion, that there are grounds for invalidity, must inform the parties of that fact and must give them the opportunity to express their opinion on the possible finding that the legal relationship concerned is void, failing which it cannot issue a declaration of invalidity (see para. 18).

The Court's Reasoning:

Not only does the CJEU state that the Hungarian legislation is consistent with correct interpretation of EU law, but it also links the procedural safeguards therein provided to Article 47, CFREU. Indeed, as the Court holds,

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 EU Charter of Fundamental Rights**. These requirements include the **principle of *audi alteram partem***, as part of the rights of defence; it is binding for a 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 has 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 considers this a general duty applicable to the court *vis à vis* all the parties to the proceedings, including the professional. Unlike the latter, however, as already recognised in *Pannon*, the consumer retains the **right to oppose the declaration of nullity** (or equivalent remedy identified by national legislation to comply with Articles 6 and 7, Unfair Terms Directive). Indeed (see para. 35),

[t]hat opportunity afforded to the consumer to set out his views on that point also fulfils the obligation on the national court, as was pointed out in paragraph 25 of the present judgment, 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 he is opposed to that term being disregarded, thus giving his **free and informed consent** to the term in question.

It is worth stressing that this right of the consumer regards the declaration of a term's non-bindingness and not assessment of a term's unfairness. A case that might arise is that the consumer waives the protection entailed by the invalidity of a clause defining the competent tribunal once the action is underway, the consumer considering transfer of the proceedings personally more prejudicial than the effects of the unfair clause.

The Court's Conclusion:

These are, then, the conclusions arrived at by the CJEU in the *Banif* case:

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 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 judgments examined here, the CJEU identified specific procedural duties to be complied with in the national procedures, albeit in general respect of the principle of national procedural authority (as specifically recalled in this judgment, too; see para. 26). It did so by referring to the Charter and to general principles of EU law rooted in previous case law.

Impact on the follow-up case:

Not available.

Elements of judicial dialogue:

As in all the decisions examined by the CJEU, the Court largely relied on existing case law in this area, particularly as regards the grounds for *ex officio* powers to ascertain the unfairness terms and the consumer's right to oppose non-bindingness (see references to *Pannon*, 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 of defence are principles rooted 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* (and subsequently *Banif*) in respect of the consumer's right to oppose the decision of non-bindingness were recognised with examined decision no. 26242/2014 (*Corte di Cassazione*, Joint Chambers).

POLAND

In accordance with the adversarial principle in civil proceedings, under Polish law every party enjoys the right to express their own opinion on any aspect of a case. This clearly also applies to 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 the relevant facts supporting his claim, while the judge is required to identify the correct legal basis. The unfairness of a clause is a matter of substantial law and therefore should be considered by the court *ex officio*, even though none of the parties have submitted a claim on those grounds. In the 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, and 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 a 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. Any failure to provide such information should be seen as depriving the parties of the possibility to defend their rights, which renders the proceedings invalid. The constitutional right of court access covers the parties' right to raise all the issues relevant to the case. These fundamental principles embody the idea of procedural justice, which requires that the resolution of the court should not prove surprising or unexpected for the parties. This standpoint corresponds with the reasoning of the CJUE in *Banif*.

Explicit reference to this case was made in the judgement of the Supreme Court of 14 July 2017 (II CSK 803/16). In this decision, the court remarked on the procedural duty of the judge to guarantee the rights of the 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* and *Banif*, 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 is to be granted the opportunity to be heard on an opposing party's claims and assertions (article 5 of Slovenian Civil Procedure Act). This rule also applies in consumer law when the parties present their views on the unfairness of terms or oppose the declaration of a term's non-bindingness. 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, the "right to be heard issue" has not been addressed explicitly in Slovenian consumer case law thus far.

Guidelines for judges emerging 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.*). CJEU caselaw on *ex officio* powers plays a key role in interpretation of EU law in several respects, thereby providing clear guidance for national courts:

- *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 himself/herself made his/her status clear when filing the claim or in his/her defence, as soon as the court has the matters of law and of fact necessary for that purpose at its disposal or may have them at its disposal simply by requesting 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** an unfair term in a consumer contract to be so of its own motion, even if the consumer has not raised any question of the unfairness of the term. The obligation of the judge is coupled with the **consumer's right to oppose the declaration** of a term as non-binding insofar as the 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 a contractual term to be unfair of its own motion to inform the parties and invite each to set out their 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 extends the duty to ascertain the unfairness of a term to the **judge's obligation to investigate** in order to evaluate a term's unfairness (*Pénzügyi* case C-137/08, concerning a jurisdiction clause). In this respect, it is to be noted that the CJEU has not yet addressed the question as to whether the reasoning of the *Pénzügyi* case (C-137/08) could apply to all types of clauses, including those that call for complex investigation, or whether it could extend to phases of judicial proceedings in which the parties may be precluded from providing evidence in support of their claims or defences.

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

The general legal issue addressed in this note

Article 101 of the TFEU as a legal basis for the right of private parties to seek damages from economic operators that have breached EU competition law.

The cluster of CJEU cases relevant to this note:

Vincenzo Manfredi, Joined Cases C-295/04 to C-298/04,
Kone, C-557/12

Identification of the main case in the cluster which can be presented as reference for judicial dialogue within the CJEU and between EU and national courts:

Vincenzo Manfredi, Joined Cases C-295/04 to C-298/04

The main questions addressed

- Question 1 **Entitlement to compensation for third parties suffering damage causally related to an invalid agreement.** Can a judge, in light of the principle of effectiveness in consumer protection, interpret Article 101 of the TFEU in such a way that it entitles third parties to rely on the invalidity of an agreement or practice prohibited by Article 101 and claim damages for the harm suffered that is causally linked to the agreement or practice? On what grounds can the judge assess the causal link ?
- Question 2 **Limitation period:** How can a judge interpret national rules on limitation in such a way that in antitrust-related civil proceedings, as such characterized by severe informational asymmetry between the consumer and the undertaking, the consumers' right to compensation is effectively protected? Does limitation, on the basis of Article 101 of the TFEU as well as the principle of effectiveness, run from the day on which the agreement comes to an end rather than from the day on which it started?
- Question 3 **Quantification of damages:** Can the effectiveness principle justify imposition of punitive damages on the infringing party to prevent it from gaining any economic advantage from the infringement?
- Question 4 **The jurisdiction of the Courts:** How does the effectiveness principle, pursuant both to EU Competition Law and to Article 47 of the ECHR, affect the choice of the judge who is to decide on a claim for damages based on infringement of Community and national provisions? Can a judge refrain from applying a national provision which requires that a claim for damages in antitrust-related cases must be filed before a court other than that usually having jurisdiction for claims of similar value, involving an increase in costs and time and thus creating more difficulty for the consumer to exercise his/her right to compensation?

Relevant legal sources

EU level: Article 101 Treaty on the Functioning of the European Union

National level (Italy):

Article 2 and Article 33 of Law No 287 of 10 October 1990 on the rules for the protection of competition and markets
(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')

Question 1 - Entitlement to compensation for third parties suffering damage causally related to an invalid agreement

Is Article 101 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 any such causal relationship?

The case

In 2000, the Italian competition authority ('Autorità Garante') 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 – relating 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 a local court in Bitonto, Italy, to obtain restitution for the increase in the premiums paid as a result of the agreement that had been declared unlawful by the Autorità Garante. Faced with legal issues that it had difficulty in resolving, the local court asked the CJEU to provide guidance regarding the interpretation of certain principles of EU competition law, and so 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 question referred to the Court:

(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 where 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 detected 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.

The Court's Reasoning:

According to settled case-law, the above principle of invalidity can be relied upon by every individual, and the courts are bound by it once the conditions for the application of Article 101(1) TFEU are met and so long as the agreement concerned does not justify granting exemption under Article 101(3) EU (see on the latter point, inter alia, Case 10/69 *Portelange* [1969] EUR 309, paragraph 10). Since the invalidity referred to in Article 101(2) TFEU is absolute (the court explicitly refers the absolute nullity to previous Article 81, now Art. 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 *Béguélin* [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 *Courage and Crehan*, cited above, paragraph 22).

Further [...], Article 101(1) TFEU produces direct effects in relations between individuals and creates rights for the individuals concerned which the national courts must safeguard.

It follows that **any individual** can claim a breach of Article 101 EU before a national court (see *Courage and Crehan*, cited above, 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, as regards the possibility of seeking compensation for loss caused by a contract or conduct liable to restrict or distort competition, it is to be noted 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 jeopardised 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*, cited above, 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 where 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 – which is the core of the present analysis – the national provisions for application of the notion of causal relationship in the proceedings must not render the exercise of the aforesaid rights impossible or excessively difficult.

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 and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see Case C-261/95 *Palmisani* [1997] EUR I-4025, paragraph 27, and *Courage and Crehan*, cited above, paragraph 29).

The Court's Conclusion:

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 of ??? and 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 processual 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 jeopardised.

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.

Below various national approaches are illustrated, which point to pragmatic ways to determine this causal relationship, and which suggest that the principle of effectiveness leads to the 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 emphasise that the effectiveness of EU law would be jeopardised 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 judgment C-295/04 (*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 May 21, 2007 applied the concept of effectiveness on a large scale to account for its judgment. 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.

One of the main concerns after *Manfredi* is the lack of guidance on causality by the EU Commission and the CJEU.

EU Commission strategy:

Causation:

The Ashurst study (2004)¹ has already ascertained that the legal systems of Member States adopt significantly different approaches with regard to the legal concept of causation. These differences relate to the choice of 'causation in fact' and the interaction between causation in fact and the scope of liability rules (causation in law).²

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. In principle, recovery will be ordered where infringing behaviour has caused harm.

¹ Ashurst, Study on the conditions of claims for damages in cases of infringement of EC competition rules, Comparative Report, 31 August 2004.

² I. Lianos, Causal uncertainty and competition law claims for damages, Yearbook of European Law, Vol. 34, No. 1 (2015), pp. 170–231, doi:10.1093/yel/yev017

Causation links damage to infringing acts, thus ensuring that the defendant will only be liable for the harm resulting from his/her illicit action.

When considering the importance of the causation requirement for the actual possibility for and efficiency of claims for damages, a distinction must be made between the legal notion of causation and the evidence showing that in a given case the requirement (as defined by the legal notion) is fulfilled.³

In the 2005 Staff Working Paper the Commission 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 so as to further facilitate actions for damages. However, there have been no concrete proposals put forward to answer the question of how this influence will be exercised and whether strong or weak requirements of causality must be advanced.

The 2005 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: as 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 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. 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.⁴

Alleviation of the claimant's evidentiary burden was also addressed by the CJEU in *Aalborg Portland*, where the Court said 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*”.⁵

The 2005 Staff Working Paper observed that in most Member States actions by indirect purchasers⁶ are in theory possible. However, the Study remarked that the lack of clarity as regards

³ Commission Staff Working Paper, Annex to Green Paper, 672 final, paras 273-276. SEC(2005) 1732, http://ec.europa.eu/competition/antitrust/actionsdamages/sp_en.pdf

⁴ 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 bring 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.

⁵ 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.

⁶ According to Article 2 (24) of the Directive 2014/104/EU, ‘indirect purchaser’ means a natural or legal person

the possibility for indirect purchasers to bring a claim, combined with difficulties of proof (in particular as regards establishing causation and damages), constitute serious obstacles to claims by indirect purchasers. The Study noted that combining the possibility for the defendant to rely on the defence that the overcharge was passed on⁷ with the indirect purchaser actions would seriously restrict private actions.

Causation was not directly addressed in the White Paper of 2008⁸ 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 further discussed below.

EU Member States have so far implemented causation principles in actions for damages over infringement of competition law with strict causation requirements. Moreover, the perception that causation requirements constitute an important hurdle seems to limit the opportunities for certain categories of claimants to advance their claims, thus undermining the effectiveness of the EU remedy for damages due to competition law infringements.⁹

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. These presumptions may regard i) proof of the occurrence of the infringement; ii) proof of the causal link between the infringement and the harm suffered; iii) proof of the damage. With regard to each of these issues, the burden of proof may shift, for example once a party has provided a certain amount of facts and evidence.

[Directive 2014/104/EU](#)

who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom.

⁷ Article 13 of Directive 2014/104/EU states that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on is on the defendant, who may reasonably require disclosure from the claimant or from third parties.

⁸ 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. to let 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 a general remedy to the consequences of the structural information asymmetry in competition cases as do measures to improve access to evidence

⁹ I. Lianos, Causal uncertainty and competition law claims for damages, Yearbook of European Law, Vol. 34, No. 1 (2015), pp. 170–231, doi:10.1093/yel/yev017

In 2014 **Directive 2014/104/EU was adopted**. Recital 11 of this Directive observes that the issue of the causal relationship ‘is not dealt with in this Directive’ and makes explicit reference to national rules and procedures to deal with this issue, within the twofold framework of the principles of effectiveness and equivalence, following the well-established case law of the EU Courts on this issue.

Nevertheless, the Directive does mention in Article 14 (2) that compensation for harm suffered may be claimed by any person, subject to the requirement of a causal relationship between the harm suffered and the infringement of the competition law.

Causation thus remains a matter of national law.

The Directive does contain certain indirect provisions concerning causation. Direct and subsequent purchasers can claim overcharge while the infringer may raise the passing-on defence according to Articles 13-14. In that case, the burden of proof turns and the infringer needs to prove that it has passed on the overcharge and harm to subsequent levels of the supply chain.

The Directive also establishes a presumption of causality for the benefit of indirect purchasers, i.e. consumers or undertakings that did not themselves make any purchase from the infringer and for whom it may be particularly difficult to prove the extent of that harm. Under Article 14(2) indirect purchasers are considered to have proven that an overcharge paid by the direct purchaser has been passed on to their level if they are able to show *prima facie* that such passing-on has occurred, i.e. whether or to what degree an overcharge paid by a direct purchaser from the infringer has been passed on to an indirect purchaser.

This rebuttable presumption applies unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not partly or entirely been passed on to the indirect purchaser.

Recital 47 of the Directive also states that to remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in harm, in particular through an effect on prices (Article 17(2)).

Passing-on and indirect purchasers’ standing

The Directive also lays down a presumption of causality for the benefit of indirect purchasers, i.e. consumers or undertakings that had not themselves made any purchase from the infringer and for whom it may be particularly difficult to prove the extent of that harm. Under Article 14 § 2 of Directive n. 104/2014, when the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, an indirect purchaser can benefit, in terms of burden of proof, from a legal presumption. In particular, the indirect purchaser is deemed to have proven that a passing-on occurred if he/she proves that: a) the defendant has committed an infringement of competition law; b) the infringement has resulted in an overcharge for the direct purchaser by the defendant; c) the indirect purchaser has purchased the goods or services that were the object of the infringement or goods/services derived from or containing them.

The presumption is, however, rebuttable, and therefore does not apply if the defendant can demonstrate credibly that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

Pass-on is closely linked to the question of causation of harm and the possibility in many market situations that persons at different levels of the supply chain may have been negatively affected by an anti-competitive infringement. It is the principle which permits national courts to attribute harm caused by an infringement between the different levels of the supply chain affected by the infringement; i.e. principally between indirect and direct purchasers which have co-existing standing to claim.

It thus constitutes a key aspect in achieving the EU law objective of full compensation: that is, that victims of competition law infringements should be compensated for actual damage suffered (direct loss, loss of profits and interest) – they should neither over-compensated (when, for example, part of the harm has been passed on to a third party) nor under-compensated (when, for example, pass-on of any overcharge may have generated loss of sales on the downstream market due to the consequent increase in prices).¹⁰

Indirect purchasers - Umbrella customers

While the Directive deals with indirect purchasers, it does not address the situation of other groups of indirect purchasers such as umbrella customers and counterfactual (potential) customers, who still face difficulties in establishing a direct causal link between the anti-competitive conduct and the damage they suffered due to the restrictive approach in certain European tort law systems on the causal link required by domestic tort law. Identifying causality in order to trace an overcharge may also prove impossible in some cases in which the anticompetitive practice affected various successive market levels, sometimes not vertically linked to the infringer.

In a previous version of the Damages Directive the Commission acknowledged the fact that for indirect purchasers in a remote position of the vertical value chain it is difficult to claim damages. However, the final version contains no provision on this issue.

This very issue was addressed in a reference for a preliminary ruling by the Austrian Supreme Court concerning **Kone AG** and others. The question referred by the Austrian Supreme Court concerned the issue of standing, i.e. whether the civil liability of the members of a cartel in damages also extends to ‘umbrella effects’ or ‘umbrella pricing’, but in fact it addressed the question of causation. Advocate General Kokott stressed that this offered the CJEU the opportunity to add to its case law on the private enforcement of European competition law and emphasized that “the issue of whether members of cartels can also be held civilly liable for umbrella pricing hangs on the existence or otherwise of a *causal link*. The question is whether there is a sufficiently close connection between the cartel and the losses resulting from umbrella pricing caused by a cartel, or whether these are excessively remote losses for which damages cannot reasonably be awarded against the members of the cartel”.

AG Kokott developed a possible strategy to provide a reply to the referring court and bring causation issues within the scope of the institutional competence of the EU court, and so provide

¹⁰ EU Commission, Study on passing-on of overcharges (2016) point 45.

an interpretation of EU law; in particular, the AG pointed out that “*the obligation to provide compensation incumbent on the members of a cartel must not be interpreted narrowly. Cartels are capable of causing considerable economic damage not only in the narrower sphere of the cartel’s members, but far beyond. It would therefore be unreasonable to restrict the group of persons entitled to bring a claim to such an extent that eligibility to seek compensation extends from the outset only to certain economic operators, such as those who have entered into a contract with the members of the cartel or the direct or indirect purchasers of their goods or services. Any other position would fail to ensure the full effectiveness of the prohibition in European Union law on agreements, decisions and concerted practices*”. On the other hand, the AG pointed out that “*it is perfectly legitimate (...) to lay down criteria which ensure that cartel members are not subject to unlimited liability to provide compensation for any losses, however remote, for which their anti-competitive behaviour may have been the cause in the sense of a ‘conditio sine qua non’*”.

Basically, the AG upheld a notion of “sufficient direct causal nexus” as had already been used in CJEU case law regarding non-contractual liability. The CJEU did not entirely follow the reasoning of the AG in its final judgment and did not directly assess the notion of causality in light of the EU Law. Rather, the CJEU relied on the Manfredi approach and expressed its preference for national law to deal with causation issues, under the twofold discipline of the principles of effectiveness and equivalence. The Court confirmed once again that ‘it is, in principle, for the domestic legal system of each Member State to lay down the detailed rules governing the application of the concept of the “causal link”’, and that ‘national legislation must ensure that European Union competition law is fully effective’.

In sum, the reference in *Manfredi* to the “legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on application of the concept of ‘causal relationship’” remains unchanged.

Quantification of damages

The 2005 Green Paper had already recognised that the high standard of proof required in some Member States aggravates the difficulties faced by claimants, particularly when the available evidence is not complete. Some Member States lower the standard of proof required in relation to quantification of damages, which can be difficult to demonstrate to the requisite standard.¹¹

Proof of harm is complex and difficult, which can make filing a claim for damages very risky. The Study comments that quantifying damages is a “*key difficulty*” in bringing private actions and notes that there is a lack of generally recognised models for quantification. Differences of approach in relation to lost profits can result in considerably different awards, but any restriction here could act as a disincentive to private actions. Many Member States allow for a reduction in the standard of proof required when damages are difficult to quantify.¹²

Also, the Member States’ law may take reference from the illicit profit made by the infringing undertaking(s) — either directly or indirectly — in estimating the harm suffered by injured parties.¹³

¹¹ Staff Working Paper (2005).p.12.

¹² Staff Working Paper (2005) point 37.

Practical Guide on quantifying harm, SWD(2013) 205

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. In some cases it is possible under the applicable legal rules to quantify this harm with pragmatic approaches, such as calculation of the total value of the lost market in terms of profits, multiplied by a percentage expressing the share of the market that the foreclosed undertaking would have been likely to acquire. For instance, if the total profits generated by undertakings active on the relevant market after the infringement amount to 200 million euros, and it is estimated that, in the absence of the infringement the foreclosed competitor would have held a market share of 30 per cent, the lost profit could be estimated at 60 million euros adopting this approach.¹⁴

The presumptions may regard i) proof of occurrence of the infringement; ii) proof of the causal link between the infringement and the harm suffered; iii) proof of the damage. With regard to each of these issues, the burden of proof may shift, for example, once a party has provided a certain amount of facts and evidence.¹⁵

In Hungary, Section 88/C of Competition Act introduced a rebuttable presumption of 10% overcharge for cartel infringements in 2008. Hard-core cartels are deemed to have affected the price by 10% unless the contrary is proved.¹⁶ Infringers can, however, claim that the overcharge has been passed on. It is also important to point out that Hungarian law does not require a direct causal link between the unlawful act and the loss. Therefore, indirect purchasers to whom the damage (e.g. higher prices) was passed may be entitled to enforce claims against the cartel members.

Although the wording refers to a reversible presumption on price increase and not to a presumption on the amount of damages, this is favourable to the plaintiff and facilitates the calculation of damages. One possibility arising from this provision is that the plaintiff may not have to provide evidence for the actual loss unless the overcharged price exceeds 10 percent. It is up to the defendant to prove that if there had been no cartel the price would not have been lower.

The 2013 Practical Guide of the Commission on quantifying harm¹⁷ also noted that national requirements on causality or proximity that link the illegal act and the harm should observe the principles of equivalence and effectiveness.¹⁸ Still, the exact application of these two principles, in particular the principle of effectiveness, and the nature of the obligations they impose on Member States' legal systems remain unclear, the only limit so far explicitly mentioned being that victims of anticompetitive practices enjoying standing should not, as a group, be denied the possibility to claim damages because the national court makes a restrictive interpretation of domestic causation requirements.¹⁹

¹⁴ Practical Guide on quantifying harm, SWD(2013) 205

¹⁵ Practical Guide on quantifying harm, SWD(2013) 205

¹⁶ For more details, see SZILÁGYI PÁL: Private Enforcement of Competition Law and Stand-alone Actions in Hungary. *Global Competition Litigation Review*, (6) 2013/3, 13 -142.

¹⁷ Commission Staff Working Document—Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440.

¹⁸ Commission Staff Working Document—Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440.

¹⁹ I. Lianos, Causal uncertainty and competition law claims for damages, *Yearbook of European Law*, Vol. 34, No. 1 (2015), pp. 170–231, doi:10.1093/yel/yev017p.6

Elements of judicial dialogue:

- Horizontal (within CJEU): The Court has referred back to *Manfredi* in other cases:

- with regard to the issue of the direct effect of Articles 101(1) and 102 TFEU, the CJEU stated that in relations between individuals these provisions create rights for the individuals concerned, which the national courts must safeguard (*Manfredi and Others* EU:C:2006:461, paragraph 39);

with regard to the full effectiveness of Article 101 TFEU and, in particular, to the practical effect of the prohibition laid down in the paragraph 1, the CJEU stated that this provision would be jeopardised if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (*Manfredi* EU:C:2006:461, paragraph 60; Case C-199/11 *Otis and Others* EU:C:2012:684, paragraph 41; and Case C-536/11 *Donau Chemie and Others* EU:C:2013:366, paragraph 21);

with regard to the entitlement of any person to claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under Article 101 TFEU (*Manfredi* EU:C:2006:461 paragraph 61, and *Otis and Others* EU:C:2012:684, paragraph 43);

and with regard to the fact, that in the absence of EU rules governing the matter, it is up to the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 of the TFEU, including rules on the application of the concept of ‘causal relationship’, provided that the principles of equivalence and effectiveness are observed (*Manfredi* EU:C:2006:461, paragraph 64). Accordingly, the rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (*Courage and Crehan* EU:C:2001:465, paragraph 29; *Manfredi* EU:C:2006:461, paragraph 62; *Pfleiderer* EU:C:2011:389, paragraph 24; and *Donau Chemie and Others* EU:C:2013:366, paragraph 27).

Impact on national case-law

ITALY

A9 Giudice di pace di Bitonto, ordinanza del 30/03/2004 02/07/2004 (234/02)

A9 Giudice di pace di Bitonto, ordinanza del 30/06/2004 02/07/2004 (250/03)

A9* Giudice di pace di Bitonto, ordinanza del 30/06/2004 02/07/2004 (233/2003)

A9* Giudice di pace di Bitonto, ordinanza del 30/03/2004 02/07/2004 (RG 172/03)

Subsequent to the *Manfredi* case and the follow-up decision by the Magistrates’ Court of Bitonto, the Italian Courts have developed in the course of the last ten years 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 between the NCA decision, its ascertainment and the follow-on civil proceeding initiated by the consumer. Below are listed some of the most relevant findings of the Italian Court of Cassation on the matter:

Italian Court of Cassation, decision n. 27527 of December 10, 2013

The decision explicitly refers to *Manfredi*, 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 states 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, 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 n. 9116, 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 n. 7039 of May 9, 2012

The decision states that, in a civil proceeding instated by a consumer seeking compensation for harm suffered consequently 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 n. 12551 of May 22, 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 n. 16786 of July 23, 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.

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

GERMANY

ORWI case “German Carbonless Paper (2011)” establishing the existence of a passing-on defence and indirect purchaser standing in German law

Federal Court of Justice, KZR 75/10, judgment of 28 June 2011.

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 in that the cartelists distributed the cartelized paper products through wholesalers. However, in the case in question the respective wholesaler was a 100% subsidiary of the defendant cartel. The German Federal 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)) that only direct purchasers would be entitled to claim damages and found that, on the contrary (and with reference to the CJEU jurisprudence in *Courage* and *Manfredi*) competition law required that indirect purchasers be entitled to claim damages, in particular because in many cartel cases it was precisely the indirect purchasers who actually suffered the harm.

The Federal Court held further that: (i) the concept of *Vorteilsanrechnung*, which largely amounts to the passing-on defence, has always been an instrument of German law in respect of civil liability and not the recently introduced in the framework of cartel damages claims; (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.

The ORWI case of the German Federal Court of Justice (BGH) constitutes the only example so far of a case in which the claim for damages was introduced by an indirect purchaser.

In ORWI the German Federal Supreme Court (Bundesgerichtshof) shifted the burden of proving the causal link between the breach of cartel law and the damage to the claimant.

The plaintiff was a printer business which had purchased carbonless paper from a wholesaler, a subsidiary of one of the paper producers fined by the Commission for participating in a price fixing cartel in the carbonless paper industry from 1992 until 1995. The printing business became insolvent and assigned its damages claims against the cartelists to the plaintiff, a German savings bank, which brought an action against the supplier. The action was dismissed by the Regional Court of Mannheim, finding that the customers of a subsidiary constitute indirect purchasers who may not claim damages. Although the decision was only partially confirmed by the Higher Regional Court (OLG) of Karlsruhe, it nevertheless accepted the claim, observing that the wholesaler was a 100% subsidiary of the cartelists, and so in this case not providing the possibility for an action for damages that would have simply enabled cartel members to avoid liability by strategically using its subsidiary to supply customers.

The BGH rejected the decision of the OLG Karlsruhe, thus allowing indirect purchasers to raise claims for damages against the members of a cartel, at the same time accepting that the defendant was consequently entitled to the passing-on defence. The BGH pointed out that it is the indirect purchaser alleging that the overcharge was passed on to the next market level who bears the burden of proving it, considering the theory of adequate causation, as established in the framework of German tort law in **accordance with EU Law**, which is of relevance in this respect.

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

The Higher Regional Court of Düsseldorf decided in favour of a private lottery agent seeking damages to the sum of EUR 11 million from a state lottery as a consequence of a boycott agreed between the German lotteries. The latter had agreed not to accept lottery business solicited by private agents in brick and mortar shops in order to protect their own distribution systems. The anticompetitive agreement between the German lotteries was very well documented in a decision of the Federal Cartel Office.

The original case ultimately went before the Federal Supreme Court. The claimant asked for lost profits he had not been able to realize because his business model of innovative offline lottery retailing had failed as a consequence of the lotteries' boycott.²⁰ The lower court appointed an expert and rejected the claim in its entirety. However, the appellate court overturned the judgment and decided in favour of the claimant, analysing in detail the claimant's business model and the details and assumptions of the anticipated profits.

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). Damages can be estimated based on verifiable facts. Secondly, according to German damages law, profits are considered lost 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 lost profits are determined on this basis, the defendant is free to substantiate facts allowing for the conclusion that the profits would not have occurred or would have been lower. It is generally agreed and accepted that the result of estimation of harm does not necessarily resemble the *but-for* scenario. Yet, if the strict rules of evidential burden were applied this would leave claimants in many cases without a remedy, even though they are most likely to have suffered some harm.

Lottery case Federal Court of Justice, Judgment 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. Once the claimant has established a factual basis, the trial court's powers to estimate

²⁰ To prove lost profits the claimant provided his business plan and two market analyses from an investment bank and a market research company that had been prepared prior to when the boycott had become public.

losses apply not only to their amount but also to whether the claimant has sustained any losses at all. Prior to the judgment in the lottery case, many pending cases had struggled with the question as to whether a claimant actually had to prove that non-zero losses were sustained before the court could move on and estimate their 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 (Judgment of 9 November 2016 – Case 6 U 204/15 Kart., Judgment of 21 December 2016 – Case 8 O 90/14 (Kart); Judgment of 28 June 2017 – Case 8 O 25/16., Judgment 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 for the existence of harm (similar to Article 17(2) of the Directive), but went a step further in arguing 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.

NETHERLANDS

Tennet v Alstom ECLI:NL:RBGEL:2017:1724

The Court of Gelderland ordered Alstom to pay TenneT EUR 14.1 million in damages on the grounds of the role it had played in the gas-insulated switchgear cartel. Interesting aspects of the case are the rejection of the passing-on defence and the manner in which the harm was assessed by the civil court.

With regard to the overcharge, the court first of all found that the burden of evidence rested on TenneT. TenneT produced its evidence by comparing a quotation of ABB from 1999 (drawn up during the cartel) with the rates under an agreement between TenneT and ABB from 2005 (therefore after the end of the cartel). Alstom disputed the comparability of the documents. In light of TenneT’s lack of knowledge, however, the court found in an earlier interlocutory judgment (ECLI:NL:RBGEL:2014:6118, TenneT - Saranne / Alstom c.s.): RO 2015/5, para 4.30-4.31.) that **the principle of effectiveness** (reference is also made to Courage case) meant that Alstom could be required to provide information on the calculation of its prices.

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. In the court’s opinion Alstom had insufficiently substantiated its counterargument that the difference in price was due to a drop in the production costs. The court subsequently found that TenneT’s total overcharge amounted to EUR 14.1 million.

Alstom then argued that TenneT could not claim reimbursement for all or part of that harm because it had passed on the higher price (resulting from the (alleged) cartel) to its customers. The rationale of this passing-on defence was to prevent a penalty being imposed on TenneT for loss that it had passed on to a third party. It was also intended to prevent Alstom from being ordered to reimburse the same loss more than once, for instance in response to a possible claim for damages from the indirect customers (consumers). The passing-on defence is 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.

The court then weighed up the interests of TenneT and Alstom, and in particular the risk of possible overcompensation of TenneT and the consequences of the damages payable by Alstom being too high or too low. The court thus took into account the possibility for consumers (who, as TenneT's customers, ultimately 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 and so 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/consumer], 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 would even constitute unjust enrichment. For that reason, the court disallowed the passing-on defence presented by Alstom.

ABB decided to appeal against this decision (ECLI:NL:GHARL:2018:4876). ABB sought a new judgment *inter alia* on the issue of the overcharge determined by the court as well as 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. ABB argued that the previous judgment of the court was incompatible with the principle of *restitutio in integrum* and the explicit prohibition of overcompensation in Dutch law. For the question of determination of the overcharge as well as reconsideration of the passing on-defence, a new committee of inquiry was appointed in an interlocutory judgment. The final decision of the Court of Appeal Arnhem-Leeuwarden was therefore still pending in the summer of 2018.

Tennet v ABB, judgment of 8 July 2016, Dutch Supreme Court.

This is the case in which the Dutch Supreme Court formally accepted passing-on as 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 the Directive in February 2017 the Dutch Civil Code addresses passing-on in Article 6:193 p. What is, however, not clear 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* (in German: *Vorteilsausgleichung*). 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 under 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. Perhaps more importantly, 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 states that if its earlier case law suggested that the doctrine of *voordeelstoerekening* (in German *Vorteilsausgleichung*) 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 applies. The actual amount of damages in this particular case will be determined during a separate stage of the proceedings, and the Supreme Court has left it up to the relevant court to determine which approach is best applied in this case.

Either way, 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.

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.

Midden Netherland District Court 10 July 2013,

ECLI:NL:RBMNE:2013:3245 (interim judgment) 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 had 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 standalone 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. This is remarkable, given that even before the implementation of the Directive, the Netherlands already showed quite extensive private enforcement of competition law. In the Explanatory Memorandum of the implementation law on the Directive²¹, the same concern was expressed as in the recital 41 of the Directive: for indirect purchasers, it may be especially hard to prove they have suffered harm because of an infringement of competition law. Therefore, the rebuttable presumption suggested in Article 14 of the Directive has directly been taken over in Article 6:193p of the Civil Code. Also, the limitation periods are arranged in a way that do not make it excessively difficult to exercise the

²¹ *Kamerstukken II* 2015-2016, 34490, 3, p. 18.

right of full compensation. Furthermore, there were already a great many laws in the Directive that did not even need implementation because they already corresponded to the Dutch Civil Code. For example, Article 843a of the Code of Civil Procedure already granted parties ample opportunity to acquire the documents 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 AND WALES

On the question of causation, the British courts 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, para. 77**; “(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.

This case provides an example of applying the so-called “but for test” which helps to establish the harm suffered by consumers in a pragmatic way. In this case, 2 Travel Group Plc accused Cardiff City Transport Services of abusing its dominant position as a major bus company in Cardiff. The Office of Fair Trading (OFT) determined the infringement by Cardiff City Transport Service, but decided not to fine the company, given that the infringement had so-called ‘minor significance’ under Article 40 of the UK Competition Act. When Cardiff submitted a follow-on damages claim, the UK Competition Appeal Tribunal (CAT) used the so-called “but for test” in order to determine causation. The goal of the test is to eliminate all the irrelevant causes in order to detect the effective cause of the resulting harm. As the court puts it, the test asks: “Would the damage of which the claimant complains have occurred ‘but for’ the negligence (or other wrongdoing) of the defendant”. If the defendant can prove the damage would have occurred either way, it is not a “but for” cause. If a claimant is able to prove that there is a more than 50 percent probability that without the infringement of competition law, the damage would not have existed, the claim passes the “but for” test. Using this test, the CAT concluded that the infringement cost 2 Travel 41,255 passengers, resulting in an amount of damages estimated at £33,818.²²

Enron Coal Services Ltd & English Welsh & Scottish Railway Ltd [2011] EWCACiv 2;

The Court of Appeal emphasized 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

²² Lianos, I; (2015) Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe. Yearbook of European Law , 2015 (1) pp. 1-61.

82 of the EC Treaty, this did not mean 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. The CAT seems to have relied on a clear distinction between factual causation and causation in law, normative aspects, such as the protective scope of competition law, exerting no influence on the assessment of causation in fact.

FRANCE

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

Strict standard of proof and passing on defence

In this judgment the French court noted that the fact 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, which purchased vitamins from Roche, from claiming that they did not pass on the alleged overcharges to the final consumers, thus breaking the causal link between the higher prices as a result of the cartel and the harm from which Arkopharma allegedly suffered. The Court observed that since the cartel was international and covered 80% of the global market, the intermediary consumers could pass on the overcharge 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 judgment provides a further example of the strict standard of proof required by the claimants to prove 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 on the overcharges to consumers by means of relatively modest price increases.

Question 2 – Limitation period

“(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?”

With this question the national court is asking, in essence, whether Article 101 TFEU must be interpreted as precluding a national rule providing 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. As far as the core of the casebook is concerned, the main point addressed in this section regards the impact that the concept of effectiveness – i.e. effectiveness of both EU Law and judicial protection – can have on the determination of national provisions regarding limitation periods.

The Court's Reasoning:

The Court considered in first place the observations submitted by the defendant (Assitalia), the Italian government and the European Commission. Whereas the defendant stated that it is for national courts to specify limitation periods and rules, in light of their own legal systems, in conformity with the principles of equivalence and effectiveness, the Italian government submitted that it is from the day on which the agreement, decision or concerted practice was adopted that the limitation period should run. Finally, the Commission argued that in the 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 of the TFEU, provided that the principles of equivalence and effectiveness are observed.

The Court pointed out first 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 form 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. In particular, if the national rule imposes a short period of limitation as well, then the limitation might 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.

The Court's Conclusion:

In the 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 point 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.

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.²³ 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. Ensuring that all Member States provide the minimum safeguards in this respect would thereby also ensure a more level playing field for both claimants and defendants.

An appropriate limitation period for antitrust damages claims is important for standalone 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 might 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.

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 remuneration. However, Member States' legislations continue to vary greatly on limitation periods, some being more favourable than others.

Directive 2014/104/EU on actions for damages tried to solve the problem of access to evidence by providing claimants, via compulsory disclosure, with the distinction between disclosure of evidence lying in the defendant's control (Article 5) and disclosure of evidence contained in NCA files (Articles 6-7). Pursuant to Article 5, Member States should empower national judges to order, on justifiable grounds, the defendant or a third party to disclose the evidence in his/her control, provided that such disclosure is respectful of the principle of proportionality. On the other hand, Article 6 regulates the disclosure of evidence in the control of the NCA after issue of a decision, and states, in particular, that the national judge may not order the NCA to disclose evidence pertaining to a leniency programme or a transaction

²³ White Paper 2008, p.226-230.

proposal. If such processes are endorsed effectively by Member States, they will certainly help claimants bringing actions for damages. Article 10 of the Directive seeks to harmonise the limitation period for bringing damage claims by providing that Member States limitation periods are obliged to run for at least 5 years after the infringement has ceased, with the 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.

Elements of judicial dialogue:

Mainly vertical dialogue has taken place, for example in UK cases, such as *Deutsche Bahn*, in which the UK High Court extensively referred to *Manfredi*, and in Italy.

Impact on national case law:

ITALY

The **Italian Court of Cassation, in 2007 (decision n. 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 successive decisions uphold the same principle laid down by the Court of the Cassation in the examined decisions: **Naples Court of Appeal, decision n. 763 of 2007; Turin Court of Appeal, decision of May 25, 2007; Naples Court of Appeal, decision of March 7, 2008; Milan Tribunal, decision n. 5251 of 2014.**

A recent development, while following the same pattern of reasoning already established, came with 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 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, thus having fully run when the civil proceeding was instated.

Impact on national case law in Member States different from that of the court referring the preliminary question to the CJEU

UNITED KINGDOM

***Arcadia Group Brands Ltd v Visa Inc* [2014] EWHC 3561 (Comm); *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883**

In this case the High Court provided guidance on the application of limitation periods in competition damages claims in the UK. The Court ruled that a substantial part of the claimant's claim, which dated back to 1977, should be struck out for having been brought too late, thus decreasing the amount of the claimed damages by around £500 million. The Court consequently awarded costs against the claimants on an indemnity basis, ruling that the claim for the period outside of the limitation period (which was held to have started running in 2007) was bound to fail.

The Court concluded that since 2006 at the latest, the claimants (a group of major retailers) had possessed (or could reasonably have diligently uncovered) sufficient information to plead a claim adequately alleging that the Visa networks' 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 judgment 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. If they do pursue 'out of time' claims, not only will those claims be struck out in whole or part, but they also risk having to face significant costs.

Arcadia is a good illustration of the need to comply strictly with time limits: 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 (whether for the claimants or, increasingly in an age of third-party litigation funding, their funders) to take a commercial decision as to whether or not a claim is worth bringing.

Deutsche Bahn AG and others v Morgan Advanced Materials plc, [2014] SC 24, judgment of 9 April 2014

The dispute centred around the question of which decision would be the starting date of the limitation period. Was this the decision against and not appealed by Morgan, or was it the *res judicata* decision of 18 December 2008 against all the cartel members.

The question in this case was whether it was still possible to submit a follow-on claim against Morgan Advances Materials plc for infringing competition law. On 3 December 2003, this infringement was established with a European Commission Decision. Morgan Advanced Materials plc, applied for leniency and thus was fined for its conduct. The cartel members that were fined brought an appeal. The deadline for further appeal expired on 18 December 2008. On 15 December 2010 Deutsche Bahn AG and others submitted a follow-on claim against Morgan Advanced Materials plc. Morgan argued that this claim did not comply with the limitation period.

More precisely, the issue was whether the respondents' follow-on claim against the appellant should be struck out for being brought more than two years after the end of the period for appealing the Commission's Decision. This decision, in turn, depended on whether the Commission's Decision is viewed: (i) as a decision made against the appellants, which they chose not to appeal; or (ii) as a decision made against all the cartel members, appealed by most of them,

and finally upheld by the General Court. With the former approach the two-year limitation period began on 13 February 2004 (when the time expired for an appeal by the appellants) and expired before the follow-on claims were brought on 15 December 2010. With the latter approach it only began on 18 December 2008 (when the time expired for those who had appealed to the General Court to appeal to the Court of Justice) and the follow-on claims were brought in time.

The Court of Appeal, overturning the decision of the Competition Appeal Tribunal, preferred the latter approach and held that the claim against the appellant could proceed. The Court of Appeal stated that as long as the cartel was still challenged by other cartel members, the limitation period had not yet started, so that “all questions of causation, quantum and contribution could be resolved at the same time.”²⁴

Follow-on claims were based on a prior Commission decision – treated as binding on the domestic courts – that an infringement has occurred. In the UK, Section 47A(8) of the 1998 Act provides that no follow-on claim may be brought during the period up to the expiry of the time limit for pursuing any appeal against the relevant Commission decision or determination of any such appeal if pursued. The relevant Tribunal rules state that the time limit for bringing any follow-on claim is two years from the end of the period specified in section 47A(8).

With regard to the nature of Commission Decisions, the Court of Justice established that a decision by the Commission regarding the existence of a cartel constitutes a series of decisions addressed to its individual addressees, which remain binding against an individual addressee who does not appeal even if there is a successful appeal by another addressee. The only relevant decision establishing infringement in relation to an addressee who does not appeal is the original Commission decision. That decision, in relation to the appellant, is the Commission Decision made on 3 December 2003, in respect of which the time period to appeal expired on 13 February 2004

The High Court stated that the detailed rules governing the recovery of any loss resulting from the operation of an illegal cartel are matters of domestic law, so long as they comply with the general principles of European law. In its paragraph 11 it referred to *Manfredi* and *Otis*.

In contrast, the existence of any loss and of a direct causal link between any loss and the agreement or practice in question are matters for the national court: *Otis*, para 65. So too are the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, finding that the appropriate interpretation is that a Commission decision establishing an infringement under Article 101 of the TFEU constitutes in law a series of individual decisions addressed against individual addressees. Consequently, the only relevant decision establishing an infringement against an addressee who does not appeal is the original Commission decision; any appeal by another addressee is irrelevant. As such, the claim against Morgan was out of time and therefore struck out.

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

This is a stand-alone claim, which requires the party which bringing the action to prove an infringement. In *Enron v EWS* (I), the Court of Appeal ruled that the scope for the CAT to go beyond the findings of the initial infringement decision is extremely limited. This judgment is widely thought to be one of the contributing factors restricting the role of the CAT in

²⁴ para 119

competition law actions in the current regime. Businesses or consumers who wish to bring stand-alone cases must bring their cases to the High Court of England and Wales, the Court of Session or the Sheriff Court in Scotland, or the High Court of Northern Ireland.

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.

Enron Coal Services Ltd [2010] E.C.C 7 CAT:

The claimant had failed to prove causation and quantum of loss. The difficulty was that there were considerable 'evidential' complications caused by the fact that the appeal tribunal could not enter upon 'in-depth' examination of the effects of the infringements because it was bound to accept the findings of an infringement by the NCA. Enron clearly went against the principles of 'equivalence' and 'effectiveness' as it prevented access to justice.

FINLAND:

MAO:614/09. **Raw wood damages claims**

Question 3 – Punitive damages

Relevant CJEU cases in this cluster:

- **Judgment of the Court (Third Chamber) of 13 July 2006, Vincenzo Manfredi v Lloyd Adriatico Assicurazione Spa, Joined Cases C-295/04 to C-298/04;**
- **Judgment of the Court (Fourth Chamber) of 17 December 2015, María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA, C-407/14;**
- **Judgment of the Court (Fifth Chamber) of 25 January 2017, Stowarzyszenie "Oławska Telewizja Kablowa" w Oławie v Stowarzyszenie Filmowców Polskich w Warszawie, C-367/15.**

(5) Is Article 81 EC to be interpreted as meaning that where 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. For the purpose of the Casebook, the main point of the

question concerns the significance that the principle of effectiveness can have in awarding punitive damages.

The Court's Reasoning

The Court stated that in the absence of EU rules governing that field, 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 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, it 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.

The Court's Conclusion:

In the absence of Community rules governing the field, 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 81 EC, provided that the principles of equivalence and effectiveness are observed.

It is worth noting 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 Article 101, as well as its practical effect, be preserved.

The stance of the Court of Justice of the European Union on punitive damages:

From the perspective 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 charged 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*”;

- i) 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 the 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 the judges to award them. In other words, a judge cannot derive from EU Law alone the legal ground to award punitive damages, but he/she needs to rely on national legislation.

Impact on the follow-up case:

The Magistrates' Court of Bitonto, in its May 21, 2007 Decision, advocated the imposition of punitive damages on the party responsible for the antitrust infringement in order to: a) deter it from any successive infringement; and b) prevent the infringer from gaining any economic advantage from the unlawful practice. The Court observed that, if the quantification of the damages was determined only pursuant to the compensation-oriented national provisions (i.e. Articles 1223 and 1224 of the Italian Civil Code), then the infringer would probably continue to gain from the infringement and the effectiveness of the EU provisions (i.e. Article 81, now Article 101 TFEU) would therefore be compromised. Thus, the damages awarded should, when necessary in order to ensure the effective application of the EU Law, also serve a deterrent and punitive purpose as well.

The reasoning of the Magistrates' Court Decision regarding punitive damages, however, has not, so far, been followed in successive case law, which has not since then considered the expediency and reasonableness for a judge to award punitive damages. This tendency, sceptical about the imposition of punitive damages, could be due to the extraneousness of the very concept of "punitive damages" to the Italian legal system, which embraces a strictly "compensative" logic.

Impact on legislation:

In the absence of EU law rules governing this field, 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 TFEU, provided that the principles of equivalence and effectiveness are observed.

Therefore, first, 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 the 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, 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 persons must be able to seek compensation not only for actual loss (*damnum emergens*), but also for loss of profit (*lucrum cessans*) plus interest.

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 does not pre-empt any further development.

According to article 3 of the Directive, Member States are to ensure that any natural or legal person who 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 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.

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 should be due from the time in which the harm occurred up 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.

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

Elements of judicial dialogue:

Punitive damages are a controversial issue in the legal systems of most of the EU Member States, and therefore there has been no dialogue and hardly any cases concerning this issue.

Impact on national case law:

ITALY

The decision of the Magistrates' Court of Bitonto is, so far, 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 their introduction in the Italian legal system have been developed over the course of the last decade.

The decision of the Magistrates' Court of Bitonto still represents 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 decision n. 1183/2007 and 12717/2015). Nevertheless, a recent decision of the Court of Cassation (n. 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 followed the steps of the CJEU by admitting, in theory, the introduction of punitive damages and, on the other hand, imposing strict limits such as, in first place, the prohibition of unjust enrichment (the Court does not explicitly mention this concept but refers to the compensation of non-sustained harm). The Italian system still neither recognises nor regulates punitive damages, and thus award of them by the judge seems incompatible with the findings of both the CJEU and the Court of Cassation. Notwithstanding, at least at the theoretical level decision n. 16601/2017 removed an obstacle in the way of bringing the concept into the Italian legal system.

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

Not available.

Question 4 - The jurisdiction of the Courts

(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 is asking, essentially, whether Article 101 EU is to be interpreted as precluding a national provision such as Article 33(2) of Law No 287/90 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. With regard to this question, the significance of the principle of effectiveness is immediately evident: as the national provisions require the consumer to bring his/her claim before a specific court – other than that usually having jurisdiction – involving 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. Therefore, the goal of the analysis is to point out how the principle of effectiveness can affect the jurisdiction's regime regarding antitrust infringement civil claims.

The Court's Reasoning and Conclusions:

The Court 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 asks the national judges to evaluate whether the national provision to be applied renders 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, thus contrasting with the principle of effectiveness. Even though the CJEU does not explicitly develop its point, it could be argued that assessment of the jurisdiction's regime and related national provisions must take into account the following concepts as derived from EU Law: 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; iii) the need to ensure that the consumer has an effective judicial remedy at his/her disposal. This last point, derived from Article 47 of the CFREU, is not addressed by the CJEU but could be inferred from systemic analysis.

Impact on the follow-up case:

The decision of the Magistrates' Court of Bitonto, of May 21, 2007, for the first time within a national context employed the concept of effectiveness on a large scale to provide a rationale for its judgment. As far as the Court's jurisdiction is 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, leading to increases in costs and time. The Italian Court stated that such national provisions rendered it excessively difficult for individual consumers to obtain compensation and thus, according to the effectiveness principle, any claim for compensation should be heard before first instance judges.

National cases

No other cases available

THE GENERAL LEGAL ISSUE ADDRESSED IN THIS NOTE

Question 5 – Access to information considering leniency programmes

Cluster of CJEU cases relevant to this note:

- **Judgment of the Court (Grand Chamber) of 14 June 2011, Pfleiderer AG v Bundeskartellamt, C-360/09**
- **Judgment of the Court (First Chamber) of 6 June 2013, Bundeswettbewerbsbehörde v Donau Chemie *et al.*, Case C-536/11**

Within this cluster, identification of the main case which can be presented as a reference for judicial dialogue within the CJEU and between EU and national courts:

Pfleiderer AG, C-360/09

Main questions addressed

Should the consumer – when bringing a civil compensation claim – be granted access, in light of the principles of effectiveness and of effective judicial protection, to evidence contained in NCA files received pursuant to a leniency programme? How should national judges balance the interests of private claimants seeking access to documents received in the course of leniency applications with the interest of leniency applicants in keeping that information confidential, given the need to ensure an effective judicial remedy for the consumer?

Question 1 – Access to evidence controlled by an NCA pursuant to a national leniency programme

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?

Legal sources

Articles 11 and 12 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and the second paragraph of Article 10 EC, read in conjunction with Article 3(1)(g) EC

Paragraph 406e of the German Code of Criminal Procedure (Strafprozessordnung)

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’),

The case

In January 2008, the German competition authority (Bundeskartellamt) imposed fines amounting in total to EUR 62 million 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 company *Pfleiderer*, 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 this type of documents. The CJEU recognised that allowing access could compromise leniency programmes, but this consideration could not override the well-established right of individuals to bring a claim for damages caused by an infringement of competition law (C-453/99 *Courage and Crehan* and C-295/04 *Manfredi*). It is therefore up to the national courts and tribunals to

consider each application for access to leniency documents on a case-by-case basis, according to national law, and to take into account all the relevant factors in the case.

Preliminary Question

‘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)’

How should a national judge 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, which may compromise the leniency programmes?

The Court’s Reasoning

Accordingly, 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 (see, to this effect, *Courage and Crehan*, paragraph 29) 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 into account all the relevant factors in the case.

The Court 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 by conduct which is liable to restrict or distort competition, on the other.

On the one hand, the Court points out that leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective. 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 person concerned could be deterred from using the leniency procedure, faced with the possibility of disclosure of the information it provides in this context, in the knowledge in particular 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 emphasises 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.

The Court's Conclusions

The Court 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.

The CJEU has ruled that 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, raising the question as to whether the competition authorities are shooting themselves in the foot by encouraging such actions.

In *Pfleiderer* 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 Court gave no further indications regarding this balancing exercise.

Impact on the follow-up case:

Not available

Donau Chemie, C-536/2011

In this case, after a leniency application, the Austrian Competition Authority brought a case before the Cartel Court of Vienna concerning a cartel of wholesalers of printing materials. The Cartel Court found that Article 101 was infringed upon, 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 is in line with EU law.

The CJEU stated that it is up to the Member States to establish procedural rules concerning competition damages claims and highlighted that these rules should not make it practically impossible or excessively difficult to claim competition damages, thereby jeopardising the effectiveness of the very right to private enforcement. Based on the *Courage and Crehan* test, the CJEU disagreed with AG Jääskinen, who proposed a revision of this test in the light of Article 47 of the Charter of Fundamental Human Rights and Article 19(1) TEU. According to the AG, it does not suffice for procedural rules not to render damage claims “*practically impossible or excessively difficult*”, but rather procedural rules must also ensure that such claims can be made in an “*accessible, prompt and reasonably cost effective*” way (para. 47 of the Opinion).

He has 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 classical 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, as interpreted in the 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.

According to AG Jääskinen, the right of access to a court also includes, on the basis of CJEU case-law, a ‘power’ in the hands of national courts to consider all the questions of fact and law that are relevant to the cases before them. In the opinion of the AG, a national tribunal deciding on the civil law consequences of an illegal restriction of competition cannot have such ‘power’ if it is in practice precluded from accessing 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 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. It can be subject 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.

He emphasized that **Article 47 of the Charter of Fundamental Rights** also comes into play in 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 the AG’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 foreshadowed in *Pfleiderer*. Such an exercise would allow the national judge to set all of the

competing factors against one another, including protection of the legitimate business secrets of the undertakings that had participated in the restriction in violation of the duty of Member States under Article 19(1) of the TEU to provide remedies ‘sufficient to ensure effective legal protection in the fields covered by Union law’. The national legislator 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.

That said, it is established under the Court’s case law that although ‘the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law... It will be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual’s rights under Community law.’

Therefore, in conducting its assessment, the Cartel Court is bound to give due consideration to the alternative means of gathering evidence available under Austrian law. This includes, for example, procedural rules on disclosure of documents within the context of civil proceedings or rules regulating access to administrative documents of the Federal Competition Authority, along with Paragraphs 219(2) and 273 of the Code of Civil Procedure, before deciding which, if any, parts of its files are to be released to third parties in order to comply with effective judicial protection in the context of *Courage and Crehan/Manfredi* damages actions against economic operators found to be in breach of Article 101 TFEU. The same exercise needs to be undertaken with respect to the quantification of damages.

In conclusion, within parameters that may be set by the national legislator, and provided that the EU law principles discussed above be 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. (paras 49-69)

In its judgment the CJEU looked at the specific provision in Austrian law and concluded that this rule does jeopardise the effectiveness of the right to private enforcement of competition rules (para. 39). The CJEU insisted that “*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*” (para. 43), thus weighing up the interests at stake protected by EU Law.

The CJEU also dismissed the Austrian government’s point 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” (para. 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 problems in 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 tool to detect wrongdoings and enforce competition rules.

Directive 2014/104/EU

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 for 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.

Elements of judicial dialogue:

- Horizontal (within CJEU): The cases concentrate mainly on the fact that both 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.

- Vertical (CJEU – national court; national constitutional court - supreme court - lower instance court)

In these cases there is not much vertical dialogue between CJEU and the national courts as the issues mainly concern national procedural rules.

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

Different courts 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.

UNITED KINGDOM

National Grid Electricity Transmission v. ABB and Others, [2012] EWHC 869 (Ch), para 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 **Air Cargo** the Claimants sought a copy of a redacted version of the Commission's infringement decision in 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 permitted redactions. 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 (paras 36-42).

Guidelines for judges emerging from the analysis

Entitlement to compensation for third parties suffering damages causally related to an invalid agreement

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?

With regard to the first question, according to CJEU case law (*Manfredi*, C-295-298/04), the principle of invalidity can be relied on 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). In this respect, the CJEU stated that the full practical effectiveness – *effet utile* – 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.

As far as the second question is concerned, the CJEU stated 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 detailed rules governing the exercise of the consumers' right to compensation, including those on application of the concept of a 'causal relationship', provided that the principles of **equivalence** and **effectiveness** are observed. On the basis of the Court's reasoning, it can be said that 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, implying 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 – i.e. *effet utile* – of the treaty provisions.

Some MSs 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.

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 contains, nevertheless, certain provisions regarding indirect purchasers, including – in Article 14(2) – a rebuttable presumption in order to prove the “passing on” of the overcharge.

The possibility of a limitation period for seeking compensation

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, 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 to run.

Punitive damages

A further question relates to the possibility of an effectiveness-oriented interpretation of Article 101 of the TFEU: 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 that field, 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 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 award them. The national courts addressing this issue have so far closely followed the CJEU’s stance.

The rules of jurisdiction

In light of the principle of effectiveness, the question arises 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 that 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 stated that increases in cost and time due to the filing of an action before a specific court could render impossible or excessively difficult to exercise the right to compensation.

Access to information in connection with leniency programmes

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 at play, and rules 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. Accordingly, 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. In particular, 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 setting out specific provisions and limits regarding access to leniency.

3. Effective consumer protection between administrative and judicial enforcement.

Relevant CJEU cases in this cluster

- Judgment of the Court (First Chamber), of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Case C-472/10 (“**Invitel**”)
- Judgment 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 will be presented as reference for 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.

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 determining the subjective scope of application of judicial decisions prohibiting the use of a particular contract clause as abusive?
- Question 2 How do fundamental rights contribute to defining the relationship between administrative and judicial enforcement of consumer law?
- Question 3 What is the relationship between administrative and judicial injunctions?
- Question 4 Are courts bound by administrative decisions concerning unfair contract terms and practices? If they are not, what legal effect do administrative decisions have upon judicial remedies?
- Question 5 To what extent can the judicial declaration of unfairness of a clause bind administrative authorities, also in relation to professionals who did not take part in the proceedings before a court? What limits are imposed in this respect by Article 47 CFREU given the principles of effectiveness and proportionality?

The relationship between the *Invitel* and *Biuro Podróży Partner* decisions:

The judgments in the *Invitel* and *Biuro Podróży Partner* cases are directly related – providing two supplementary conclusions as to the effects of review of clauses in B2C contracts. They pertain, in particular, to *in abstracto* review – i.e. to the model of examination of the standard terms of the contract that is carried out regardless of any contract actually concluded. The core element of both cases is the question of **whether a judgment declaring a clause abusive can have extended effects, including upon administrative enforcement**. In particular, together these cases give the answer to the question of whether the *in abstracto* declaration of unfairness can allow administrative bodies to apply sanctions (or oblige them to do so).

On this matter, the *Biuro Podróży Partner* judgment approves the core findings of the *Invitel* judgment as regards the efficacy of unfairness declaration **in favour of consumers**. At the same time, it adopts this decision as a basis to take a step forward and ascertain the limits of the *erga*

omnes effect of unfairness **against professionals** – in particular, in the interest of administrative remedies for violation of a judicial injunction that prohibits use of a particular clause.

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 – 209/B of the Hungarian Civil Code

The provisions in question included 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 a 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 applied a particular term. It entails invalidity of a clause, regarding all the parties concluding contracts that contain such a clause, as well as every professional who includes this clause in standard contract terms. Consumers are then entitled to bring further claims against the seller or supplier.

Articles 479³⁶⁻⁴⁵ of the Code of Civil Procedure

The provisions, whose conformity with EU law was challenged (currently not in force, see further below), concerned *in abstracto* review of contract clauses. The judicial proceedings in question were designed for the purpose of abstract control of standard contract terms and to protect the collective consumers' interests. 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, providing a way to protect consumers' collective interests 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 the 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 holds a clause unfair, it cites its content and issues an injunction prohibiting its use. A copy of the final judgment, 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 clauses that have been declared unfair *in abstracto*. A final judgment granting the action has an effect upon third parties when a provision of the model agreement considered as prohibited is published in this register. The Court orders that every final judgment is to be published in the “Court and Commercial Gazette” (*Monitor Sądowy i Gospodarczy*) (Article 479⁴²⁻⁴⁵ of the Code of Civil Procedure). Under Article 479⁴³ of the Code of Civil Procedure, the judgment 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 unfair clause declaration 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 inserted into 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 cases of non-compliance e.g. use of the unfair clause in standard contract terms listed in the public register of unfair terms.

The consequences of using an unfair term may be also self-remedied by a business party that undertakes – prior to issue of a decision declaring a clause abusive – the obligation to perform 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 the party using the standard terms indicated in the decision.

The legislative reform of April 2016

The legislative framework discussed in the *Biuro Podróży Partner* case had been repealed as of 17 April 2016 before the final judgment was rendered. The new act cancelled the former provisions of the Code of Civil Procedure almost entirely, 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 centralizes sanctioning for unfair contract terms, as the President is still competent to impose fines for applying contract terms that had 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 a competence to issue a decision that declares *in abstracto* the unfairness of a clause (Article 23b). The decision may also provide specific remedies that allow for 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 are to be proportionate to the gravity and type of breach, as well as necessary for the removal of its consequences. The consequences of using an unfair term may also be self-remedied by a business party that 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 declarations of unfairness. It is to be effective regarding the entrepreneur against whom the unfairness has been declared, and all the consumers who concluded with him a contract, using the standard terms indicated in the decision.

Question 1 – The subjective scope of the 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 determining the subjective scope of application of judicial decisions prohibiting the use of a particular contract clause as abusive?

The case

Invitel concerns the applicability of a judgment related to unfairness to consumers other than those who are technically parties to the proceedings. *Biuro Podróży Partner* concerns the applicability of unfairness to professionals other than those who were parties to administrative proceedings holding a clause *in abstracto* unfair. In the *Invitel* case, the CJEU answered a preliminary question from 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 – telecom company *Invitel Távközlési Zrt* – that certain terms on additional fees used in its contracts concluded with consumers were unfair. With the preliminary question the Hungarian court aimed to ascertain whether domestic law can provide the possibility to issue injunctions that prohibit 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 Court:

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 the 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?

The Court's Reasoning:

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 cases, an injunction will generally prohibit the use of the particular contract term in every contract concluded with consumers. From this perspective it is irrelevant whether a particular consumer was involved in the original proceedings in which the

injunction was issued and whether he/she concluded a contract before or after the injunction was made. The principle of effectiveness suggests that remedies for using abusive clauses should apply broadly beyond the parties to the relevant proceedings.

Specifically, the CJEU stated that Article 7(1) of the 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, relying on the principle of dissuasiveness, and considering the injunctions' independence of 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 CJEU in the *Biuro Podróży Partner* case (the background to the case will be discussed below, under question 2).

The Court's Conclusions:

Subsequent to 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 as being unfair. In this case, the injunction in question can be effective in favour of every consumer, regardless of the date they concluded their contracts, and whether or not they were involved in the initial proceedings in which the unfairness was declared. In the *Invitel* case, the CJEU stated that:

“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 consumers who were not party to the injunction proceedings;
- when the unfair nature of a term in the general business conditions has been recognised in such proceedings, the 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 was summed up in the *Biuro Podróży Partner* decision, “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:

There is no direct follow-up in Polish case law so far.

In Polish law, due to the radical change in the model of abstract review of contract clauses (see above), the judgment addresses provisions no longer in force. They still, however, have relevance for the *ratione personae* effects of declarations of abusiveness made in the former “judicial” model.

Notwithstanding these obvious limits, the *Biuro Podróży Partner* judgment provides significant guidance on interpretation of Article 47 of the Charter in the area of consumer remedies, as well as representing a significant development in the doctrine of *in abstracto* review, the cornerstone of which had been set with the *Invitel* case.

Elements of judicial dialogue:

The *Biuro Podróży Partner* case is linked to the CJEU’s *Invitel* decision (C-472/10). It supplements the previous decision by answering the question as to whether, given the possibility of extended effects of unfairness of a clause – which has been ascertained in the *Invitel* judgment as regards consumers – this also applies to all the professionals in the market. In particular, the *Biuro Podróży Partner* judgment addressed the question as to whether a judicial injunction (issued in civil proceedings) which prohibits use of a clause as being unfair has an *erga omnes* effect against all the business parties that may 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

No impact evidenced so far.

Question 2 – Fundamental rights and the judicial/administrative enforcement relation

How do the principle of good administration and 47 CFR contribute to defining the relationship between administrative and judicial enforcement of consumer law?

The case and Preliminary question referred to the Court

The problem in question was not addressed directly in the preliminary questions raised in the *Invitel* and *Biuro Podróży Partner* cases. However, the issue looms very large in the background to both cases. It is particularly evident in the context of the *Biuro Podróży Partner* decisions, where the national court aimed directly to ascertain whether (and if so to what extent) the administrative body is bound – in deciding upon sanctions for using unfair terms – by the declaration of unfairness made by the civil court.

The Court’s Reasoning

As follows from both decisions of the CJEU, the interrelation between the judicial and administrative enforcement in consumer cases is clear in judgements (*Invitel*, *Biuro Podróży Partner*) that deal with extension of the effects of declaration of unfairness beyond the array of parties to the particular civil proceedings. Relying on the principle of effectiveness, the CJEU extended the effects of decisions on the unfairness of the clause, and as a consequence created connections between administrative and judicial enforcement. In this respect, 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 the dir. 2009/22 and dir. 93/13 in conjunction with and in the light of art. 47 CFR. The CJEU recalls 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 that found a clause abusive *in abstracto* and with effect for all consumers. This dimension of administrative/judicial enforcement was addressed with particular thoroughness in the *Biuro Podróży Partner* case, where the Court of Appeal in Warsaw was reviewing a decision by the national regulatory authority (the President of the Competition and Consumer Protection Office).

The Court's Conclusion

The CJEU (*Biuro Podróży Partner* judgment) stated, that, in the light of Art. 47 CFR, national legislations could provide that the declaration of unfairness established in a public register is to apply to a seller or supplier that was not a party to the proceedings culminating in 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 *Biuro Podróży Partner* decision) only as the general criterion for **judicial review of administrative decisions**, but not for the administrative decisions themselves. In the latter respect the principle of good administration is applicable. On the relationship between the two, see also the remarks below, under Question 3.

Impact on the follow-up case

There has been no direct follow-up in Polish case law so far.

Elements of judicial dialogue

On the relation between the *Invitel* and *Biuro Podróży Partner* cases, see the introductory remarks to this Chapter.

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

No impact evidenced so far.

Question 3 – Administrative vs. judicial injunctions

What is the relationship between administrative and judicial injunctions?

The case and Preliminary question referred to the Court

The issue was not addressed directly in the preliminary questions in the *Invitel* and *Biuro Podróży Partner* cases, but clearly remains in the background. This pertains in particular to the latter case, where the preliminary question was raised 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 use of an unfair clause, although the professional subjected to this sanction had not been involved in the proceedings in which unfairness had originally been declared.

The Court's Reasoning

As was pointed out in the *Biuro Podróży Partner* judgment, the national administrative bodies (including in particular the regulatory authority responsible for the consumer market) can enforce consumer law in an interconnected way with the courts.

The general principle 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, Art. 47 CFR plays an important role in stressing the importance of the judicial review of administrative decisions to guarantee the right to an effective remedy.

Furthermore, it should be noted that, with regard to administrative proceedings, the principle of good administration is to apply.

The Court's Conclusions

Particularly clear conclusions were set forth by the CJEU in the *Biuro Podróży Partner* case. Discussing the possibility of applying an administrative sanction with reference to the previous civil judgment (as the premise of 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 has been 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 close enough 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 – and in particular to reassess 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 concentrates especially on the **right to be heard** – considering it to be the particular substrate of the right to effective judicial remedy in the sense 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 of demanding**

separate review of a contract clause, even if the (apparently) similar clause has already been declared unfair.

Impact on the follow-up case

There has been no direct follow-up in Polish case law so far.

Elements of judicial dialogue

On the relationship between the *Invitel* and *Biuro Podróży Partner* cases, see the introductory remarks to this Chapter.

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

No impact evidenced so far.

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, what legal effect do administrative decisions have on judicial remedies?

The case and Preliminary question referred to the Court

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 – solely or in parallel to courts – are competent to review clauses in consumer contracts. This prompts us to raise the question as to **whether an administrative declaration of abusiveness can subsequently entail consequences for the judicial enforcement** – especially in having a prejudicial character for the judicial application of remedies.

The Court's Reasoning and conclusions

The issue has not been addressed in either of the two decisions discussed in this Chapter. However,

In the light of art. 47 CFR, professionals **must be vested with a right to present their point of view before a court** (e.g. to claim that the clause at stake is not similar to the clause 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).

Impact on the follow-up case

There has been no direct follow-up in Polish case law so far.

Elements of judicial dialogue

On the relationship between the *Invitel* and *Biuro Podróży Partner* cases, see the introductory remarks to this Chapter.

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

No impact evidenced so far.

Question 5 – The *erga omnes* effect regarding professionals

To what extent can the judicial declaration of unfairness of a clause bind administrative authorities regarding the professionals who had not taken part in the proceedings before a court? What limits are imposed in this respect by Article 47 CFREU given the principles of effectiveness and proportionality?

The case and preliminary question referred to the Court

The problem was addressed directly in the CJEU judgment in *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 judicial review of a decision of the President of the Office of Competition and Consumer Protection of 22 November 2011, which imposed a financial penalty for Biuro Podróży Partner sp. z o.o. for using a contractual clause that was previously declared abusive with respect to another business party and entered into the public register (upon 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 the 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, having already been declared abusive *in abstracto*. The judgment was challenged by the travel agency before the Court of Appeal in Warsaw.

The Court’s Reasoning:

The possible scope of the *erga omnes* effect of declaration of unfairness against the business parties was the core element of the *Biuro Podróży Partner* case. The Court based its reasoning on the clear **balancing between the fundamental rights entailed by Article 47 CFR and the principle of effectiveness set forth in 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 violation of the court’s injunction, issued as a result of the *in abstracto* review of contract clauses**. The conclusions reached in the *Biuro Podróży Partner* judgment directly address the prerequisites to be met to render professionals who were not involved in the initial reviewing procedure (and were not able to defend their rights) liable for not complying with the injunction.

First of all, the principle of effectiveness may provide a ***rationale* for extending the effects of a declaration of unfairness to every business party that introduced into a contract a clause that had previously been declared unfair and entered into a public register** (even if this professional had not participated in the proceedings that led to issue of a judicial injunction).

This outcome would obviously increase the level of consumer protection, enhancing the remedies available in the entire system. This role of effectiveness was discussed broadly above, in relation to question 1.

Secondly, however, the Court observed that **the personal scope of unfairness of a clause according to the principle of effectiveness cannot be established without taking into account the other overriding standards of the legal system – especially the right to effective judicial protection.** On the grounds of *in abstracto* review, the CJEU stressed in particular the need to provide every business party – accused of using unfair clauses and thus liable to an administrative penalty – with the right to challenge the decision on imposing this sanction. As has been ascertained by the CJEU, **the right to access the court is a component of the right to effective judicial remedy** (Art. 47 CFR). In particular, the domestic system should put in place instruments to control not only the fine itself, but also the grounds for 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 between these two criteria was based implicitly upon **the principle of proportionality** (referred to in Article 7 of the directive in the form of “adequacy”). Due to the general standpoint adopted by the CJEU, ascertainment of the personal scope of unfairness of a clause according to the principle of effectiveness cannot disregard the general standards of the legal system, and especially the right to effective judicial protection. The *Biuro Podróży Partner* judgment applied proportionality as a moderating factor, allowing for tempering of 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 also below). The CJEU summed up this element of its findings in the judgment:

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.

The Court's Conclusion

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 the extended effects of declaration of unfairness (see question 1), extending the effects of abusiveness onto the business parties is subject to stricter limitations.

As ascertained in the judgment:

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.

Impact on the follow-up case:

There has been no direct follow-up in Polish case law so far.

Elements of judicial dialogue:

On the relationship between the *Invitel* and *Biuro Podróży Partner* cases, see the introductory remarks to this Chapter.

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

No impact evidenced so far.

Guidelines for judges emerging 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 for consumers and professionals that were not party to the proceedings. In the first respect, according to *Invitel*, once the injunction has been 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 the business party's procedural rights, established by art. 47 CFR, are respected. This is particularly relevant to the legal systems which recognize a separate mode of administrative enforcement for cases in which the professional failed to comply with an injunction and continued using a clause that was 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** (Article 41 CFR). Furthermore, the principles of effectiveness, equivalence and proportionality play a significant role in CJEU case law and, as a consequence, affect national jurisprudence. At a more practical level, domestic courts should consider that Article 47 CFR has an even stronger impact on 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, including 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 those found to be unfair, although used by other businesses that were not party to the proceedings; in this case, the business party shall have, under article 47 CFR, adequate means for challenging the decision establishing that equivalence (*Biuro* case, C-119/15).

4. Collective redress and coordination between collective and individual proceedings.

When collective and individual redress are available, the question of their coordination arises. Art. 47 CFR and the principle of effectiveness can play a significant role in interpretation of the existing coordination mechanisms. The issue is now topical: in the framework of the “New Deal for consumers”, the proposal for a Directive on representative actions for the protection of the collective interests of consumers (COM(2018) 184 final) provides that Member States shall ensure that any infringement harming the collective interests of consumers established in a final decision of an administrative authority or a court, including a final injunction order, is deemed as irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress before their national courts against the same trader for the same infringement (art. 10).

Furthermore, a question of coordination could arise with respect to transnational cases. In *Schrems II* (C-498/16), the question is whether a social network user, being a “consumer” within the meaning of Regulation Brussels I/Ibis, can invoke at the same time as his/her own claims arising from a consumer supply at the claimant’s place of jurisdiction the claims of other consumers on the same subject who are domiciled in the same Member State, in another Member State, or in a non-Member State. The CJEU answered the question negatively. The decision, following the results of the AG’s opinion, relied on the fact that art 16 Brussels I regulation is an exception based on the weaker condition of the consumer, and that it is thus only when he/she is part of the claim that it may be applied.

4.1. Power/duty to suspend a standing procedure.

Relevant CJEU cases in this cluster

- Judgment 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**”)
- Judgment 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, the main case which can be presented as reference for judicial dialogue within the CJEU and between EU and national courts is *Sales Sinués*.

Main questions addressed

- Question 1 When national legislation provides for forms of coordination between individual and collective redress, should the former prevail over the latter?
- Question 2 Can the individual action be suspended until the decision in the collective action is decided?

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 are to 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

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 except where one of the proceedings may be deemed as preliminary for the decision of the other. The provision allows the court to suspend the proceeding pending the decision of the other.

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 is decided?

The case

Mr Sales Sinués concluded an agreement for the novation of a mortgage loan with Caixabank in 2005, which contained a ‘floor’ clause (*cláusula suelo*), i.e. a minimum interest rate below which the interest rate could not fall, independent of market rate fluctuations. In 2013, Mr Sales Sinués brought an individual action seeking the annulment of the clause before the *Juzgado de lo Mercantil* nº 9 in Barcelona due to 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 prohibiting the continued use of ‘floor’

clauses in loan agreements, Caixabank requested a suspension of the individual action brought by Mr Sales Sinués, pending final judgment in the collective action.

Preliminary question referred to the Court

The court in Barcelona found that the applicable procedural rules required it to suspend the individual action, leading to subordination of the individual action to the collective action as regards both the course of the proceedings and the outcome. First, the consumer would necessarily be involved in the outcome of the collective action, even if he/she had decided not to participate in it, and this would prevent the court from analysing all the circumstances in the individual action. Secondly, the consumer would be dependent on the period within which final judgment in the collective action was to be given. Thirdly, even if the consumer wished to participate in the collective action, he would be subject to constraints relating to the determination of the competent court and to the pleas that might be put forward.

As 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 rules] 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 are void, and therefore infringe Article 7(1) of Directive 93/13?

Does the fact that a consumer is unable to dissociate himself 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 providing for other equally effective procedural mechanisms for the protection of consumers' rights, and by the principle of legal certainty?

The Court's Reasoning:

The CJEU jointly addressed all the questions presented by the referring court and addressed the protection afforded by the 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 the CJEU made no explicit reference to the Charter, the consumer's right to effective judicial protection (right to adjudication within a reasonable time, right to an effective remedy before a court of law) could be prejudiced if he/she were forced to await the outcome of the collective action.

Under the **principle of effectiveness**, the CJEU assessed the effects of suspension of the individual action in the Spanish context and acknowledged that, on the one hand, the outcome of the collective action could be binding for the individual consumer, even if he/she had 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 could 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 through reference to the organization of the Member State’s judicial system.

The Court’s Conclusions:

The individual and collective redress mechanisms, although included in the same article within Directive 93/13, serve a different purpose and are of 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 or 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 automatically impose 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 case-by-case suspension of the individual action, but without providing specific criteria that may be used by national courts to decide in this respect.

Impact on the follow-up case:

The CJEU’s judgment 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 in collective actions, but nor can they rely on the outcome. This could be considered as a complete ‘opt-out’ for the better or worse. This is the approach taken by e.g. the *Audiencia Provincial* in Barcelona (decision n. 139/2017 of 30 March 2017).
- While the difference between individual and collective actions must be recognised, 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 personal and specific circumstances. The judgment 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 had already been a subject 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 rely 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 was subsequently addressed by the Court 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* regarding the suspension or stay of the individual proceedings remained valid, the consumer was to 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 was an ongoing collective action. The Court ruled that, although the principle of procedural autonomy empowers the Member States to set 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 to the full and effective protection of the consumer, preventing the counterparty from carrying on using an unfair contractual term. Even with regard to interim relief, the Court therefore ruled that the national judge, while pending a final judgment in an ongoing collective action, must be able to adopt an interim relief on his/her own initiative, in order to ensure that the consumer is adequately protected in the meantime. A national provision denying any such possibility violates the principle of effectiveness.

[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, is to be seen in the decision of the Tribunal of Rome, 2 November 2016, n. 20283. In its decision the court affirmed that “Article 140-bis d.lgs. 206/2005 allows the consumer to present a collective action, but this does not limit the possibility for the consumer to present an individual action. The collective action is only one of the remedies available to the individual, who can always pursue the individual remedies”.

A similar question was addressed by the Italian jurisprudence before the *Sales Sinués* decision, in a decision of the Court of Appeal of Rome, (24 September 2002) which affirmed that the collective action for an injunction is a general and abstract one, which may affect the clauses that are included in all 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 occurred between the consumer and the professional. Thus, “the two proceedings flow on partially different levels, and issue of an injunction does not, as said, entail nullity of the clause - which, in the context of the specific circumstances of the case, may well be included in the consumer contract - but only makes it unlawful and prohibits its automatic admission under general conditions (first paragraph of Article 1341)”.

4.2. *Erga omnes* effects of decisions²⁵.

Relevant CJEU cases in this cluster

- Judgment of the Court (First Chamber), of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Case C-472/10 (“**Invitel**”)
- Judgment 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**”)
- Judgment 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**”)

Within this cluster, the main cases which can be presented as reference for judicial dialogue within the CJEU and between EU and national courts are *Invitel* and *Biuro Podróży Partner*.

Main questions addressed

- Question 3 If a consumer has not participated in the proceedings in which a clause had been declared unfair, can he/she refer to this declaration in his/her own dispute with a professional, even if his/her contract was concluded after the clause had been declared abusive? Does the involvement of an organisation or public authority acting for the consumers’ collective interests affect the answer to this question?
- Question 4 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)

National level (Hungary and Poland)

Hungary

Articles 209 – 209/B of the Hungarian Civil Code

The provisions in question establish 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

²⁵ By Mateusz Grochowski and Monika Jozon.

unfairness may also claim a clause to be abusive regardless as to whether it had been applied in any contract that was actually concluded.

Poland

Articles 479³⁶⁻⁴⁵ of the Polish Code of Civil Procedure

The above provisions regulated the *in abstracto* review of contract clauses, designed for the protection of collective consumers' interests against the use of unfair terms 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 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 clause to be entered in a public register kept 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 judgment was also publicised with entry in the “Court and Commercial Gazette” [*Monitor Sądowy i Gospodarczy*]. The injunction and the publishing procedure aimed at protecting the collective interests of all consumers who might enter into a contract containing the particular clause. So much was established in particular in the Article 479⁴³ of the Code of Civil Procedure, which provided for an extended effect of declaration of unfairness, stating that a judgment 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 transferred from the judicial to the administrative authority (the review is currently carried out by the President of the Office of Competition and Consumer Protection).

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 he/she 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 affect the answer to this question?

The case

The answer to these questions was given in particular in the *Invitel* decision. Here the CJEU decided upon the preliminary question 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 to allow consumers to obtain reimbursement of the fees paid under the clauses in question.

Preliminary question referred to the Court:

The questions referred to in the *Invitel* case are:

“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 where a body appointed by law and competent for that 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, 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?”

The Court's Reasoning

In the *Invitel* case, as the starting point of its reasoning, the Court emphasized an obligation for the Member States, set forth in the 93/13/EC directive, to provide adequate, dissuasive, and effective means in cases of unfair terms in consumer contracts. These means undoubtedly include, according to the Court, granting individuals or organizations a right to initiate judicial review of the clauses in order to protect consumers' (collective) interests. Moreover, the principle of dissuasiveness justifies 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 are to be non-binding on all the consumers, regardless as to whether or not they were parties to the proceedings in which the injunction was issued.

The Court's Conclusion:

According to the CJEU, the declaration of unfairness of a clause – and related judicial injunction – is effective for every consumer who concludes a contract with use of a particular term. Thus, the CJEU has made it clear that a Member State can construe a review of abusiveness as a means of protection of collective interests of consumers.

The conclusions reached in the *Invitel* decision lead to more substantial implications for the practical features of protecting collective consumer interests through unfair contract term regulation. In practice, the conclusion in question is especially relevant to 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 protect effectively all consumers contracting with particular professionals.

Impact on the follow-up case:

Not available.

Elements of judicial dialogue:

The *Invitel* and *Biuro Podróży Partner* decisions supplement each other, establishing jointly a comprehensive standard for *erga omnes* efficiency of injunctions issued by courts or other domestic bodies, which prohibits the use of particular clauses as abusive. The *Biuro Podróży Partner* case is a direct follow-up to the CJEU's *Invitel* decision, complementing its conclusions with an issue regarding a professional party. As a result, the *Invitel* judgment ascertains the admissibility and

limits of protection of collective consumers' interests from the perspective of claims brought by consumers themselves. The *Biuro Podróży Partner* decision determines the scope of professionals who are obliged to comply with an injunction (issued without their direct participation) and who may be held 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 efficiency of prohibitory injunctions issued by courts was assessed by the Italian Court of Cassation with decision n. 13051/2008, ruling that an injunction prohibiting the use of particular clauses had effect both on the existing contractual relationship – i.e. at the moment of issue of the injunction – and on future relationships. The Court pointed out that only by producing an effect upon the future, and thus preventing abusive clauses from being used, could the collective prohibitory injunction function as an adequate instrument of judicial protection. The statement is particularly relevant to the contracts – such as banking contracts – in which clauses usually produce effects repeatedly over time.

Other decisions by Italian lower courts have reassessed such principles and ruled that prohibitory injunctions have an effect on existing relationships as well as relationships to be established in the future (see Milan Tribunal, decisions of 30 June, 13 July and 1st October 2015, Cuneo Tribunal, 29 June 2015). Moreover, another decision of 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 achieve its purpose of preventing the proliferation of damage caused by abusive clauses, thus also discouraging individual consumers from initiating lengthy and expensive individual actions to protect their rights.

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 was involved?

The case and preliminary question referred to the Court

The answer to this question was implicitly provided in the *Biuro Podróży Partner* decision. The CJEU was addressing a question referred by the Court of Appeal in Warsaw in the case concerning a pecuniary fine imposed by the national regulatory authority (Office of Competition and Consumer Protection) on a professional (a travel agency “Partner”) for use of a contract clause that had been previously declared abusive vis-à-vis another professional. The travel agency made an appeal to the Court of Competition and Consumer Protection (a specialized division of the District Court in Warsaw), within a scheme for judicial control of the decisions of the President of the Office provided by Polish law.

In the decision of 11 October 2013, the Court of first instance dismissed the appeal, agreeing that the clause used by the travel agency was prohibited, as already declared abusive *in abstracto*. The judgment was challenged by the travel agency before the Court of Appeal in Warsaw.

According 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. This means that an injunction was also able, in principle, to protect collective consumer interests, and not only the individual interests of the parties involved in the review proceedings. With its preliminary question, the Court of Appeals in Warsaw sought, amongst other things, to ascertain the precise scope of collective interests of consumers that are protected by unfair clause legislation *vis-à-vis* professionals:

In the 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?

The Court's Reasoning:

According to the CJEU's reasoning, 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 means of extending the effects of the control beyond the relationship between the parties involved in the particular proceedings. In other words, it is possible for domestic legal systems to generate extended effect for the declaration of non-bindingness of unfair terms, especially allowing it 1) to act "for" all consumers or 2) "against" all business parties who use the particular clause. Although the first case seems reasonably straightforward (particularly in the light of the CJEU's *Invitel* judgment), the latter is much more controversial, for it gives rise to serious concerns involving fundamental rights – in particular, the right to access a court (which may be significantly limited in the case of introducing any sort of *erga omnes* efficacy).

As a result, the CJEU's *Biuro Podróży Partner* judgment points 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. In particular – according to Article 47 CFREU – the business party should have the faculty to challenge effectively the judicial or administrative decision declaring that terms of the particular contract are similar to or identical with the terms that have been previously declared abusive. This standard is a clear threshold for introducing collective redress, which could be effective against (potentially) unlimited groups of business entities.

The Court's Conclusions

As concluded by the CJEU, a business party may be held 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 finding the clause he has used 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 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. The situation may change if the review of clauses was carried against an industrial organisation, representing the collective interests of a group of professionals or an entire sector of industry (in the sense 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 meet the procedural guarantee of a right to defence specified in the *Biuro Podróży Partner* decision. For the other professionals, the standard in question has to be examined separately, on the basis of the guidelines provided by the CJEU.

Impact on the follow-up case:

There has been no direct follow-up in Polish case law so far.

Due to the radical change in the model of abstract review of contract clauses (see the introductory remarks on the Polish legislative reform of April 2016 above in chapter 2), the judgment tackles a provision no longer in force. With the current model (in force as of 2016), *in abstracto* examination of clauses has been regulated as an 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 is still of relevance given 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:

No impact evidenced so far.

Guidelines for judges emerging from the analysis

1. The mechanisms of collective redress in consumer contracts are to be applied with a clear view to the fundamental rights sphere. In every case, 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 are to comply with the proper level of procedural guarantees, safeguarding for every party to judicial or administrative proceedings a right to effective remedy against a decision/judgment that has been based upon collective redress mechanisms (Article 47 section 1 CFR).
2. The aforesaid applies especially to decisions or judgments that aim to protect collective consumers’ interests by imposing penalties on a broad array of business parties for committing an act that had previously been prohibited in the proceedings and that involved one particular business party or an industrial organisation. In all of these cases, the domestic courts are to keep the fundamental rights perspective in sight, and in particular the guarantees derived from Article 47 section 1 CFREU (according to the *Biuro Podróży Partner* case). It is, consequently, to moderate

domestic instruments in accordance with the standards set by the CJEU, both through CFREU-compliant interpretation and (in particularly grave instances) by refusing to apply the domestic rules.

3. Both judgments also substantially tackle the problem of *res iudicata* in the context of unfair terms review. According to the Court's findings, declaration of unfairness may enjoy extended scope of *res iudicata*, reaching beyond the relationships between the parties to the particular proceedings. From the perspective of consumers, when a general injunction (in the form provided by Polish and Hungarian law) is issued, they can refer to it directly, without any need to initiate a separate proceeding to review a clause in their contract.

In other words, an abstract judgment, once made, ascertains the unfairness of a clause for any other procedure – both judicial and administrative (especially public penalization for infringing the injunction). This extension of *res iudicata* is, in principle, unlimited. However, according to the *Biuro Podróży Partner* decision, professionals must be vested with effective remedy guaranteeing review as to whether a particular clause is actually identical with the clause mentioned in the injunction. The extended *res iudicata*, introduced in favour of a consumer should thus be balanced with the guarantee of a right to defence in administrative and judicial proceedings.

4. Keeping the aforesaid in mind, it is possible to distinguish between a few situations that may occur subsequent to the *Invitel* and *Biuro Podróży Partner* decisions:

a) prior or *ex post* contracting

According to the standpoint adopted in both decisions, 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 as well as some of the other professionals (so long as the requirements set out in *Biuro Podróży Partner* are satisfied). This effect applies to all the consumers who conclude a contract that includes the clause that has been declared abusive – regardless of the time of the 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 effective remedy, as specified in the *Biuro Podróży Partner* decision.

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 condition that the rules put in place are no less favourable than those governing similar situations subject to domestic law (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law on consumer protection associations (principle of effectiveness).

According to the *Sales Sinués* case, the principle of effectiveness of consumer protection requires that, when there are both a collective and an individual action concerning the unfairness of the same clause, the national courts cannot automatically suspend the individual action, without any possibility for the relevance of suspension to the protection of the consumer who brought the individual action to be taken into consideration and without the consumer being able to decide to dissociate himself/herself from the collective action.

c) *in abstracto* vs. *in concreto* review

The extended effects of *in abstracto* review, determined jointly in the *Invitel* and *Biuro Podróży Partner* cases, is closely interrelated with *in concreto* scrutiny – carried out with respect to the specified contract that contains a particular clause. Review of this kind is usually carried out as a defence or a counterclaim – e.g. if a professional sues a consumer for payment, the defendant can claim unfairness of a clause that determined the sum due (e.g. specifying the interest rate) and decline payment totally or in part. The court will then make its own assessment, using similar criteria as might have been used for *in abstracto* examination of the same clause (this review can also be carried out *ex officio*, without any claim from a consumer; see chapter 1.2, in this Casebook).

As follows from the concept of extended efficacy, expressed in the *Invitel* and *Biuro Podróży Partner* decisions, the judgment declaring a clause abusive *in abstracto* can pre-determine the effects of the *in concreto* control. It is to be noted that the Court's decisions rest on the careful balancing of the principles of effectiveness and proportionality, also with respect to the professional right to effective judicial remedies, and such careful analysis of both principles is to be applied in national cases related to similar cases too. More specifically, while ensuring consumers' protection in accordance with the broad scope of remedies available under EU law, domestic courts are always to ensure that the professional against whom an injunction may be enforced has access to an effective remedy, questioning the identity of the two clauses or the legitimacy of the enforcement.

5. Effective, proportionate and dissuasive remedies.

This chapter analyses the influence of European principles and of the Charter of Fundamental rights of the European Union on remedies. This point of view is particularly topical, considering the approach adopted in the *New Deal for Consumers* (COM/2018/0183 final), according to which “effective enforcement is a top priority” of the European Commission.

5.1. Unfair terms and individual redress: invalidity, interim relief and restitution remedies.

Relevant CJEU cases in this cluster

- Judgment 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**”)
- Judgment of the Court (Third Chamber) of 10 September 2014, *Monika Kušionová v SMART Capital a.s.*, Case C-34/13. (“**Kušionová**”)
- Judgment 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**”)

Main questions addressed

- Question 1 Is declaration of non-bindingness of an unfair term an effective remedy as such or, in order to provide effective consumer protection, is the judge to bring in additional and consequential measures, associated with the term's non-bindingness, such as, in the case of credit contracts, interim measures to 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, is the judge to bring in 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 existing, limiting restitution to the sums unduly paid after the judge's declaration of non-bindingness (*ex nunc* effects of non-bindingness)?

Relevant legal sources

Article 47, CFREU, *Right to an effective remedy and 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

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.

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, is the judge to bring in additional and consequential measures associated with the term's non-bindingness, such as, in the case of credit contracts, interim measures to 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 will focus on the *Aziż* and the *Kušíonová* cases, as cases in which application of the principle of effectiveness has had an important role.

In both cases a consumer's home was subject (or could be subject) to a mortgage enforcement procedure based on – allegedly unfair – credit contract terms.

In the *Aziż* case, the Spanish law that was applicable at the time of the proceedings only allowed for limited grounds of opposition to the enforcement proceedings, excluding ascertainment of unfair contract terms, nor did it enable the different judge responsible for ascertaining the terms' unfairness in the declaratory proceedings to suspend the parallel mortgage enforcement procedure.

In the *Kušíonová* case, on the other hand, the consumer brought an action before the court for assessment of credit contract terms, including a term enabling home foreclosure with an extrajudicial procedure, as indeed allowed by the statutory provisions of Slovak law. However, as emerged during the preliminary reference proceedings before the CJEU, Slovak legislation allowed (and still allows) a court to adopt interim measures, including suspension of the extrajudicial procedure and declaration of the sale of the seized home as void should the mortgage be based on an invalid clause.

Preliminary question referred to the Court:

For the purposes of the present chapter, we will not consider here the questions concerning the *ex officio* power of the judge to ascertain terms' unfairness in consumer contracts, although they were addressed by the Court (see chapter 1). Instead, we shall focus on the issue of available

remedies/measures other than mere declaration of the unfairness of terms as a necessary complement to effective consumer protection against the use of unfair terms. More particularly, we will focus on the role of interim measures applicable to enforcement procedures which are or may be associated with declaratory proceedings in which the unfairness of terms is or may be assessed.

In the *Aziž* case the relevant question was:

With its first question, the referring court wishes to know, essentially, whether Directive 93/13 is to be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing for grounds for objection based on the unfairness of a clause contained in a contract between a consumer and a seller or supplier in mortgage enforcement proceedings, does not allow the court before which declaratory proceedings have been brought, and which has jurisdiction to assess whether such a clause is unfair, to grant interim relief in order to guarantee the full effectiveness of its final decision (*Aziž*, para. 43).

In the *Kušionová* case the referring court asked whether the national legislation, which enables a creditor to recover sums on the basis of unfair contract terms by enforcing a charge against a consumer's immovable property, without any assessment of the contract 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 the light of Article 38 of the Charter. As we will see below, the answer of the CJEU builds on the existence of procedural and substantive safeguards in Slovak legislation providing for the adoption of interim measures, invalidity rules and restitutionary remedies.

The Court's Reasoning:

In the CJEU's reasoning the availability of interim measures is held to be an important complement to effective consumer protection.

Indeed, in the *Aziž* 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 (para 52). More particularly:

such procedural rules impair the protection sought by the directive, insofar 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). (*Aziž*, para. 59)

Following an argument proposed by the AG, the Court also dealt with the issue as to whether alternative remedies could provide effective protection for the consumer in the form of the damages that the consumer could claim once his/her home was irreversibly seized. Clearly, due to the specific nature of the interest affected, 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 constitute neither an adequate nor an effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13.

This applies all the more 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 the dwelling. (*Aziz*, paras. 60-61)

These arguments are perfectly comparable with the ones adopted in the *Kušionová* case, where, by contrast, the CJEU found the Slovak legislation compatible with EU law, interpreted in accordance with the principles of **effectiveness** and **dissuasiveness**. What is decisive is precisely 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 literally 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*, paras. 60-61)

Moreover, the nature of the consumer's right, in that it is also linked with another fundamental right (the right to family home), is specifically addressed by the Court 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* with respect to the affected right. It also refers to ECHR jurisprudence and places it in relation with article 7, CFREU. The *Aziz* decision is conclusively cited.

With regard to the proportionality of the penalty, it is necessary to pay particular attention to the fact that the property which is the object of procedure for the extrajudicial enforcement of the charge at issue in the main proceedings 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** which 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 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 that effect, the judgment in *Aziz*, EU:C:2013:164, paragraph 59) (*Kušionová*, paras. 62 et seq.).

The Court's Conclusion:

Mainly based on the **principle of effectiveness**, the Court concluded that the lack of interim measures within a declaratory proceeding in respect of an enforcement proceeding makes (effective) consumer protection impossible 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*, para. 64).

Similarly, in *Kušionová*:

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, although referred to in *Kušionová*, remain in the background reasoning.

Impact on the follow-up case²⁶:

Immediately after the *Aziz* decision of the CJEU, the Spanish lower courts started direct application of its rationale in their decisions. In particular, the *Juzgado de Primera Instancia* n. 13 of Madrid, on 15 March 2013, granted the suspensive effect of executory proceeding should the consumer initiate a declaratory proceeding, implicitly disapplying the provision of art 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 to make the procedural system compliant with Directive 93/13/EEC: (1) including a new ground for 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 suspension of the foreclosure proceedings. Ley 1/2013 adopted the first solution, including within those contained in Article 695.1 CCP a new ground for objection based on the unfairness of contractual terms.

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 on the mortgage sector through dialogue with the national constitutional court.

As the constitutional court refrained from stepping into the role of legislator, the national courts faced the choice between direct disapplication of the national provision on the basis of conflict with EU law, or the possibility of requesting a preliminary reference. Given the willingness of Spanish courts to engage in constructive dialogue with the CJEU, which recognised 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.

Through consistent interpretation with the CJEU decision, the national courts immediately disappplied the national provision.

Furthermore, the decision of the CJEU eventually triggered the reaction of the legislator on the specific issue, opening the way to 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 *Aziz* judgment has been referred to in a number of decisions of Polish courts of 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 judgment – i.e. the requirement to verify whether a professional could reasonably expect the particular clause to 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, XXVII Ca 3010/16). In the judgment of the Regional Court in Siemianowice Śląskie of 12 December 2016 (I C 741/16) the *Aziz* decision was referred to as an argument for the procedural autonomy of EU law.

²⁶ This section is extracted from a section of the CJC Database authored by Federica Casarosa (<http://judcoop.eu.eu/data/?p=data&fold=6&subfold=6.7&idPermanent=325>).

The problem of interim measures as a consequence of declaring a clause unfair has not been directly addressed in Polish case law so far. In principle, Polish procedural law does not allow for the awarding of such measures *ex officio*, but there are no particular examples indicative as to whether these rules can be interpreted in EU-compliant terms.

The Naranjo decision was referred to in the judgement of the Supreme Court of 14 July 2017 (II CSK 803/16) although without going into its impact on the case in depth. 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 implying that a contract is declared 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 Courts explicitly refer to the principle of effectiveness as applied in the *Aziž* case, the *Naranjo* case, 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 due to declaration of a clause as unfair, but rather concerned the interpretation of article 1, paragraph 2 of Directive 93/13.

Question 2 – Non-bindingness of unfair terms and restitutionary remedies

2. Is the declaration of non-bindingness of an unfair term an effective remedy as such or, in order to provide effective consumer protection, is the judge to provide additional and consequential measures, such as an 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 judge has declared the non-bindingness (*ex nunc* effects of non-bindingness)?

The cases

These questions were recently addressed by the CJEU in *Naranjo*.

All three cases were initiated by consumers who had 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 affect many consumers. In all three cases, the consumers brought proceedings against the bank after the judgment of the Spanish Supreme Court – *Tribunal Supremo* (“**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 as from the date 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 judgment were to be repaid, thus limiting the consumers' right to full restitution as far as time is concerned. The judgment 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 are '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 relationship between individual and collective actions.

Preliminary questions referred to the Court:

The questions referred to the CJEU in the three proceedings were similar but not entirely equivalent. For the sake of clarity, our reference here will be to the questions referred to in the *Naranjo* case.

The questions were addressed by the referring courts under three different perspectives.

In the perspective of **nullity**, the issue is whether the UCTD and particularly Article 6 are compatible with a temporal limitation to the non-bindingness of terms to the effect that, though unfair, they may be considered effective until they are declared unfair by the court. This is 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, concerns the use of an **injunction**: whereas an injunction normally refers to future action or inaction, it may be coupled with a declaration of nullity (in which case a question much like 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 concerns **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. Is this compatible with effective consumer protection? This is the question referred to by the Spanish court in *Naranjo*:

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?

The Court's Reasoning:

The CJEU started by stating that assessment of the unfairness of a clause relating to the main subject-matter of a contract falls within the scope of Directive 93/13, the consumer not having

had, before the conclusion of that contract, the necessary information on the contractual conditions and the consequences of entering into that contract (cf. Article 4(2) of Directive 93/13/EEC).

The CJEU then went on to point out 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 he/she 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 cannot alter the scope and substance of the protection guaranteed to consumers by Directive 93/13/EEC. It is up to 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 is based on both the principles of effectiveness and dissuasiveness.

In the perspective of **effectiveness**, it is stated that the temporal limitation in question:

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 constitutes neither an adequate nor an 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*, para. 73)

In the perspective of **dissuasiveness**, the Court stated 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*, para. 63).

The Court’s Conclusion:

The CJEU concluded by saying 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.

Thus, on the basis of the above arguments, the CJEU considers the temporal dimension of nullity and restitution as an intrinsic aspect of effective consumer protection: only if nullity and therefore restitution extend to the whole time-span of the contractual relation as from the time of limitation is such protection effective and dissuasive.

Impact on the follow-up case:

The judgment of the CJEU has given 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 amount of claims. Thousands of consumers are affected, with estimated damages 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 to be unfair to set up an extrajudicial mechanism for the settlement of claims.

Second, the question is to what extent the CJEU's judgment affects 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 in chapter 3). On 24 February 2017, the TS held that its previous judgment 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 is to be noted that the Spanish banks responded to the CJEU's judgment in different ways. Many banks announced that they would 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 judgment of 9 March 2017, it held that in the individual case at hand the consumer had been sufficiently informed by the civil notary of the economic consequences of the floor clause.

Third, the question is what should happen if consumers have already brought individual proceedings that 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 judgments rendered before 21 December 2016 are not affected, even if they violate EU law. Those judgments cannot be revised, and the proceedings cannot be reopened.

Consumers are therefore effectively 'punished' for rapid submission of their claims. Not all the courts were ready to suspend the proceedings 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 (judgment of 19 September 2016).

Elements of judicial dialogue:

The preliminary reference procedure was used by the referring courts to solve a conflict between the Spanish TS and several lower courts regarding the required level of consumer protection under Directive 93/13/EEC.

The TS judgment of 9 May 2013, concerning a collective action, affirmed that a floor clause could be unfair due to lack of transparency if the consumer was unable to foresee the economic risks and the legal obligations following 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 judgment.

Many lower courts had nevertheless continued to apply the full retroactive effect of a declaration of nullity in individual actions, granting consumers their right to full restitution of amounts overpaid on the basis of floor clauses, from the moment the contract had been entered into.

After the temporal limitation was extended to individual actions by the TS in its judgment of 25 March 2015, several lower courts resorted to the preliminary reference procedure to question the TS' approach.

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 contract nullity is to be declared as having effect from the time of stipulation, so that no legal effect can be attached to the contract at any point in time along the contractual relation, is well rooted in the Italian legal tradition. In case law, it has recently been applied in the area of credit contracts (regardless of these being 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 must be the judicial declaration of nullity with its effects to follow from the time of contract stipulation and not the legal force of the contract to adapt 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, a certain coherence may be seen between this Italian case law and the *Naranjo* decision.

Impact analysis could be taken even further. Indeed, in the Italian panorama judges and scholars have discussed which 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 exceeded the usury threshold during the contractual relationship; in fact, the usury threshold changes over time. In this case, although the issue is still somewhat open to discussion, a recent decision of the Banking and Financial Arbitration Committee 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 (the time of stipulation being the one relevant for nullity assessment), but contractual rules should be adapted by means of inclusion 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 n. 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, Rome's Committee decision n. 3020 of 20 March 2017; Palermo's Committee decision n. 4649 of 3 May 2017). The rule of replacement of contractual default interest in accordance with new usury thresholds is also applied both by the Italian lower courts (see Messina Tribunal, decision n. 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 acknowledgment 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 might be observed that the debtor subject to the effects of usury is by definition a weak party, in some respects comparable with a consumer. One might then go on to ask whether the "Italian rule" on replacement of default interest subsequently exceeding usury thresholds could ever represent an evolution of the *Naranjo* 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 similar protection when money is paid under the legal force of a valid clause whose effects become non-executable and the due performance non-payable (“*non esigibile*”) due to a supervening change in the legal framework as interpreted in the light of good faith.

POLAND

Declaration of the unfairness of a clause occurs *ex lege* and has an *ex tunc* effect, which has been referred in multiple examples of case law (see e.g. judgments: 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 in Gdansk of 19 June 2015, III Ca 970/14, of the Regional Court in Warsaw-Śródmieście of 19 July 2016, VIII C 2064/15). This issue was recently reaffirmed in the resolution of a panel of seven judges of the Supreme Court of 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 of concluding the contract, it is a natural consequence that this provision is declared ineffective from the very outset. Therefore, under this assumption, the professional is obliged to refund the consumer in full, i.e. the total sum that he/she had paid on the basis of that provision.

The issue regarding the legal nature of a consumer claim to obtain full compensation has not been analysed in depth 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 in 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 lower courts. Furthermore, it was noted that the courts did not follow correct practice in deleting the unfair term from the contract. Indeed, 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 disallowing use of 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 (a part of the unjustified enrichment provisions). A declaration of the abusiveness of a clause – leading to it not being binding – 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, 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 in a life insurance contract with an insurance capital fund (ICF), derived from a declaration on the grounds of the abusiveness of a clause, was 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 one of the consequences of declaring the nullity of the contract is that each contracting party must return everything to the other party that was received on the basis of the contract (paragraph 1, article 87 of Slovenian Obligations Code). In the case under analysis, the plaintiffs themselves claimed they need pay the sum of EUR 19,419.30 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 plaintiffs' claim, and decided they were to pay the defendant 19,419.30 EUR. The court pointed out 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; however, a certain correspondence might be seen between this case and the *Naranjo* case.

5.2. Unfair terms and individual redress: invalidity and moderation/replacement of invalid terms.

Relevant CJEU cases in this cluster

- Judgment 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**”)
- Judgment 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**”)
- Judgment of the Court (Fourth Chamber) of 30 April 2014, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, Case C-26/13 (“**Kásler**”)
- Judgment 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**”)

Within this cluster the main case which can be presented as reference for the judicial dialogue within the CJEU and between EU and national courts is the *Kásler* case.

The following general legal issues will then be addressed:

- the powers of the national court when dealing with a term considered to be unfair;
- substitution of the unfair term by a supplementary provision of national law should the contract not remain in force upon elimination of the unfair term declared void;
- application of the principle of persuasiveness.

Question 1 – Substitution of unfair terms

Is Article 6(1) of Directive 93/13 to 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 cannot continue to exist after deletion of the unfair term?

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 level:

Section 237 of the Civil Code:

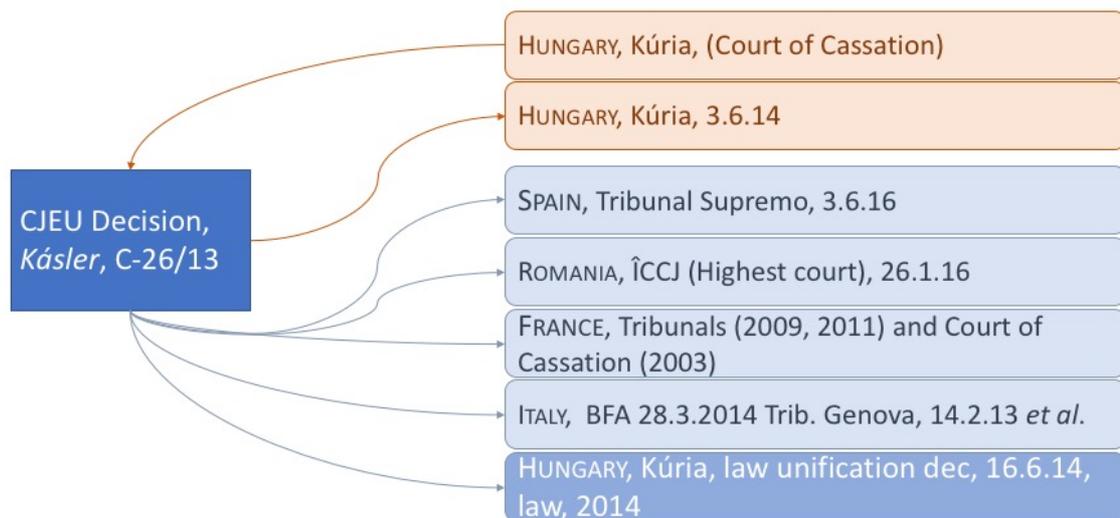
1. In the event of ineffectiveness of the contract, the situation existing before it was entered into must be restored.
2. If it is impossible to restore the situation existing before the conclusion of the contract, the court may declare the contract applicable until it has adjudicated. An ineffective 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, this will be necessary to order the restitution of any performance outstanding, if need be without consideration.

Section 239 of the 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 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.’



F. 1.4 *Kásler*

The case

On 29 May 2008, two Hungarian borrowers concluded an agreement for a mortgage loan to the sum of 14,400,000 HUF, denominated in foreign currency and secured by a guarantee *in rem* (mortgage). Under clause I/1, the amount of loan in foreign currency advanced to the borrower 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 foreign currency. Accordingly, the loan amount was fixed at 94,240.84 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 of each monthly instalment in HUF by reference to the selling rate of exchange of the foreign currency applied by the bank on the date before the due date of payment.

The borrowers brought an action against Jelzálogbank claiming that Clause III/2 was unfair, for the reason that the term authorized Jelzálogbank to calculate the monthly repayment instalments due 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 judgment was then upheld on appeal. The second instance (Szeged Court of Appeal) held, in particular, that in a loan transaction such as that at issue in the dispute before it, Jelzálogbank did not provide any mercantile financial services relating to the buying or selling of foreign currency, and so accordingly was not entitled to apply an exchange rate for the repayment of the loan different from that 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, because 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 judgment of the court of second instance. It stated, in particular, that Clause III/2, insofar 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 as 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 the main subject matter from unfairness control.

Preliminary question referred to the Court:

Must Article 6(1) of Directive 93/13 be interpreted as meaning that it precludes 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 render the whole contract void. The terms having been declared unfair and void by the courts, in line with the ruling of the CJEU in *Banco Español de Crédito* the Court should not be in the position to replace the unfair terms. This would have led to the termination of thousands of contracts by the credit institutions, with the consumers then being 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 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. An important point in this context is that at that time there were no special legal provisions in place on how to render the financial consequences of declaring the terms on the exchange mechanism void between the contracting parties. 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, but it is up to the legislator to intervene with 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.

The Court's Reasoning:

The CJEU first recalled from its earlier ruling *Banco Español de Crédito* (para. 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 for **adequate and effective means** 'to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers' (para. 78). It also emphasized (in para. 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 of the unfair terms for the consumer, insofar 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*, para. 69).

The CJEU then established that, if the lack of substitution of the unfair term lead to termination of the entire contract, 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 93/1 “since, 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 (para. 83). In general, in fact, 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, **might not be dissuaded** from inserting such terms into its contracts (para. 84).

The Court’s Conclusion:

Article 6(1) of Directive 93/13 must be interpreted as meaning that, in a situation such as that 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 for it 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 para. 86 of the *Kásler* ruling, if the contract cannot be performed in 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 remedy for invalidity”. Accordingly, the Kúria declared as unfair the terms of the exchange rate mechanism in the case at hand that gave rise to the preliminary questions referred to the CJEU, and applied Article 231 (2) of the Civil Code (old), which stipulates that debt determined in a currency other than the national currency 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, but rather 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 of 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 recalled Article 205 (2) of the Civil Code (old), which states that, in questions rendered by law, the agreement of the parties is not necessary.

Although the new New Civil Code in force since March 15, 2014 was not applicable in the *Kásler* case, the Kúria established “for reasons of legal interpretation” that Section 6:45 (2) of the new Civil Code qualifies as the default rule in line with the *Kásler* ruling, not the special provisions of Section 200/A of the Civil Code introduced by Law XCVI of 2010 in support of mortgage loan debtors, the latter being mandatory law.

Elements of judicial dialogue:

With respect to horizontal dialogue within the CJEU, the following may be noted.

In the *Banco Español de Crédito* case:

“Article 6(1) of Directive 93/13 must be interpreted as precluding legislation of a Member State, such as Article 83 of Royal Legislative Decree 1/2007 approving the consolidated version of the General Law for the protection of consumers and users and other supplementary laws (*Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*) of 16 November 2007, which allows a national court, in the case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term.”

In the *Asbeek* case:

“Article 6 (1) of Directive 93/13 must be interpreted as meaning that it does not allow the national court, in the case before where it has established that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair, merely, as it is authorised by national law, to reduce the amount of the penalty imposed on the consumer by that clause, but requires it to exclude the application of that clause in its entirety with regard to the consumer.”

In the *Unicaja* case:

“Article 6(1) of Directive 93/13 must be interpreted as not precluding a national provision under which the national court hearing a mortgage enforcement proceedings is required to adjust the amounts due under a term in a mortgage loan contract providing for default interest rate more than three times greater than the statutory rate in order that the amount of that interest may not exceed that threshold, provided that the application of that national provision: is without prejudice to the assessment by the national court of the unfairness of such term and, does not prevent the court in removing that clause of it were to find the latter to be ‘unfair’ within the meaning of Article 3 (1) of the directive.”

The *Kásler* ruling elaborates on the rulings mentioned above 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.

Article 6(1) of Directive 93/13 is to be interpreted as meaning that, in a situation such as that 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 for it a supplementary provision of national law.

Firstly, in *Kásler* the CJEU did not depart from its earlier approach established in *Banco Español de Crédito* (para. 65) and later reinforced in *Asbeek* (para. 57) that national courts are required to exclude the application of an unfair contractual term to prevent this term from producing 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, insofar as such continuity of the contracts is legally possible under the applicable national law.

In *Banco Español de Crédito* the CJEU denied the national court the ability to modify a contract by revising the content of the unfair term under Article 83 of Legislative Decree 1/2007, which, as a consequence of unfairness, provided for 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.’ (paras. 22-23)

Asbeek denied the power of a national court allowed under national law to adjust the penalty clause in consumer contracts (para.60).

Secondly, the *Kásler* ruling provides a new perspective to the national courts in search of solutions to remedy those 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 allows 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 is **to protect the consumer from the disadvantageous consequences of declaring the contract void**, which would also diminish **the persuasive effect** of Article 6(1) of the Directive 93/13, since the consequence of having declared the contract void would generally be for the consumer to terminate the contract and *restitutio in integrum*.

These two cumulative conditions - (a) the existence of a contract being endangered by an unfair term and (b) that termination of the contract would cause significant disadvantage to the consumer - for the power of the national courts to replace an unfair term with the default rules of the applicable national law, were **subsequently revised** by the CJEU in *Unicaja*.

In *Unicaja*, after recalling the policy beyond the *Banco Español de Crédito* and emphasizing that the interest of the consumers will not be affected adversely in the case before it by removing the unfair terms (para 34), the CJEU established that Article 6(1) of Directive 93/13 must be interpreted as not precluding a national provision under which the national court hearing mortgage enforcement proceedings is required to adjust the amounts due under a term in a mortgage-loan contract providing for default interest at a rate more than three times greater than the statutory rate to prevent the amount of interest from exceeding that threshold, provided that application of the national provision is without prejudice to assessment by the national court of the unfairness of such a term and does not prevent that court from removing such a clause if it were to find it ‘unfair’, within the meaning of Article 3(1) of the directive (para. 42).

It is to be noted that, as in the case of *Kásler*, the *Unicaja* ruling makes the power of the national court to substitute the unfair terms subject to mandatory default rules under national law.

Although *Kásler* solved the problem of the referring Hungarian court, it does not provide guidance to other national courts on how to proceed if there are no default rules by which the nullity of the unfair term could be remedied under their national law.

Finally, let us recall the *Home Credit* case (C-42/15), which dealt with the application of the dir. 2008/48. Specifically, the Court settled the question as to whether the provisions of Art. 1 of Directive 2008/48, under which the directive seeks full harmonisation in the field concerned, or Article 23 of the directive, which requires that penalties be proportionate, be interpreted as

precluding provisions of national law under which failure to provide most of the information required in a credit agreement by Article 10(2) of the directive has the consequence that the loan granted is deemed to be interest-free and free of charges, so that the borrower is obliged to repay the lender only the capital sum received under the agreement. The CJEU relied on the **proportionality principles** and recalled its previous case-law (*LCL Le Crédit Lyonnais*, C 565/12), stating that “**the severity of penalties 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**”. Consequently, the Court stated that “Art. 23 of Dir. 2008/48 must be interpreted as not precluding a Member State from providing, under national law, that, where a credit agreement does not include all the information required under Article 10(2) of the directive, the agreement is deemed to be interest-free and free of charges, provided that the information covers matters which, if not included, could compromise the ability of the consumer to assess the extent of his liability”.

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

HUNGARY

Shortly after the *Kásler* ruling, 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 the unfair terms on exchange rate mechanisms should be replaced by the official exchange rate of the National Bank of Hungary, so anticipating the contents of future mandatory statutory legislation.

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 **will not be** replaced by mandatory rules.

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 of establishing unfairness of terms allowing the banks to unilaterally amend consumer loan agreements. Law XXXVIII of July 18, 2014 on the clarification of the decision of 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 the purchase exchange rate for the transfer of the loan, whereas for the reimbursement of the loan the selling exchange rate, or another exchange rate different from that established when the loan was transferred onto the debtor will be void.

(2) In the 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 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 provision special law (introduced by Law XL of 2014 in force as of November 15, 2014).

Pursuant to Law XL of 2014, the Hungarian legislature provided the courts with the legal tool of rendering the financial consequences of finding the exchange mechanism terms unfair between the parties. 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 institutions must recalculate the loan transferred to the consumer and the reimbursement instalments paid at the official exchange rate of the National Bank of Hungary applicable on the day of the transfer. Should a specific day be established in the contract, the official exchange rate of that day should apply.

(3) If the exchange rate established in special laws was applied, then the official exchange rate of the National Bank of Hungary should not apply.

ROMANIA

ÎCCJ, Decision no. 84/2016 issued on January 26, 2016

On the issue of the power of a national court to remedy the unfairness of a term on the method of calculation of a variable interest rate should the contract be unable to 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 between the parties, the judge being competent only to establish the nullity of the term, not to modify it.

The impossibility for the courts to amend the contract was established by the CJEU in *Banco Español de Crédito*; thus the only derogation allowed by the CJEU is substitution of the void term with a dispositive rule of the national law- as established in *Kásler*. **No such default rule exists in the matter of the case before the court, which makes [it] impossible for the court to remedy the void term.**

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 correctly rejected the claim to establish as applicable interest rate the fixed interest rate in force at the moment of contract conclusion [...]

The fact that upon nullity of the term on the calculation of the variable interest rate the contract remains without an indicator to calculate the interest does not justify amendment of the contract by replacing the variable interest rate with a fixed rate; this situation does not cause disadvantage to the bank, but only obliges the parties to the contract to negotiate to supplement their agreement by establishing a new formula for calculation of the variable interest rate, **this being their exclusive competence, and not of the court.**

As consequence [...] the contract may continue with the consent of the consumer, or if upon elimination of the term the contract cannot be upheld, the consumer is entitled to terminate the contract and claim damages, if due.

The contract cannot remain in force without interest, since **the parties are obliged to negotiate another variable interest rate term** 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 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*, and also recalled the interpretation of the CJEU in *Banco Español de Crédito* 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 plaintiff’s claim to order enforcement penalties should the financial institution refuse to modify the term, and 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 is not in the situation at the moment of the judgment to establish the exact amount payable, because it “has no reference elements” for the amount of interest, and on the period to which the modification of the term applies; thus it cannot determine whether undue payments were charged and to what amount. By deciding so, 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.

It is to be noted that in this case the ÎCCJ also reflected upon the issue of whether finding the terms unfair may benefit other consumers who are in active procedural co-participation against the same business entity, but who have not “criticized” the term concerned. The ÎCCJ refused to extend the effects of finding unfairness to all plaintiffs on the basis of procedural law reasoning, stating that the consumers had not built a “veritable *litisconsortium*”, as demanded under Articles 47 and 48 of the Civil Procedural Code. In the court’s view, the plaintiffs sued the defendant under a “collective action” (the court uses this term) based on common or similar contract clauses and common grounds of nullity, but they were parties to different contracts and as such in distinct legal relationships with the credit institution, which rules out the idea of common obligations or obligations resulting from the same case. It also established that there is no legal provision in Romania to impose extension of the favourable effects of the judgment to all the plaintiffs of a collective action (the court used the term for the second time), because this type of action (collective action) has not been acknowledged by legal norms, but is only the creation of jurisprudence under foreign inspiration.

ÎCCJ, Resolution of November 8, 2016

The Appeal Court of Bucharest asked the ÎCCJ to refer to the CJEU three questions including 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 9³ 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 is no connection between Article 6 (1) and Article 3 of the old Civil Code, which states 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 has been clarified by the CJEU in *Kásler*, 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 a wider understanding of the ruling of the CJEU in *Kásler* than it had before, concerning the type of national provisions which can 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 it 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 cannot be replaced with statutory default interest terms has been applied in several decisions of 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, n° 11-365. The opposite view, supporting the application of statutory default interests, had previously been held by the *Cour de Cassation*, 1re civ., 18 mars 2003, in *Recueil Dalloz*, 2003, 1036.

ITALY

The CJEU's decisions described above have partially influenced Italian case law concerning the consequences of invalidity of unfair terms on default interest in consumer credit contracts. Different outcomes can be observed depending upon whether the terms on interest violate general contract law or consumer contract law. A third intermediate case is that of terms encroaching on the usury thresholds imposed by law and enforced through criminal law as well.

In the area of general contract law (e.g. breach of prohibition of interest' capitalization as a mandatory rule in banking law), the *Corte di Cassazione* has allowed for replacement of the invalid term by applying default rules enabling re-assessment of the amount due (Cass. 10.9.2013, n. 20688).

By contrast, in the area of unfair terms under the 93/13 Directive, the first instance courts have followed the *Banco Español de Crédito* rule excluding the replacement of unfair terms by applying

default statutory interests 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 by the CJEU, the courts have ruled out the possibility of applying 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. but also, with regard to application of penalty clause provisions to default interest clauses, Court of Cassation, decision n. 888/2014 and decision n. 23273/2010).

A less univocal approach has been shown 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 embraced the *Banco Español de Crédito* rule and the principle of dissuasiveness to exclude the possibility of replacing the contractual term on default interest through application of statutory default rules, which call for application of compensatory interest when default interest is not distinctly specified by the parties, see Article 1224, It. Civ. Code (BFA Committee of Rome, 23.5.2014, no. 3415; BFA Coordination Committee decision n. 1875 of 28 March 2014; decision n. 2666 of 30 April 2014); by contrast, a subsequent decision by the BFA Coordinating Committee considered application of Article 1224, It. Civ. Code sufficiently dissuasive, even in the light of the CJEU's decisions (BFA Coordinating Committee, 24.6.2014, no. 3955).

In the light of the proportionality principle, we may recall the national caselaw in cases of default interest terms violating the usury thresholds. In this respect, article 1815 c.c., as modified by law no. 108/1996 on usury, already provides that usury interest terms are void and cannot be replaced with any default interest rule (the loan becomes free of interest as a civil penalty). The threshold beyond which the default interest is void is periodically determined by Ministry decree in respect of the type of loan. The validity of the term is to be assessed with respect to the time of stipulation, not that 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 does not apply to contracts concluded before, and although for this reason a supervening usury threshold may not subsequently render invalid a flat rate interest term which was valid at the time of stipulation, statutory default interest terms are to 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). In these cases contractual interest moderation is then to be provided.

A recent decision by the Banking and Financial Arbitration Committee came to a similar conclusion on the basis of the principle of good faith in contract execution: in this view, claiming default interest, valid with regard to the law applicable at the time of stipulation but exceeding the legal threshold hypothetically applicable at the time of payment, would violate the duty of good faith in contract execution. Therefore, without article 1815 It. Civ. Code on usury being applicable, since the contractual term is valid, the default interest is moderated in respect of the new threshold (Banking and Financial Arbitration Committee, Coordinating Chamber, 10.1.2014, no. 77).

This decision can be read in the light of the opinion recently issued by the AG in the *Home Credit* case, where it is provided that, further to the CJEU case law in *Credit Lyonnaise*, remedy against a violation of consumer law in consumer credit legislation is to be dissuasive *and* proportionate. In the AG's opinion, "cancellation" of any default interest may be proportionate if the violation is particularly severe, but not in other less severe cases. It may be observed that Italian case law follows this approach when it distinguishes between the case of violation of legal thresholds on

usury (when article 1815 applies and no interest is payable) and the case of unfair interests terms that remain below this threshold at the time of stipulation, in which, in certain cases, substitution of contract terms is allowed.

SPAIN

The rule by which excessive default interest terms cannot be replaced by statutory default interest terms is also applied in Spanish case law. See in particular: *Tribunal Supremo*, 3 June 2016, no. 364, in www.poderjudicial.es; *Tribunal Supremo*, 18 February 2016, no. 79; *Tribunal Supremo*, 22 April 2015.

SLOVENIA

The Ljubljana Higher Court referred to the *Kásler* case in its decision no. III Cp 2452/2016 of January 1, 2017, in which the plaintiffs sought declaration of nullity and voidness of credit contracts. The court stated that it was true that in the *Kásler* case the ECJ had called for greater transparency in credit conditions to the benefit of consumers. However, the court explained that in the present case the concrete credit contracts did not include unfair contract terms. Besides, the plaintiffs had only argued the existence of unfair contract terms for the first time in the complaint, which made this objection inadmissible. Although the court fully accepted the interpretation of EU law given in *Kásler*, it concluded that the *Kásler* decision could not be applied in the present case (for the reasons mentioned above).

Guidelines for judges emerging from the analysis

The judicial dialogue taking place between a national court and the CJEU may indeed have significant cross border externalities for private law governance at the domestic level in countries other than that of the referring jurisdiction. The ruling of the CJEU in *Kásler* brought in a new balance between positive law and case law in the Member States on consumer contract fairness. On the one hand, the ruling has narrowed the adjudicatory role of the courts, while on the other hand it has encouraged a return to the default rules of the general contract law (and here one may wonder to what extent this development might benefit consumers), whereas it has indirectly encouraged Member States in the direction of legislative intervention by enacting new laws. This new balance seems to lead to situations, as in Romania, in which there are no default rules under the national law that would substitute the void terms; this, in turn, has a blocking effect on justice provisions.

Thus, *Kásler* does not provide a universal tool for the courts when the existence of the contract is affected by the unfair term.

The default rules will not provide suitable or workable substitutes for the many other types of terms that may prove to be unfair and void in areas other than consumer loan agreements.

The different perceptions and impacts of the *Kásler* ruling in the two jurisdictions discussed above confirm that the actual tool-function of the ruling very much depends on the national approach to the law-making role of the judiciary. The solution of replacing the unfair term with a law provision was advanced by a country (Hungary) in which the judiciary considered that it is not its role to render mass litigations, with the highest court decisions and constitutional court decisions repeatedly calling upon the legislator to intervene, restoring fairness in consumer loan contracts containing unfair terms by law. This solution may not work in other countries where the legislator is more reluctant or unwilling to intervene with legislative tools while the courts

cope successfully with bridging the principles and rules of the domestic civil law with the rulings of the CJEU.

5.3. Unfair practices and individual redress: the role for contract invalidity.

Relevant CJEU case

- Judgment 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**”)

Main questions addressed

Question 3 To what extent are the EU principles of effectiveness, proportionality, and dissuasiveness to influence identification of civil remedies against unfair commercial practices (see arts. 11 and 13, Dir. 2005/29/CE)? More particularly, to what extent are these principles to affect the possibility of setting aside the contract stipulated in relation to 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

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 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.

Question 1 – Contract nullity as an effective, proportionate, and dissuasive remedy against unfair commercial practices?

To what extent are the EU principles of effectiveness, proportionality, and dissuasiveness to influence identification of civil remedies against unfair commercial practices (see articles. 11 and 13, Dir. 2005/29/CE)? More particularly, to what extent are these principles to affect the possibility of setting aside the contract stipulated in relation with or as a consequence of an unfair practice?

The case

The issue can be addressed from the point of view of the *Pereničová* case.

A Slovakian lending company (SOS finance spol s.r.o.) granted consumer credit on the basis of standard loan agreements. The agreement indicated a yearly interest rate of 48.63%, but did not include the additional cost for granting the credit.

In 2008, a married couple took out a credit of 4979 EUR, which was to be paid back in 32 monthly rates of ca 199 EUR. The 33rd monthly rate, the last, was supposed to be equal to the amount loaned, i.e. 4979 EUR. Since the total amount to be returned was 11,352 EUR, according to the court's calculations the yearly interest rate in practice was 58.76% and not 48.63%, as contractually stated.

After the couple had delayed payment of one of the instalments, the company demanded payment of the penalty. As the consumers deemed that the credit agreement included unfair and non-transparent provisions, they started proceedings asking the referring court to declare void the consumer credit contract. One of the main issues addressed by the court was whether violations of EU law such as those occurring in the present case would entitle consumers to set aside the whole contract (and not just single unfair terms) if this type of protection were economically more advantageous for the consumer.

Preliminary question referred to the Court:

The referring Court considered that the case should be addressed not only in the perspective of the Unfair Contract Terms Directive but also in that of the Unfair Commercial Practices Directive. This is what specifically matters for the purpose of the present analysis.

With regard to application of the Unfair Commercial Practices Directive, the court raised the following question before 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?'

Actually, the two Directives may be linked insofar as an unfair practice may determine the existence of unfair terms. If that were the case, then the choice of effective remedies should be made taking into account the objectives of both directives.

The Court's Reasoning:

The Court's reasoning in fact confirms the existence of a possible link between the occurrence of an unfair practice and the use of unfair terms. This link is not automatic, however:

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*, para. 43)

In the present case, the fact that the service provider gave the consumer a lower estimate of a yearly interest rate than the real one should be seen as an unfair commercial practice. This element, then, should be taken into account when assessing unfairness, based on 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 are to be drawn on the basis of the Unfair Terms Directive rather than the Unfair Commercial Directive. In fact, 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.

Pursuant to article 6, UCTD, Member States are to rule 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 holds that national courts must, first, use national law principles to assess whether there are unfair contract terms in a consumer contract and, second, objectively assess whether a contract can continue without its unfair terms, rather than simply declare the entire contract invalid.

The latter assessment is to be conducted in “objective” terms, without it being sufficient 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*, para. 31)

The Court's Conclusion:

The *Court* concluded that the occurrence of an unfair practice may influence assessment of unfair terms in the contract but no automatic inference may be drawn from the former onto 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 cannot be based on the mere and subjective consideration of the individual 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 for validity rules applicable to contracts concluded as a consequence of unfair practices. In this respect, the CJEU has confirmed the choice made in EU legislation *not to deal* with contract validity in this area (Article 3(2), UCPD). It remains that, provided or not, these rules would be part of the measures determined by Member States to ensure effective, proportionate, dissuasive enforcement under Article 13, UCPD.

Impact on the follow-up case:

Not available.

Elements of judicial dialogue:

We may recall the *Bankia* case (C-109/2017, 19 September 2018). The CJEU settled the question whether, in accordance with Directive 2005/29, national legislations on mortgage enforcement should provide for 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 review by the courts of contracts or acts which may contain unfair commercial practices.

The CJEU considered that it is settled case-law that dir. 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, on condition 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, the directive is without prejudice to, in particular, individual actions brought by parties 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 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 authorise 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 conclusions are 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 noted above, the conclusion reached by the CJEU is compatible with the possibility for national legislation to provide for validity rules applicable to contracts concluded as a consequence of unfair practices. Indeed, in some Member States like France, the Netherlands, Luxembourg, and the UK, the consumer has been enabled to set aside the contract concluded on the basis of unfair commercial practices through different means (voidness, voidability, unwinding). Without providing for a specific remedy concerning the effectiveness or validity of the contract, article VI.38 of the Belgian Code of Economic Law establishes that, when the consumer concludes a contract involving an unfair practice, he or she is entitled either to claim reimbursement of the amount paid, or to refuse payment without any obligation to return the goods or compensate the services provided.

Lacking a specific remedy, the ordinary rules on vices of consent may apply. Such is the case of Italy. These rules will 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 contractual consent as materially affected by those circumstances and unfair practices. This restriction may fail to provide 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 the light of the restrictive approach taken by the *Corte di cassazione* excluding 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 recognizes that, although nullity may not serve as a general remedy in these cases, voidability may do so, if legal the 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 on 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 practice 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 (n. 358 of 2 February 2018) stated that once the NCA has ascertained the unfairness of a practice, a contract concluded due to the 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 brought the NCA decision before the Court, it is up to the professional or producer to prove that there are no grounds to recognize 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 must be considered that in other decisions the Italian Courts apply strict rules on proof of vices of consent.

With regard to fraud, the Court of Cassation pointed out that any such fraud, in order to justify annulment, must have been such that the consumer would not have consented to the contract without it (Decision n. 14628/2009). On the other hand, with regard to the legal definition of "mistake", the Court of Cassation pointed out that it is the party requesting annulment that should bear the burden of proof, without any legal presumption (Decision n. 21600/2013). Italian case law, to summarize, appears to gravitate between two points of reference: on the one hand the general rules concerning the vices of consent and their proof, and on the other hand the value of ascertainment of unfair practice in the NCA decision, in light of the effective judicial protection for 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. The legislative design of this sanction seems somewhat unclear, but – as the most convincing interpretation has it – 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 was not dealt with directly by Polish courts. The references to this judgment were made only to establish the general idea of the review of fairness of clauses in B2C dealings (so the District Court in Łódź in several similar judgments – e.g. of the 17 November 2016, III Ca 1427/15), with stronger emphasis on the principle of *ex officio* review (judgment of the Regional Court in Kamienna Góra of 27 January 2017, I C 1040/16). In the first group of judgments, the District Court in Łódź ascertained only – with reference to the *Pereničová* decision – that application of rules on unfair terms does not always have to lead to invalidity of the entire contract.

5.4. Delivery of defective goods in consumer sales and the remedies under Article 3, Consumer Sales Directive.

Relevant CJEU cases in this cluster

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

Within this cluster the main cases which can be presented as reference for the judicial dialogue within the CJEU and between EU and national courts are: *Weber and Putz*, for questions no. 1, 2 and 3, and *Faber* for question no. 4

Main questions addressed

- | | |
|------------|---|
| Question 1 | What is the relationship 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 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 | 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 due care ? |
| Question 4 | How is the burden of proof allocated with respect to the claim of non-conformity of a consumer good? How is it affected by the principle of effectiveness? |

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)

National level (Germany)

§ 437 of the German Civil Code (*Bürgerliches Gesetzbuch* – henceforth BGB). This provision determines remedies for non-conformity of consumer goods and belongs to the regulations that transpose the 1999/44/EC directive. The provision sets out a general framework of remedies,

referring to other provisions that specify particular remedies and premises under which consumers may claim this protection. Of these:

§ 439 BGB refers to the replacement of a non-conforming good, establishing 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.”

Question 1 – Effectiveness vs. proportionality in selection of remedies

What is the relationship between effectiveness and proportionality in making a choice between repair and replacement in consumer sales contracts?

The case

In *Weber*, the dispute originated from a consumer sales contract for tiles, purchased to be laid in the floor of the buyer's house. After the tiles had been fixed in the floor, it became apparent that they were defective (having 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 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 into account the required installation work, the cost of replacing the tiles was estimated by an expert witness at 5,830.57 EUR (the tiles having been originally purchased for 1,382.27 EUR). Having his claim rejected, the buyer sued the seller for 5,830.57 EUR 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 EUR, but after the consumer's appeal, the court of second instance awarded a payment of 2,122.37 EUR and delivery of other tiles, free of defects. The judgment was challenged by the seller before the German Federal Court (*Bundesgerichtshof*), which referred the preliminary questions to the CJEU.

In *Putz*, the case originated from a sales contract regarding a dishwasher, acquired by a consumer for 367.00 EUR. The delivery costs were ascertained at 9.52 EUR. After an attempt to repair the machine in the consumer's home it turned out that it was defective and could not function properly. The parties agreed on replacement; however, the buyer requested the seller to uninstall the device and install the new one (or, alternatively, cover the costs of these services). On rejection of this request, the buyer sued the seller, demanding reimbursement for the price she paid for the machine. After the courts had decided the case in two instances (which adjudicated

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 Court:

The crux of the legal issues addressed in both cases was the question of the precise meaning of the criterion “disproportionate cost”, set forth in § 439, sections 3 BGB. The national court referred thus to the ECJ to establish more detailed criteria for assessment of the adequacy of costs of repair and replacement. Through this inquiry, the court sought, further, to ascertain under which precise circumstances it was possible to set apart the claims from the first “sequence” set forth 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 BGH referred two preliminary questions to the CJEU, addressing the same problem of criteria in parallel 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 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?

The Court's Reasoning:

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 of a good. The domestic provision (§ 439 BGB) allowed sellers to refuse replacement (if under the particular circumstances of a case repair were not available) should the cost of the work be disproportionate with the price of a good. In other words, under this provision the seller was entitled to deprive the purchaser totally of the protection guaranteed by the remedies of the first “sequence” set forth in the 1999/44/EC directive – i.e. to render a consumer unable to obtain the good that was to be purchased under the contract.

According to the CJEU, to understand this rule it is necessary to take into consideration a few points:

1) From an economic point of view, the remedies in the first “sequence” are the most advantageous for the consumer, as they allow him/her to achieve directly the economic goals that drove him/her to conclude a contract. The remedies from the second “sequence” provide only protection of the purchasers’ 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 was 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) Making these observations, the Court referred implicitly to the **effectiveness of protection of a consumer’s economic interest**, embedded in the sales contract. It should allow for selection of the remedy that provides the most convenient way of remedying non-conformity, adequate to the actual needs and aims of a buyer. This also includes specific performance (in particular, replacement of a defective good with a conforming one). Therefore, it seems justified to apply repair or replacement first – which, it is worth noting, can according to the CJEU be advantageous for both parties.

3) At the same time, however, the Court noted that **the prioritization of remedies is not absolute**. The 1999/44/EC directive lists two exceptions in this respect: impossibility and disproportionality. The second **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 ECJ, “**effective protection of the legitimate financial interests of the seller**” (p. 73).

4) The CJEU thus pointed out clearly that under Article 3 section 3 of the directive it is necessary to **maintain balance** between the protection of buyers’ and sellers’ economic interests. In other words, **while selecting between the remedies available in the case of non-conformity**, the court has to 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 listed in Article 3 of the directive. As has been 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) A more precise understanding of proportionality has been established by the CJEU with reference to two provisions of the 1999/44/EC directive. It observed, first of all, that **Article 3**

section 3 of the 1999/44/EC directive refers to two separate degrees of (dis)proportionality:

- (a) **absolute disproportionality** (in the first subsection of this provision) and
- (b) **relative disproportionality** (in the second subsection).

While the first of these refers merely to lack of proportionality between the costs of repair and replacement assessed in economic terms, the second refers to **comparison between two remedies that can be enforced alternatively: repair and replacement of a good**. Secondly, the CJEU also took into consideration **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 concurring remedies. Consequently, a **disproportionate remedy** is a remedy that entails **unreasonable costs** – which means that the costs of applying one remedy are **substantially higher** than the costs of employing the other remedy alternatively available.

The Court's Conclusion:

Having ascertained the meaning of proportionality in the absolute and relative senses given Article 3 section 3 of 1999/44/EC, the ECJ referred to the fundamental problem of selection between repair and replacement, as well as price reduction and rescission.

According to the court, Article 3 section 3 of the directive **rules out adoption at the domestic level of any rules that would allow a seller to refuse replacement of a non-conforming good, if repair were not possible, only because this remedy proved disproportionate**. This applies, in particular, to any claims of a seller that replacement would be too costly as regards the value of the good (if it were conforming with a contract), as well as the significance of non-conformity. As a consequence, if of the first “sequence” of remedies only replacement is available, **it is impossible to switch to the second “sequence”** (i.e. price reduction or rescission) **only because of the disproportionality of the replacement**. This does not mean that, in practice, all of the costs of replacement are to be borne by the seller (the problem will be addressed below, under question 2).

Impact on the follow-up case:

The ECJ decision was followed directly by two judgments of the German Federal Court (BGH), deciding upon the two cases that were a basis for referring the preliminary questions:

- (a) judgment of 21 December 2011, VIII ZR 70/08 [*Weber case*];
- (b) judgment of 17 October 2012, VIII ZR 226/11 [*Putz case*].

Both judgments directly implemented the guidelines provided by the CJEU, adopting a view that both the tiles and dishwasher were to be replaced by the sellers – even though the costs of this operation should prove disproportionate.

Elements of judicial dialogue:

The case was based on the vertical judicial dialogue scheme. The German Federal Court (BGH) aimed to ascertain EU-conforming interpretation of domestic provisions, and therefore referred a preliminary question to the CJEU.

Not available.

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 Court:

The problem in question is part of 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 has not been addressed in any of the preliminary questions referred to the CJEU by the German Federal Court (BGH), it directly follows the main findings of the CJEU in the *Weber and Putz* case. They supplement the general observations regarding the interplay between effectiveness and proportionality in assessing the admissibility of replacement of a non-conforming good.

The problem in question may be phrased in the following way: if a seller cannot refuse to replace a non-conforming good (if repair is impossible) by claiming that doing so would be disproportionately costly, 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 the division? Finally, if a consumer is obliged to bear the costs of replacement, can he/she refuse to have his remedy applied, and instead claim one of the remedies from the second sequence?

The Court's Reasoning:

Referring to these problems, the Court clearly based its reasoning on the observation that Article 3 of the directive assumes **balancing between the sellers' and buyers' economic interests**. Consequently, consumers may be entitled to obtain reimbursement of only a part of costs incurred for the replacement. The threshold established by the CJEU in this respect is a matter of **proportionality**. Only the costs that meet this requirement can be shifted onto the seller – the others are to be borne by the consumer him/herself. In particular, as has been pointed out by the Court, the test of proportionality has to take into account two criteria: “**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 the 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 conformity of a good with a contract.

The Court also arrived at a further conclusion – ascertaining that in a case in which the costs of replacement are to be divided between the parties, **a consumer has a right to reject having a good replaced and instead claim price reduction or rescission of a contract**. Granting this option has been 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”.

The Court's Conclusion:

The Court concluded that in the case of replacement being the only remedy available for a consumer (repair being impossible), its costs may be **shared between the parties to a contract**. The criterion for division is the threshold of proportionality, ascertained *ad casum* by referring to the **value of a good and significance of its non-compliance with a contract**. The final assessment as to whether particular costs come within the threshold of proportionality is to be carried out by a domestic court, applying these guidelines to a particular circumstance. In such a case, a **consumer may decline replacement and switch to the second “sequence” of remedies – claiming price reduction or rescission of a sales contract**.

Impact on the follow-up case:

The Court's reasoning has been applied in two judgments 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 EUR each. As explained in the judgment, the threshold of proportionality (due to the general point of view of the CJEU) was established according to two criteria: the significance of non-conformity and the value of the good (i.e. the criteria set forth explicitly by the ECJ). Consequently, the seller can eventually claim this sum to the extent to which it has not been previously paid by the consumer.

Elements of judicial dialogue:

See above, under question 1.

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 due care ?

The case and the preliminary question referred to the Court

The issue of allocation of costs of replacement of a non-conforming good between a seller and a buyer was directly addressed in both preliminary questions referred to the ECJ by the German Federal Court (BGH). Both aimed 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 usage, a consumer installed the good, incorporating it into a more complex structure.

The question in the *Weber* 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, 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?

The Court's Reasoning:

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 in p. 52), affirmed in Article 3, as well as in the material from the legislative procedure. All these arguments lead to the conclusion that replacement of a non-conforming good has to 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 had been installed in accordance with the appropriate practice and without awareness of any defect. The opposite solution – making consumers liable, in principle, for the costs of replacement – could compromise the proper functioning of consumer protection in sales contracts, **hence being contrary to the principle of effectiveness**.

The principle that remedies are free of charge in the case of non-conformity applies to the broad array of costs, which is only exemplified in Article 3 section 4 of the 1999/44/EC directive. As the Court has made clear, 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 finally whether particular costs fall within the scope of this rule and should, therefore, be borne by the seller.

The Court's Conclusion:

According to the CJEU, in the event of non-conformity, the **consumer is not obliged to bear the costs for replacement of a good, including the costs for its removal and re-installation** (provided that the good was originally installed without awareness of non-conformity and in accordance with the prescribed procedures). Moreover, the obligation of a professional seller to reimburse these costs exists **irrespective as to whether the installation of a good was originally agreed upon in the sales contract**.

The problem in question is interrelated with the issue addressed above, under question 2. With 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 Court's reasoning has been applied in two judgments of the German Federal Court (BGH) referred to above (under question 1).

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:

Not available.

Guidelines for judges emerging from the analysis

1. The seller's possibility to deny replacement due to unreasonably high costs, established in Article 3 section 3 of the 1999/44/EC directive, is excluded when the consumer – due to the specificities of a case – cannot claim reimbursement. **The national court is obliged to provide the relevant assessment as to whether specific performance (replacement) is the only remedy available within the first “sequence” of measures provided in the 1999/44/EC directive.**
2. If a national provision on remedies in the case of non-compliance of a good with a contract does not allow for the replacement of goods in those circumstances, the national court is obliged to **interpret it in conformity with the directive** or to **disapply it**.
3. All the costs of replacement are, in principle to be borne, by the seller. The list of the respective costs provided in the 1999/44/EC directive is not exhaustive. Therefore, it is the role of the national court to indicate precisely what costs the seller should bear – both directly (e.g. by paying for installation services to another contractor) or indirectly (reimbursing expenses borne by the consumer regarding replacement of a defective good). The overriding guideline in this respect is **the principle of effectiveness of consumer protection** – as framed by the CJEU in the *Weber and Putz* judgment.
4. If a national court adjudicates that a consumer good is to be replaced, **it can nevertheless assess the costs of this operation from the perspective of proportionality**. If the costs of replacement are excessively high from the perspective of a seller, **the national court is entitled to share them between the parties**. In this situation, the consumer may be obliged to bear a part of the costs of replacing the non-compliant good with a compliant one. The proportionality, as a threshold for this division, is to be established by taking into account three main criteria:
 - (a) the significance of non-conformity of the good in question;
 - (b) the value of the good;
 - (c) the principle of effectiveness of consumer protection (as the general, steering guideline).
5. If a court arrives at the aforementioned findings, the **consumer decides** whether to have **a good replaced** (sharing the cost with the seller), or whether to remain with the non-conforming item, with **a price reduction** – or, alternatively, to **terminate the contract** and obtain full reimbursement of the price.
6. While deciding any case regarding the **hierarchy of remedies in consumer sales** – especially by **making a choice between repair and replacement, and the remedies from the second “sequence”** – the national court is to observe the general framework of reasoning established by ECJ in the *Weber and Putz* case:
 - (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 are to be balanced with protection of a seller's interests. As the *Weber and Putz* decision clearly indicates, **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 they apply should be moderated by way of proportionality**.
- (c) With respect to the outcome, whether **it is possible to adopt solutions that share the economic risk or consequences of non-conformity between the seller and the buyer**. This approach was well illustrated in the *Weber and Putz* decision, where the Court – reconciling the principles of effectiveness and proportionality – allowed sharing of the (excessively high) cost of replacement between the parties, leaving a consumer with the right to choose this remedy or adopt another solution from the “menu” specified in the 1999/44/EC directive.

Question 4 – Burden of proof and *ex officio* evidence in consumer sales disputes

How is the burden of proof allocated 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 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 accident claimed that the vehicle had had a technical failure. The court of the first instance rejected the claim. After Ms. Faber's recourse the Court of second instance referred a preliminary question to the CJEU.

Preliminary question referred to the Court:

While asking the preliminary question in the *Faber* case, the Dutch court addressed, amongst other problems, the issue of **the general outline of burden of proof in consumer sales cases**.

First (in question 5), the national court inquired **whether it was possible to oblige a consumer to present on his own the facts and evidence relevant for claiming remedies for the non-**

conformity of goods. The question referred especially to the issue as to whether domestic law can oblige consumers to prove that they notified a seller of a lack of conformity within the terms set forth in Article 5 section 2 of the 1999/44/EC directive. The court sought to establish whether such an obligation is consistent with the **principle of effectiveness**.

Secondly (in question 6), the court aimed to clarify **how precise a claim of 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 is to be. Also in this respect, the court asked, in particular, about the relevance of the principle of effectiveness for ascertaining this matter.

Finally (in question 7), the Dutch court sought 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**.

The Court's Reasoning

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 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 the reasons precisely. The scope of obligations regarding proof that the notification has been made is 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, specified in **Article 5 section 3**. As long as this requirement is met, **it is presumed that the 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 the cause or possibility to attribute it to the seller;
- (b) **that the non-conformity appeared** 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 contrary case – 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 simply 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 should be framed in a unified way and “independent of the specific circumstances of each case”.

The Court's Conclusion:

With regard to these arguments, the Court 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 subject to rules on providing evidence of non-conformity only so long as they do not create excessive difficulty or impossibility for the consumer to exercise his/her rights. In such a case, the consumer is not obliged, in particular, to provide evidence of the precise cause of non-conformity. A similar rule also applies to notifying non-conformity within the period of six months specified in Article 5 section 3 of the 1999/44/EC directive. The way of administering the burden of proof remains the same regardless as to whether a consumer receives professional legal assistance or acts on his/her own.

Impact on the follow-up case

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

The case was discontinued.

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

ITALY

The *Faber* case was specifically referred to in a decision adopted by the *Consiglio di Stato* (the national appeal administrative court) when assessing the adequacy and proportionality of fines imposed on Apple for unfair practices consisting in offering as a distinct guarantee 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). In fact, although this guarantee perfectly overlaps with the guarantee provided by law (for which the consumer may be charged no additional payment), 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 verifying the causes of and remedies for the non-conformity, the burden of proof of the existence of non-conformity and its causes resting on the consumer. Referring to the CJEU's decision in *Faber* and the principle of effectiveness therein applied, the Italian court qualified Apple's conduct as an unfair practice to be sanctioned with effective, proportionate and dissuasive penalties.

POLAND

The *Faber* judgment was not referred to directly by Polish courts. On the general rules regarding the burden of proof and provision of evidence that are also applicable to consumer sales, see the comments above on Poland under section 1.1.

Guidelines for judges emerging form the analysis:

Unfair terms and individual redress: invalidity, interim relief and restitution remedies

In proceedings on declaration of non-bindingness of an unfair term, in order to provide effective consumer protection the judge could provide additional and consequential measures, associated with the terms' non-bindingness, such as, in the case of credit contracts, interim measures to suspend/interrupt executive procedure on the consumer's home.

Mainly based on the **principle of effectiveness**, in the *Aziž* and the *Kušionová* cases the Court stated that the lack of interim measures within a declaratory proceeding in respect of an enforcement proceeding makes (effective) consumer protection against the use of unfair terms on which the enforcement proceedings are based impossible. The above question has been addressed by the CJEU in several decisions. The principles of dissuasiveness and proportionality, though recalled in *Kušionová*, remain in the background reasoning.

Non-bindingness of unfair terms and restitutionary remedies

In the perspective of the effectiveness and dissuasiveness of consumer protection, the availability of **restitution** is particularly important. In this respect, in the *Naranjo* case (C-154/15), **the CJEU stated that national case law cannot temporarily limit the restitutory effects arising from a finding of unfairness by a court, in respect of a clause contained in B2C contracts, to amounts overpaid under such a clause after delivery of the decision in which a finding of unfairness has been made.** In this respect, the CJEU noted that the absence of 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 considered the temporal dimension of nullity and restitution as an intrinsic aspect of effective consumer protection: only if nullity, and therefore restitution, extends to the whole timespan of the contractual relation as from the time of limitation is protection effective and dissuasive.

To sum up, generally speaking, in cases of 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 terms' 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 require that there be no limitation of the restitutory effects arising from 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 right affirmed in Article 47 of the CFR, and are to be considered.

Whenever any applicable law compromises application of these principles, clarification should be sought through preliminary question procedures.

Unfair terms and individual redress: invalidity and moderation/replacement of invalid terms.

According to the principles of effectiveness and dissuasiveness, the CJEU has set limits to the possibility of a national court attempting to remedy the invalidity of an unfair term by substituting a supplementary (default) provision of national law. In this respect, the CJEU has stated that the national courts are only required to rule out application of an unfair contractual term to prevent it from producing binding effects for the consumer, without being authorized to revise its content (*Banco Español* case, C-618/10). The contract must continue in existence, in principle, without any amendment other than that resulting from deletion of the unfair terms, insofar as any such continuity of the contract is legally possible.

Nevertheless, according to the rulings of the *Kásler* case (C-26/13) concerning a consumer loan agreement, the CJEU, applying the principle of dissuasiveness, stated that in such a situation in which a contract concluded between 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 remedy the invalidity of that term by substituting for it a supplementary provision of national law. Also the principle of proportionality could play a role, as shown by the *Home Credit* case (42/15), which dealt with the application of dir. 2008/48.

Unfair practices and individual redress: the role for contract invalidity

The question arises whether the EU principles of effectiveness, proportionality and dissuasiveness can influence identification of civil remedies against unfair commercial practices. In this respect, according to the ruling in the *Pereničová* case (C-453/10), the occurrence of an unfair practice may influence assessment of unfair terms in the relevant 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 for national legislation to provide for validity rules applicable to contracts concluded as a consequence of unfair practices. Indeed, in some Member States, the consumer has been enabled to set aside the concluded contract on the basis of unfair commercial practices with various means (nullity, voidability, unwinding). If the proposal formulated by the EU Commission within the *New Deal for Consumers* (COM (2018) 183 final) is approved, similar remedies would be required under EU law, increasing 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 of 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 due to 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. Indeed, the principle of proportionality will be applied 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). If a national provision on remedies in the case of the non-compliance of a good with a contract does not allow for goods to be replaced in those circumstances, the national court is obliged to **interpret it in a way conforming with the directive or not apply it.**

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 role of the national court to indicate precisely what costs the seller should bear – both directly (e.g. by paying for installation services to another contractor) or indirectly (reimbursing expenses made by the consumer regarding replacement of a defective good). The overriding guideline in this respect is **the principle of effectiveness of consumer protection** – as framed by the ECJ in the *Weber and Putz* (joined cases C-65/09 and C-87/09) judgment.

If a national court adjudicates that the consumer good is to be replaced, the **principle of proportionality** will be applied. Proportionality, as a threshold for this division, is to be applied by taking into account three principal criteria:

- (a) the importance of the non-conformity of the good in question;
- (b) the value of the good;
- (c) the principle of effectiveness of consumer protection (as the general, steering guideline).

If the costs of replacement are excessively high from the perspective of a seller, for reasons related with installation of the good already carried out by consumer in good faith, the national court is entitled to share the costs between the parties.

If a court arrives at the aforementioned findings, the consumer can 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 – or, alternatively, to terminate the contract and obtain full reimbursement of the price

The rules concerning the burden of proof

The rules on the burden of proof regarding consumer sales are 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 addressing the issue of evidence:

- (a) the provisions **transposing directly** into domestic orders the 1999/44/EC directive (i.e. Italian case law);
- (b) the **other provisions on evidence** – especially the general rules of civil procedure that exist in national legal orders (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 corresponding evidence, to be limited to **the circumstances 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 considering this distribution of the burden of proof in light of the principle of effectiveness, are to consider whether it can cause an excessive obstacle to claiming remedies for lack of conformity.

6. Access to justice and effective and proportionate A.D.R. mechanisms.

Relevant CJEU cases in this cluster

- Judgment 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**”)
- Judgment 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**”)

Within this cluster both cases can be presented as reference 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 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 there further specific requirements for compulsory ADR pre-judicial procedures involving consumers pursuant to Directive 2013/11?

Relevant legal sources

EU level

In *Alassini*:

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*:

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*:

Legislative Decree n. 259 of 1 August 2003, relating to the Electronic Communications Code (GURI No 214 of 15 September 2003, p. 3), providing for pre-judicial mandatory out-of-court settlement procedure in litigation concerning this matter.

In *Menini*:

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 disputes (*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 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'*)

Question 1 – Mandatory ADR mechanism and access to effective judicial protection.

Is a procedural rule that makes 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 *Alasini* judgment, certain consumers lodging a judicial complaint against electronic communications services providers first failed to attempt 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 such a 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 the 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 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 opposition to an enforceable payment order and concerned, in the first place, the fact that under Italian law the 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 will be addressed below.

Preliminary question referred to the Court:

In the *Alassini* case, the referring judge put to the CJEU the following question:

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* the national judges referred two questions. 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 (...)?

The Court's Reasoning:

In *Alassini*, after first clarifying that the Universal Service Directive is not to be construed as explicitly prohibiting pre-judicial mandatory settlement procedure (*Alassini*, para. 42), the CJEU tackled the question of the compliance of the mandatory schemes with EU law from two concurring perspectives:

- (i) compliance with the **principle of effectiveness**, as the directive provides remedies for consumers, exercise of which 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, as the procedure may hinder access to judicial redress for consumers' rights violations, which in itself is a fundamental right recognized by EU law.

With respect to the first point, the Court points out 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 admits 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 asserts that such limitations can be considered valid under EU law on 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 Court further states 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 Court recalls 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 interests, are proportional to such aims, and do not excessively impair the substance of the rights guaranteed. The Court specifically stated:

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 that effect, Case C-28/05 *Doktor and Others* [2006] ECR I-5431, paragraph 75 and the case-law cited, and the judgment of the ECHR in *Fogarty v United Kingdom*, no. 37112/97, §33, ECHR 2001-XI (extracts)). (*Allassini*, para. 63)

In the specific case, then, the Court states that the imposition of a mandatory ADR mechanism pursues the general and legitimate objectives of offering a quicker and less expensive procedure for the settlement of disputes and reduces 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 respects the six criteria set out in relation to the principle of effectiveness.

In the subsequent *Menini* case, 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* judgment, 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 procedure 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 a fair trial guaranteed by Article 47 of the CFREU, and she suggests that compliance of a mandatory pre-judicial procedure with the principle of effective judicial protection and Article 47 of the CFREU are to be verified taking into consideration the six tests stated in the *Allassini* case. The test run in *Allassini* with regard to the respect of the principle of effectiveness is thus taken as reference as the general test applicable to verify that Article 47 of the CFREU is respected in cases where Member States impose pre-trial mandatory ADR mechanisms. In the subsequent judgment the Court pointed out that the expression “on a voluntary basis” set down in Article 1 of Directive n. 2013/11, is to be interpreted according to the context and the objectives pursued. The Court also pointed out that Article 1, moreover, states that Member States can render participation in an ADR procedure

mandatory, provided, the Court noted, that the parties' right of access to judicial proceedings is maintained. Indeed, the opinion of the Advocate General showed the same conceptual pattern, observing 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 a fair trial, guaranteed by Article 47 of the CFREU". The Court states 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 refers to Article 3(a) of Directive n. 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 clarifies that "*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 refers to the *Alassini* case, and points 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) notwithstanding, 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 in 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*".

The Court's Conclusion:

In the *Alassini* case, the CJEU decided the case affirming 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, the Court rules that 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 are to be free to set certain procedures as mandatory in accordance with the principle of procedural autonomy, provided that this 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, could function as guidance points for the judges to assess that national provisions on mandatory ADR schemes comply with Article 47 of the Charter, in such a way that the procedure:

- (a) shall not result in a decision which is binding on the parties;
- (b) shall not cause a substantial delay for the purposes of bringing legal proceedings;
- (c) shall suspend the period for the time-barring of claims;
- (d) shall not give rise to significant costs for the parties;
- (e) shall not be accessible only by electronic means; and
- (f) shall 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 had a significant impact on the subsequent debate between Italian legislators and Italian judiciary, with the intervention of the Constitutional Court, and between Italian courts themselves.

In Italy, shortly before the decision of the CJEU in *Alassini*, the Italian legislator enacted legislative decree n. 28 of 4 March 2010, introducing a mandatory mediation procedure that was to be attempted before bringing an action to court in certain specific civil matters²⁷. Several courts²⁸ then addressed the question of the constitutionality of this mandatory settlement procedure before the national Constitutional Court, on the grounds that the procedure violated

²⁷ 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.

²⁸ 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.

articles 76 and 77 of the Italian Constitution on Government's legislative power, article 24 of the Italian Constitution, on the right of defence and right to a cause of action, and article 3 of the Italian Constitution, on the right to equal treatment, as the lower courts deemed that there could emerge an unjust disparity of treatment between the matters covered by mandatory settlement procedures and those that were not²⁹.

On 24 October 2012, the Constitutional Court decided the case and held that art 5.1 d.lgs. 28/2010 was unconstitutional due to the violation of certain legislative procedural rules without considering whether article 24 was also violated³⁰. In that judgment, the Constitutional Court acknowledged the CJEU's decision in the *Alassini* case, but also stated that the decision's relevance, in respect of the role of out-of-court settlement procedures for enhancement of access to justice, is limited to the specific area of communication service contracts, and that it could not be generalized. In a previous decision, however, adopted before the *Alassini* case and having regard to a compulsory mediation attempt in the field of communication services, the Constitutional Court had already considered the obligation compatible with the constitutional right of accessing judicial redress (Article 24, Italian Constitution), provided that the out-of-court procedure is interpreted as not precluding recourse to interim measures³¹.

In 2013 the legislator then amended the content of the legislative decree 28/2010, introducing a new Article 5.1*bis* formulated so as to reintroduce the mandatory settlement procedure³², no longer as an admissibility condition for the action before the court, but as a condition to proceed and go ahead the claim before a court.

On this point, the Supreme Court intervened with decision no. 24711, 4 December 2015. The Supreme Court dealt with a contractual claim filed by a client against a communication services provider. The claim addressed the problem as to whether the mandatory settlement procedure is to 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 referred to the issue of admissibility, the Supreme Court interpreted the principles stated there 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, represents the legal basis for such an interpretation. The Supreme Court concluded that, if no attempt at settlement has been initiated by the client, the judge is to suspend the proceeding for the time needed for the settlement within the legal time limitation, with no prejudice for the claim already filed before the court.

Subsequent to the decision of the Supreme Court, however, Italian jurisprudence was not settled. Some lower instance courts consistently interpreted national provisions in accordance with the

²⁹ Note that previous jurisprudence of the Constitutional court had already deemed such a disparity compliant with constitutional principles. *See* Italian Constitutional Court, Ordonnance n. 51/2009 (11 February 2009); Italian Constitutional Court, Ordonnance n. 355/2007 (22 October 2007); Italian Constitutional Court, Judgment n. 403/2007 (21 November 2007); Italian Constitutional Court, Judgment n. 276/2000 (6 July 2000).

³⁰ The act was enacted as a legislative decree by the Italian Government under the mandate of the Italian Parliament implementing Directive 2008/52/EC. 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, to the effect that the rule was to be considered outside the scope of the Government's powers and, thus, in violation of articles 76 and 77 of the Italian Constitution. *See* Italian Constitutional Court, Judgment n. 272/2012, paras 12.1-12.2.

³¹ Italian Constitutional Court, Judgment n. 403/2007 (21 November 2007).

³² The Government first adopted the urgency Decree n. 63/2013, which the Parliament ratified on August 9, 2013, with Act n. 98/2013.

approach of the CJEU in *Alassini*, holding that the right to effective protection may be subject to restrictions insofar as they are proportionate to general interest goals pursued through the restriction (Trib. Lamezia Terme, Order 1 August 2011). Other courts went further, and adopted a consistent interpretation of Article 111 Constitution and the right to a reasonable duration of judicial procedures, holding that mandatory mediation is inadmissible if it occurs after the judicial action has commenced and therefore a consumer's claim brought before the court before any attempt at mediation has been initiated is to be considered inadmissible without leading to a mere suspension of the proceeding (see part. judgments of Tribunal of Milan, sect. XI, of 24 September 2014 and 17 December 2015). This result then implicitly departs from the conclusions reached by the Supreme Court.

With regard to the *Menini* case, the decision of September 28th, 2017, of the Verona Tribunal implemented the CJEU judgment in the case examined here: it first assessed that Directive n. 2013/11 could not apply to the case, since the ADR body which should have managed the case was not included in the right list or notified to the Commission, as instead ruled by Directive n. 2013/11.

In the second place, the Tribunal upheld the principles established by the CJEU concerning the relationship between 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 focused mainly on the aspects concerning legal assistance (see the section on Impact on the Follow-up case in connection with the next question). However, the reasoning of the CJEU in the *Menini* case appears to have widely influenced the stance of Italian Courts regarding mandatory ADR procedures: the Milan Tribunal, with its decision of July 18th, 2017, upheld the same principles expressed in the *Menini* decision, although it did not mention it. With regard to a case concerning a provision for a mandatory conciliatory attempt before accessing the Court, the Tribunal pointed out that the provision does not constitute a violation of Article 47 of the CFREU, provided that it does not lead to a binding decision, nor cause excessive delay or excessive costs. The principle of proportionality is also used as the interpretative tool to distinguish a justifiable restriction of the right to access to court from an unjustifiable one. The Tribunal did not mention the *Menini* case but it directly referred to the *Alassini* case, 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. The same reasoning, with a direct reference to the *Menini* decision, was also upheld by another decision of the Verona Tribunal, of 27 February 2018.

Elements of judicial dialogue:

An initial, significant horizontal judicial dialogue within the CJEU can be noted in relation to the *Alassini* and the *Menini* cases, as the reasoning applied to the latter largely draws from the reasoning developed in the former, to the extent that we may actually expect the tests applied in *Alassini* to be consolidated as a general standard that may be applied to any case of mandatory ADR mechanism implemented by Member States, possibly not only with respect to matters related to consumer protection.

A second element of judicial dialogue can be seen in the references made by the Italian Constitutional Court and by the Italian Supreme Court to the *Alassini* case in matters not directly related to litigation concerning communication services, as well as by other Italian lower courts mentioned above. 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 rather impairs

effective judicial protection, rather than being limited exclusively to matters related to communication services.

In this respect, the case law that followed the CJEU decision shows that consistent interpretation was made by different courts and revealed the different outcomes that it may trigger: (1) the Constitutional Court followed consistent interpretation in order to clarify that compulsory proceeding was not an obligation emerging from EU law or the CJEU decision, but rather that it was the result of the choices of the national legislator; (2) the Supreme Court limited the consequences deriving from the CJEU 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 reasoning of the CJEU.

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 CJEU³³ and recalled the *Alassini* case to state 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) was to be construed as a limitation to effective judicial protection and that (as ascertained in *Alassini*) the right is not absolute and can be restricted under certain circumstances³⁴. In the CJEU's decision, reference to *Alassini* was made only by analogy with respect 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 para. 23).

Question 2 – Further EU specific requirements for ADR mechanisms involving consumers.

Are there further specific requirements for compulsory ADR pre-judicial procedures involving consumers pursuant to Directive 2013/11?

The case

³³ 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.

³⁴ The question referred to the CJEU is 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 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?*”

In the *Menini* case, as mentioned 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 is not questioned only on the ground that the mandatory procedure may excessively limit access to justice by consumers (*see* above), but also on the grounds that, under Italian law, assistance by a lawyer is mandatory and in the following judicial proceedings the judge may charge a special fee on the succumbing party withdrawing from the ADR procedure without valid grounds (“*giusta causa*”), implying that the consumer may not, in fact, be completely free to withdraw from the procedure at any stage at will.

Preliminary question referred to the Court:

The second part of the second question in the *Menini* case is 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?

The Court's Reasoning:

The reasoning of the Advocate General in her opinion strictly applies 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 2013/11³⁵, and that the consumer is always to be completely free to withdraw from the ADR procedure at any stage, even on purely subjective grounds, and that the decision is not to adversely affect the consumer in the following judgment³⁶.

The Advocate General does not, therefore, explicitly consider, in this case, the relevance of Article 47 of the CFREU or the relevance of the principles of equivalence, effectiveness, dissuasiveness, or proportionality in suggesting the answer to the question posed. On the contrary, she points out that the Directive obliges Member States not to impose the assistance of a lawyer, as well as allowing consumers to withdraw from the ADR procedures without consequences, while at the same time, she states, 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 rule out the assistance of a lawyer (which would not be in the best interest of consumers), but rather only imposition of such assistance.

³⁵ See *Menini*, Opinion, paras 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*”.

³⁶ See *Menini*, Opinion, paras 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*”.

As far as the judgment 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 demonstrates the existence of a valid reason, and states that “such a limitation restricts the parties’ right of access to the judicial system, contrary to the objective of Directive 2013/11”.

The Court’s Conclusion:

The Court concluded:

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.

Impact on the follow-up case:

With its decision of September 28th, 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 requiring mandatory legal assistance – as is the case in Italian legislation – does not respect the CJEU ruling according to which the mandatory mediation procedure is not to generate new costs for the parties. Therefore, the Tribunal concluded that the provision requiring 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 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*, 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

Of the disputes examined here, the question of 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 l. 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).

Guidelines for judges emerging from the analysis

Both the *Menini* and the *Alassini* cases follow a common pattern in their reasoning, as is also shown by the incorporation of *Alassini*'s guidelines into the Opinion rendered by the AG in the *Menini* case and by the reference that national Courts made to both cases in order to assess similar issues.

Further to the two judgments, with respect to mandatory ADR schemes in matters related to consumer rights, Member States are to be free to set certain procedures as mandatory in accordance with the principle of procedural autonomy, provided that the 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, to be ascertained on the basis of the following criteria, namely the procedure:

- (a) shall not result in a decision which is binding on the parties;
- (b) shall not cause a substantial delay for the purposes of bringing legal proceedings;
- (c) shall suspend the period for the time-barring of claims;
- (d) shall not give rise to significant costs for the parties;
- (e) shall not be accessible only by electronic means; and
- (f) shall not prevent the granting of interim measures in exceptional cases where the urgency of the situation so requires;
- (g) shall allow the consumer to withdraw from the proceeding without penalties even if he or she does not demonstrate the existence of a valid reason

7. Effective consumer protection in cross-border cases.

7.1. The court having jurisdiction over cross-border consumer cases.

Relevant CJEU cases in this cluster

- Judgment of the Court (Sixth Chamber) of 1 October 2002, *Verein für Konsumenteninformation and Karl Heinz Henkel*, Case C-167/00 (“**Henkel**”)
- Judgment of the Court (Fourth Chamber) of 4 June 2009, *Pannon GSM Zrt. v Erzsébet Sustikéné Győrfi*, Case C-243/08 (“**Pannon**”)
- Judgment 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**”)
- Judgment of the Court (First Chamber), of 17 November 2011, *Hypoteční banka a.s. v Udo Mike Lindner*, C-327/10 (“**Hypoteční**”)
- Judgment of the Court (Fourth Chamber), of 6 September 2012, *Daniela Mühlleitner v Ahmad Yusufi, Wadat Yusufi*, Case C-190/11 (“**Mühlleitner**”)
- Judgment 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**”)
- Judgment 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**”)
- Judgment 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**”)
- Judgment of the Court (Third Chamber) of 28 July 2016, *Verein für Konsumenteninformation (VKI) v Amazon EU Sàrl*, Case C-191/15 (“**Amazon**”)

Main questions addressed

- Question 1 Based on the right to effective consumer protection, are judges to interpret broadly the scope of application of the Brussels I Regulation rules on jurisdiction protecting consumers, and in particular the general condition according to which a sufficient cross-border element is needed?
- a. Are the judges to decide that Regulation 44/2001 (Brussels I) applies when the consumer/defendant, whose domicile is unknown, is a national of another Member State?
 - b. Are the judges to decide that Regulation 44/2001 (Brussels I) applies to a domestic contract inseparably linked to a cross-border contractual relationship?

- Question 2 Based on the right to effective consumer protection, are the judges to interpret broadly the scope of application of the Brussels I Regulation rules on jurisdiction protecting consumers, and in particular the specific conditions set out in Chapter II, Section IV?
- Question 3 When the court having jurisdiction over a case regarding the protection of consumers is not clearly identifiable under the rules of the Brussels I Regulation, how should the tribunal having jurisdiction be designated?
- a. What court has jurisdiction when the domicile of the consumer is unknown?
 - b. What court has jurisdiction over cross-border claims brought by consumer associations?
- Question 4 Should a court, designated by a choice-of-court provision included in a transnational consumer contract violating the provisions of article 17 of the Brussels I Regulation, before which the consumer enters an appearance without challenging jurisdiction, raise the issue of jurisdiction *ex officio*?
- 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 (common to all questions in 7.1)

Lists of the relevant EU sources:

Regulation 44/2001 (Brussels I) – and equivalent provisions of the Brussels Convention (1968) and of Regulation n°1215/2012(Brussels I recast / Brussels I bis).

Recital 13

“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”.

Recital (14) of the Brussels I bis Regulation:

“A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seized.

However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant’s domicile”.

Chapter II, Section IV: Jurisdiction over consumer contracts, Article 15

“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”.

Article 16

1. 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. [Compare Article 18 (1) of the Brussels I *bis* Regulation, extending the scope of the rule: “*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*”].
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

“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”.

Question 1 – Scope of application of the Brussels I Regulation rules on jurisdiction protecting consumers, in the light of the general condition that a cross-border element exists

1. Based on the right to an effective consumer protection, are judges to interpret broadly the scope of application of the Brussels I Regulation rules on jurisdiction protecting consumers, and in particular the condition that a sufficient cross-border element is needed?

The cases

The issue is addressed in *Hypoteční* and *Armin Maletic*. In these cases the CJEU had to decide whether the rules on jurisdiction set by the Brussels I Regulation were applicable to consumer contracts that were apparently ‘purely domestic’, as they had been concluded between a professional and a consumer established in the same Member State.

The Court’s Reasoning

The Court pointed out that application of the Brussels I Regulation requires a sufficient cross-border element.

Then, implicitly applying the ***principle of effectiveness of consumer protection***, the Court broadly recognized the existence of a cross-border element (foreign nationality of the consumer in *Hypoteční*; domestic contract inseparably linked to a cross-border contractual relationship in *Armin Maletic*). The relevance of the principle of effectiveness of the consumer protection is more clearly established in *Armin Maletic* than it is in *Hypoteční* (where it is probably more the effectiveness of the Brussels I Regulation that counts).

The Court’s Conclusion

The condition according to which a sufficient cross-border element is needed for application of the Brussels I Regulation rules on jurisdiction protecting consumers is to be interpreted broadly. It does not require that the professional and the consumer be established in different Member States.

1.a. Are the judges to decide that Regulation 44/2001 (Brussels I) applies where the consumer/defendant, whose domicile is unknown, is a national of another Member State?

1.b. Are the judges to decide that Regulation 44/2001 (Brussels I) applies to a domestic contract inseparably linked to a cross-border contractual relationship?

Question 1.a – Application of the Brussels I Regulation where the domicile of the consumer/defendant, who is a national of another Member State, is unknown

1.a. Are the judges to decide that Regulation 44/2001 (Brussels I) applies when the consumer/defendant, whose domicile is unknown, is a national of another 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 (being unable to submit the original contract to the judge). The order was granted by a District Court, but 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, the 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 a person of unknown domicile. The guardian raised several objections on the matter.

The court decided to stay the proceedings and refer a preliminary question to the CJEU.

Preliminary question referred to the Court:

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 this constitute 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 (...)?

The Court’s Reasoning:

The *Court* first recalled that 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 stated 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 relevant for the purpose of deciding on the applicability of the regulation (§29-32).

Secondly, the Court stated that, when the domicile of a foreign national is unknown, the courts of the Member State of which the defendant is a national could 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 CJUE does not specify the basis on which jurisdiction could be assumed by the Court of the Member State of which the defendant is a national, but it may well be the national one. In fact, the jurisdiction rules are based on the nationality of the parties in several Member States’ systems, application of which is ruled out by the Brussels I Regulation. **Here there is an implicit reference to the principle of effectiveness of the Brussels I Regulation. One might wonder whether it is more particularly the effectiveness of the consumer protection provided for by EU rules that is involved. The Court’s reasoning is not developed, but it could tentatively be inferred from the decision in the light of the Advocate General’s opinion. Application of the Brussels I Regulation is needed: 1) to avoid parallel proceedings; 2) to**

guarantee application of the jurisdiction rules of the regulation protecting consumers (see the – perfectly clear – opinion of the Advocate general, §62). 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 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 below question 1.b), the CJUE clearly links the extension of the scope of RBI rules on jurisdiction protecting consumers with the objective of protecting consumers.

The Court's Conclusion:

Regulation No 44/2001 is to be interpreted as meaning that 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 as to raise questions relating to determination of the international jurisdiction of that court. Such a situation arises in a case such as 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.

Impact on the follow-up case:

Not available (Czech Republic).

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 had set the rule that application of the rules of jurisdiction of the Brussels I Regulation requires the existence of an international element which does not necessarily rest on the fact that the parties do not have their domicile in the same 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. In *Hypoteční* it was decided that the foreign nationality of one of the parties is a relevant element in this respect, at least (and only) if the domicile of the party is unknown.

In the *Visser* (C-291/10) decision that was rendered subsequently, the CJEU made reference to *Hypoteční* and held that the Brussels I Regulation, particularly Article 5(3), is applicable to an action for liability arising from the operation of an internet site, harming a defendant who is probably a European Union citizen but whose whereabouts are unknown, if the court seized of the case does not have firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union. The reason given is that application of the uniform rules of jurisdiction established by Regulation No 44/2001, instead of those in force in the different Member States, meets 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 without difficulty the court in which he may sue, and the defendant reasonably to foresee before which court 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 is driven by the objective of ensuring an effective protection of consumers (effectivity of the protection provided by Article 16) (see below question 1.b):

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

Question 1.b – Application of the Brussels I Regulation to a domestic contract inseparably linked to a cross-border contractual relationship

1.b. Are judges to decide that Regulation 44/2001 (Brussels I) applies to a domestic contract inseparably linked to a cross-border contractual relationship?

The case

The issue is addressed in *Armin Maletic*.

In 2011 the Maletics, who are 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 the lastminute.com website.

In order to recover the surcharge paid and to be compensated for the inconvenience which 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, with the order of 4 July 2011, it dismissed the action insofar 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 as 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, namely the court having jurisdiction in Vienna and not in Bludenz.

The applicants brought an appeal against that part of the decision, claiming that the booking they 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 refer a preliminary ruling to the CJEU.

Preliminary question referred to the Court:

‘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 having its seat abroad) has recourse to a contracting partner (here, a travel operator having its seat in the home country), Article 16(1) of Regulation No 44/2001 is, for the purpose of proceedings brought against those two parties, also applicable to the contracting partner in the home country?’

The Court’s Reasoning:

The Court first pointed out that 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 Court stated, secondly, that where 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 Court 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** is clearly involved and implicitly lay behind the Court’s conclusion.

The Court’s Conclusion:

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 judgments in civil and commercial matters is to 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:

Not available (Austria)

FRANCE

The French *Cour de cassation* (Supreme Court) decided in two decisions of 22 February 2017 (n°15-27.809 & n°16-11.509) that, when applying the French rules on jurisdiction to an alleged domestic ‘consumer contract’ concluded between two parties having their establishment/domicile in the same 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 State, whereas the object of the contract (a service offered for the transportation of the passenger from one State to another) implies the existence of a cross-border element which could be seen as sufficient for application of the Brussels I Regulation, on the basis of CJEU case law. According to 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 that the rules protecting consumers were not applicable to a contract of transport; 3) he then claimed 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 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.

Question 2 – Scope of application of the Brussels I Regulation rules on jurisdiction protecting consumers, in the light of the specific conditions set out in Chapter II, Section IV

2. Based on the right to effective consumer protection, are the judges to interpret broadly the scope of application of the Brussels I Regulation rules on jurisdiction protecting consumers, and in particular the specific conditions set out in Chapter II, Section IV?

The issue was addressed in both the *Pammer and Hotel Alpenhof* and *Mühlleitner* judgments. Of these, the main case which can be presented as reference 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 through companies based in Germany and Austria respectively. The reservation was made from their own domicile, through the websites of the professionals. Disputes arose over payment. 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 residence have jurisdiction -- were applicable.

The question referred to the Court

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 those sites can be consulted on the internet sufficient for that activity to be regarded as such?

The Court’s Reasoning

The Court first pointed out that Article 15(1)(c) of Regulation No 44/2001 constitutes a derogation both from the general rule of 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 for them 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, and that the concept should be interpreted independently, with 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 Court 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 Court 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 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 – and, at the same time, 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* directed towards foreign consumers. In particular, does the objective of increasing the protection of consumers mean that

the words ‘directs such activities to’ are to 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 Court *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, it concluded 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 intention to establish commercial relations with consumers from 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 he was minded to conclude a contract with those consumers.

The evidence establishing whether an activity is ‘directed to’ the Member State of the consumer’s domicile includes 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 he/she is offering his services or goods in one or more Member States designated by name. The same is true of 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 need not 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’; 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 presenting reviews written by the customers.

The Court’s Conclusion:

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/she 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 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 up to 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:

Not available (Austria & Germany).

Elements of judicial dialogue:

In terms of horizontal dialogue within the CJEU, it is to be noted that *Pammer and Alpenhof Hotel* should be read in the light of the *Mühlleitner* judgment.

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 CJUE completed the analysis made in *Pammer and Hotel Alpenhof*.

Article 15 being a derogation from the ordinary rules on jurisdiction, it must necessarily be interpreted strictly, as any derogation from or exception to a general rule is to be interpreted strictly. On this point, 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 the 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 Court to justify its conclusion that "Article 15(1)(c) of the Brussels I Regulation is to 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 consumer protection lay behind the rather "extensive" interpretation of the conditions set by Article 15(1) given by the Court.**

Question 3 – Identification of the courts having jurisdiction over cases regarding the protection of consumers, in the absence of any explicit rule set by the Brussels I Regulation

3. When the court having jurisdiction over a case regarding the protection of consumers is not clearly identifiable under the rules of the Brussels I Regulation, how should the tribunal having jurisdiction be designated?

The issue is addressed in *Hypoteční, Asociación de Consumidores Independientes de Castilla y León* and *Amazon*, with specific reference to the following sub-questions:

3. a. What court has jurisdiction in situations in which the domicile of the consumer is unknown? (*Hypoteční*)
3. b. What court has jurisdiction over cross-border claims brought by consumer associations? (*Asociación de Consumidores Independientes de Castilla y León* and *Amazon*)

Question 3.a – What court has jurisdiction in situations in which the domicile of the consumer is unknown

3.a. What court has jurisdiction in situations in which the domicile of the consumer is unknown?

The case

The relevant case is *Hypoteční*, details of which were given above.

Preliminary question referred to the Court:

Does Regulation No. 44/2001 preclude the use of provisions of national law which enable proceedings to be brought against persons of unknown address?

The Court's Reasoning:

In the absence of an express provision in Regulation Brussels I which defines jurisdiction in a case in which the exact domicile of a defendant is unknown, the Court assumed 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 considered 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 Court considered that this interpretation is 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 of ensuring a fair balance between the rights of the applicant and those of the defendant (§45-54).

The Court extensively justified this last argument. Article 47 of the Charter requires that the rights of the defence 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*).

Applying Article 26(2) of the Brussels I Regulation, the Court judged that, in order to avoid a disproportionate interference with the rights of the defence, when 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, it remains true that the rights of the defence 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, the right would be meaningless.

The Court thus combined **the principle of effective access to justice with the principle of proportionality** in drawing its conclusions.

The Court's Conclusions:

Regulation No 44/2001 is to 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, leaves his domicile before proceedings against him for breach of his contractual obligations are brought, the courts of the Member State in which the consumer had his last known domicile have jurisdiction, pursuant to Article 16(2) of that regulation, to deal with proceedings should 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;
- this regulation does not preclude 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 seized 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.

Impact on the follow-up case:

Not available (Czech Republic)

Elements of judicial dialogue:

The CJUE referred to 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 identify with no difficulty the court in which he/she may sue, and the defendant reasonably to foresee before which court he/she may be sued. Similar definition of the consequences attached to the objective had already been given 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 an effective access to justice. The Court pointed out

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 deemed 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).

Question 3.b – What court has jurisdiction over cross-border claims brought by consumer associations

3.b. What court has jurisdiction over cross-border claims brought by consumer associations?

Regulation Brussels I / Regulation Brussels I recast establishes no specific rule on jurisdiction applying to the cross-border claims brought by consumer associations. The question, then, is what court should have jurisdiction over such claims? The issue has not been expressly decided upon by the CJEU. However, some of the cases mentioned above can be presented as reference in this respect: *Henkel*, *Asociación de Consumidores Independientes de Castilla y León* and *Amazon*.

The case

The case with the most relevant facts 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 set by 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, and indeed to the practical effect of directives and the principles of equivalence and effectiveness, is to 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 his/her 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 issue arose in *Henkel* and *Amazon*.

Question possibly referred to the Court 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 State where the defendant has its establishment?

The Court's Possible Reasoning

The Court would probably have to decide, firstly, if a cross-border action brought by a consumer association is included in the scope of application of the Brussels I/Brussels I bis Regulation. Considering the broad interpretation of 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 confirmed 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 Court would then decide what constitute the rules of the regulation specifically applied to determine what tribunal should 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) should 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 tribunal having jurisdiction to decide on the action brought by an association.

As assessed by the CJEU in *Sales Sinués* and *Asociación de Consumidores Independientes de Castilla y León*, the association (like the consumer) is not 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, ***the principles of equivalence and effectiveness*** are to be interpreted as not precluding national procedural rules under which actions for an injunction brought by consumer protection associations are to be brought before the courts where the defendant is established or has his address (Article 2, Regulation n°44/2001). Therefore it is likely that the Court would decide that the same principles do not require extension of the scope of the protection of consumers established by the Regulation to consumer associations.

The Court would then, finally, decide on what courts have jurisdiction to rule on the claim brought by the consumer association. As in the case of *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 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 the case of *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 para. 7.2). Such qualification is transposable to the application of the Brussels I Regulation. Consequently, the jurisdiction of the courts is also to 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 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 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.

Question 4 – Judicial duty to raise the issue of the non-applicability of choice-of-court clauses included in transnational consumer contracts

Should a court, designated by a choice-of-court provision included in a transnational consumer contract violating the provisions of article 17 of the Brussels I Regulation, before which the consumer enters an appearance without challenging jurisdiction, raise *ex officio* the issue of jurisdiction?

The above question has not been strictly dealt with by the CJEU. However, probable answers might be inferred from some of the decisions of the court, and in particular from *Pannon* and *Amazon*.

Relevant legal sources

Regulation 44/2001 (Brussels I)

Article 17: (*see above*)

Article 26 (1): “Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.”

The case

The situation would be the following: A consumer contract is concluded between a consumer having 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 of 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 Court

Should the court raise, of its own motion, the fact that a choice-of-court clause is in conflict 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 confers 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 to be unfair. If the term is found unfair, it must not apply, unless the consumer opposes 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/her domicile. This may make it difficult for him/her 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/her to forgo any legal remedy or defence.

In *Amazon* (see below 7.2), 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 insofar 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 he/she 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 insofar as it leads the consumer into error by giving him/her the impression that the court of the Member State where the professional has his/her establishment has exclusive jurisdiction, and deprives the consumer of 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, **such courts are ex officio to raise the issue of jurisdiction where the defendant entering an appearance is a consumer**.

Being unfair, the choice-of-court term should not apply, unless the consumer, fully informed of his/her right to claim that another court has jurisdiction, opposes non-application and explicitly confirms the jurisdiction of the designated court.

Follow-up

This 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 n.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.”

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, n°15/08624, Facebook*) decided that the contract concluded between a user of the social network provided by Facebook, and the company Facebook Inc., is a consumer contract. Even if the service is provided to users free of charge, Facebook Inc., which is a professional, draws important benefits from its activity. The contract is not individually negotiated.

The general terms and conditions of the contract include a choice-of-court provision, according to which the courts of California (USA) have exclusive jurisdiction over any litigation concerning the terms of the contract.

The Appeal Court stated that pursuant Article 15 and 16 of the Brussels I Regulation, the consumer could decide to bring his/her claim before the court of his/her place of domicile, in that case 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 obliges the consumer to bring his/her claims against the professional before a court which is a long way from his/her domicile, and to bear costs disproportionate with the amounts of money involved, the French Court concluded that the practical difficulties and the costs of accessing the foreign court are likely to deter the consumer from bringing any claim and induce him/her to forgo any legal remedy or defence.

On the other hand, Facebook has an agency in France, and has financial and human resources making it easy for it to ensure its legal representation and defence before the French Courts.

The choice-of-court provision being unfair, it is to be deleted and the French courts have jurisdiction over the claims brought by the consumer.

The Appeal Court reasoning is implicitly based on *Pannon*, as well as the principle of effective access to justice and the principle of proportionality.

Question 5 – Parallel proceedings brought in different Member States by consumer associations and by consumers individually

5. 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 legal sources

Article 29(1), Regulation n° 1215/2012 [eq. to Article 27 (1) Regulation n°44/2001]

“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 30, Regulation n°1215/2012 [eq. to Article 28, Regulation n°44/2001]

“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 above question 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 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 annulment of the same allegedly unfair clause, before a tribunal of Member State B, where he/she has domicile.

Possible question to be referred to the Court

Does any provision of Regulation n.1215/2012 (Brussels I recast) imply that the court seized by a consumer seeking annulment of an allegedly unfair clause is to or may, possibly 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

First the question raises the issue, still undecided, of 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 oblige/allow judges to stay proceedings in a case such as 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 alleged unfairness of the clause. But the CJEU's reasoning in *Sales Sinués* seems transposable. **The principle of effectiveness** of protection in cases of unfair terms as intended by the directive implies that the consumer should not be prevented from obtaining the individual redress sought through his/her individual action without further delay.

The Court's Possible Conclusions

Regulation Brussels I/ Brussels I *bis* applies to determine the tribunal having jurisdiction on cross-border actions brought by consumer associations, but the jurisdiction of the court is to 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* are to 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 ongoing parallel proceedings 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.

Guidelines for judges emerging from the analysis

1. The scope of application of the rules on jurisdiction of the Brussels I Regulation protecting consumers is to be defined broadly, based on the principle of effectiveness of the protection of consumers mitigated by the principle of proportionality (need 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)).
2. Interpretation of the rules on jurisdiction set out in the Brussels I Regulation for cases involving consumers is to 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 of the defence)).
3. Based on the principle of effectiveness of consumer protection, the judges are to 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 application of the clause.
4. Based on the principle of effectiveness of consumer protection, a national court before which a consumer brings an individual claim based on an allegedly unfair term is not 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. The law applicable to transnational consumer contracts: *ex officio* powers to declare the unfairness of a choice-of-law clause.

Relevant CJEU cases in this cluster

- Judgment of the Court (Sixth Chamber) of 1 October 2002, *Verein für Konsumenteninformation and Karl Heinz Henkel*, Case C-167/00 (“**Henkel**”)
- Judgment of the Court (Grand Chamber), of 15 March 2011, *Heiko Koelzsch v État du Grand-Duché de Luxembourg*, Case C-29/10 (“**Koelzsch**”)
- Judgment of the Court (First Chamber), of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Case C-472/10 (“**Invitel**”)
- Judgment of the Court (Third Chamber), of 23 April 2015, *Jean-Claude Van Hove v CNP Assurances SA*, Case C-96/14 (“**Van Hove**”)
- Judgment of the Court (Third Chamber) of 28 July 2016, *Verein für Konsumenteninformation (VKI) v Amazon EU Sàrl*, Case C-191/15 (“**Amazon**”)

Within this cluster the main case which can be presented as reference for the judicial dialogue within the CJEU and between EU and national courts is the *Amazon* case.

Main questions addressed

- Question 1 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 the judges apply in addressing the action and examination of the alleged unfairness of the contractual terms?
- Question 2 Is a judge to decide (*ex officio*) to set aside a choice-of-law clause included in a consumer contract when the clause is unfair, and apply the mandatory provisions of the State where the consumer has his residence instead?

Question 1 – 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 the judges apply in addressing the action and examination of the alleged unfairness of the contractual terms?

Relevant legal sources

I - Regulation (EC) n°864/2007, 11 July 2007, on the law applicable to non-contractual obligations (Rome II): Article 6 and Article 14

In cross-border relationships, where the collective interests of consumers are affected by an operator’s behaviour, the law applying to the claim brought against the operator on that basis is to be **the law of the country where the collective interests of consumers are affected**, i.e. the law of the country of residence of the consumers suffering from the behaviour.

Regulation Rome II authorises a limited choice of the law ruling non-contractual obligations, but this **choice of law is excluded when the action is brought to protect the collective interests of consumers**, on a twofold basis: the parties (i.e. the association acting for the protection of consumers) are not both “pursuing a commercial activity” within the meaning of Article 14 (1) (b); and application of Article 14 is expressly excluded where the law applicable is designated pursuant to Article 6 (4).

Article 6 (1) & (4), ‘Unfair competition and acts restricting free competition’

(1) The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

(4) The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Article 14 (1), ‘Freedom of choice’

(1) The parties may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred;

or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

II - Regulation (EC) n. 593/2008 of 17 June 2008, on the law applicable to contractual obligation (Rome I): Article 6

Regulation Rome I identifies the law applicable to transnational consumer contracts by taking into account the need to protect the consumers. Whereas the normal rule is that the law applicable to a transnational contract is to be the law of the place of residence of the party carrying out 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 place of residence of the consumer**. This is a protective rule, because even if the law of the place of residence of the consumer is not necessarily the one with the most protective content, it is usually the law 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.

Nevertheless, as in other contracts, the law applicable to consumer contracts may be chosen by the parties. It is then necessary to protect the consumer from the stronger party, which could impose a law less favourable than the law of the place 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 him/her by the mandatory provisions of the law of his/her country of residence**.

However, the protection provided for by Rome I only applies **when the professional has in some way 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 this country.

Article 6, ‘Consumer contracts’:

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/her trade or profession (the consumer) with another person acting in the exercise of his/her trade or profession (the professional) is to be governed by the law of the country where the consumer has habitual residence, provided that the professional:

(a) pursues his/her commercial or professional activities in the country where the consumer has 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. Any such is not, however, to have the result of depriving the consumer of the protection afforded him/her 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 the very least, entitled to the protection of the law of his/her country of residence. For instance, if a contractual provision is unfair according to this law, the sanctions defined by it should apply (even if the parties chose a different law as the law applying to the contract). This solution in which the action against the unfair contractual clause is brought by the consumer is commonly admitted.

However, some questions remain unanswered in the texts:

- What is to be the applicable law when the action against the use of unfair clauses is a collective action, brought by a consumer association?
- Is the judge to verify, *ex officio*, whether the law chosen by the parties deprives the consumer from the protection he/she is entitled to under the law of his/her country of residence?

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, alleges the illegality and unfairness of several clauses of the general terms and conditions in the contracts, including a choice-of-law clause according to which Luxembourg law is to apply to the contracts.

VKI brings an action before the Austrian courts for an injunction to prohibit the use of the unlawful terms in those general terms and conditions and for publication of the judgment to be delivered. One of the allegedly illegal clauses is a choice-of-law clause included by Amazon in its general terms and conditions, according to which Luxembourg law (the law of the State where the professional has his establishment) is to apply to the contracts.

Preliminary question referred to the Court:

In short, as the Court puts 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 is 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 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 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 where 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?

The Court's Reasoning:

The *Court* first reiterated its previous case law relevant to the Brussels Convention and 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 is fully applicable to interpretation of Regulation Rome I and Rome II (§39).

The Court stated, secondly, that the appropriate conflict-of-law rule is article 6(1) of Regulation Rome II, dealing with non-contractual obligations arising out of an act of unfair competition. The law applicable to the action is to be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected (§40). This 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).

Thirdly, the Court rejected application of the exception clause (Article 4 (3) Rome II) according to which: a) another law may be applied where 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 could 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 were 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, applies to such contracts. It would allow the professional to choose the law to which a non-contractual obligation is subject, and thereby to evade the conditions set out in that respect in Article 14(1)(a) of the Rome II Regulation (§44 - §47).

However, the Court pointed out 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 alleged unfairness of terms in consumer contracts is to be determined independently, in accordance with the Rome I Regulation, given the nature of those terms (§49-52). This 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 Court has established by requiring the national courts of their own motion— all to draw – also for future reference the conclusions provided for in national law that follow 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 with Directives 2009/22 and 93/13 of efficaciously putting an end to the use of unfair terms (§57).

The Court noted, finally, that the choice of the law applicable to the contractual terms is without prejudice to 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 some 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).

The Court's Conclusion:

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 an undertaking established in a Member State which concludes contracts in the course of electronic commerce with consumers resident in other Member States, and in particular in the State of the court seized, is to be determined in accordance with Article 6(1) of Regulation No 864/2007 (Rome II). However, the law applicable for *assessment* of a particular contractual term must always be determined pursuant to Regulation No 593/2008 (Rome I), whether the assessment is made in an individual or collective action.

Analysis of the decision of the Court: relevance of the principle of effectiveness

The Court made 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 as to the coordination of both laws (4).

(1) The law regulating the unfairness of the contractual provisions of consumer contracts is to be the same in collective actions as in individual actions. It is to be the law applying to the consumer contract, i.e. pursuant 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 their residence (if the conditions for the protection are met). For the Court, such unification is a matter of **effectiveness of the protection**, as it “*is the only one ensuring that the applicable law does not vary according to the type of action (individual or collective)*”. The Court emphasized that, following its previous case law, whenever a term has been found unfair in the context of a collective action, the judges are to draw all the consequences of the 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 were to apply a different law to assess the unfairness of the same term, since the two assessments could lead to different results. Consistency is needed in assessments; accordingly, the same law should be applicable in each Member State.

It may reasonably be inferred from the rationale behind the decision that, for the Court, not only are the judges from different Member States to apply the same law (designated by Article 6 Regulation Rome I) to assess the unfairness of contractual term in individual and collective cases, but also that **judges are bound, in individual cases, by application of the law made by judges from a different Member State in a previous collective action.**

(2) **The law applying to the injunction** is not necessarily, at least theoretically (see below on the consequences), the same as the law assessing the unfairness of the term, because the conflict-of-law rule applicable is not the same. Whereas the unfairness of the term is subjected to the law ruling the contract pursuant Regulation Rome I, the action for an injunction brought by a consumer association is not a contractual matter but, in fact, a non-contractual one, within the meaning of Regulation Rome II. The law applying to the injunction is to be identified by applying article 6 of the Rome II Regulation. The Court’s reasoning in reaching this conclusion *is entirely based on an analysis of the nature of the action*, and does not include explicit or implicit references to the principle of effectiveness.

However, the Court again referred to **the principle of effectiveness of consumer protection to analyse the consequences of a possible choice of law.** The Court observed that, as far as assessment of the unfairness of a term is concerned, choice of the law applying to the contract by the parties is not to jeopardise the protection of the consumer, since it is established by Rome I Regulation (applicable to the issue) that the chosen law cannot deprive the consumer of the protection of the law of his/her country of residence. This means that whichever law is applicable, 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 Court confirmed that the same protection is awarded when Regulation Rome II is applicable (collective action). Pursuant to Regulation Rome II, no choice of law is acceptable when the law is defined according to Article 6 (Article 6 excluding application of Article 14). However, the Court made in-depth examination of the consequences 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 applying to the consumer contract (Article 6, Reg. Rome I). Pursuant to the exception clause, the judge is not to apply the law normally applicable where it clearly appears 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 is to apply the law of that country); and the provisions of the Regulation further specify that the “*manifestly closer connection with another country*” could be the based, in particular, on a pre-existing contractual relationship between the parties.

Let us suppose 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 subject to the law of the consumer's residence pursuant to Article 6 Rome II, could be ruled by the law of the contract in application of the exception clause, then consumer protection would be jeopardised, because the professional would -- through the contract -- be able to bring the collective action under a law less favourable to the consumer than the law that should otherwise apply. This is why the Court rules out application of the exception clause.

Nevertheless, to fully understand the reach of this decision it is necessary to consider what the respective scopes of the law regulating unfairness and the law applying the injunction are.

(3) The **respective scopes of the two laws** are not defined by the Court, although important questions arise in this respect.

The scope of the law of the contract (assessing 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 affect 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 relatively limited. It seems that the following question in particular should be addressed: is the association qualified to bring the action?

However this is not a neutral consideration, because the issue would otherwise normally be seen as a procedural one, and consequently be subject to the law of the forum, i.e. the law of the country where the professional has domicile (see above 7.1, question 3b, on the courts having jurisdiction). Let us suppose that a professional established in Germany directs its activities to Austria and Austrian consumers. An Austrian 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 (rather than German law, which would be applicable if a procedural qualification were 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 imagine the same situation, but with a German 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 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 assess 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 the chosen law is more favourable than that of the consumer's residence, the chosen law will assess the unfairness of the term, while for the admissibility of the association's claim the law of the consumer's residence will still apply. It is not an issue as such, so long as the

laws have scopes clearly differentiated, but questions regarding the scope could 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 are to be subject to the law of the contract or the law applying to the injunction remains open.

Impact on the follow-up case:

Not available (Austria).

Elements of judicial dialogue:

In *Brogstetter* (C-548/12) and *Henkel*, the Court concluded that, in the context of the Brussels I Regulation and 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 observed that a consistent interpretation of Regulation Rome I, Regulation Rome II and Regulation Brussels I 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 when 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, also in the future, to draw all the consequences provided for by national law to ensure that consumers who have concluded a contract to which those GBC apply will not be bound by that term. The CJUE ruled that the effectiveness of this duty of the courts implies consistency of assessment (of the unfairness of the contractual terms) between collective actions and individual actions, i.e. that such assessment be subject to the same law in both types of actions. Hence the assessment should be subject to the law applying to the contract (Rome I), even if the action is subject to another law (pursuant Rome II).

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

FRANCE

In 2010 the French *Cour de cassation* decided that the law applying to 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, n°08-70.229). What possible effect might the *Amazon* case have in changing case law ? (?)

Question 2 – *Ex officio* judicial powers to set aside choice-of-law clauses found to be unfair.

Is a judge to decide, *ex officio*, to set aside a choice-of-law clause included in a consumer contract when it is found to be unfair, and apply mandatory provisions of the country where the consumer has residence instead?

Relevant legal sources

Regulation Rome I: Article 6(2) *quoted above*

Directive 93/13

Recital 5 : “Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State”.

Article 3(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”

Article 6: “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.”

The case

The relevant case is *Amazon*; see the statement of the facts of the case above, under question 1.

Preliminary question referred to the Court:

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?

The Court’s Reasoning:

The Court pointed out that EU legislation in principle allows choice-of-law terms in consumer contracts. 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 which the consumer is afforded by provisions of the law of his/her country – which cannot be derogated from by agreement (§66) – is ensured.

The Court also addressed the definition of an unfair term, which should reflect two criteria: 1) It has not been individually negotiated (which is always the case if 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 2) 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 insofar 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). Such is 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 inform the consumer of those provisions (§67-68).

If article 6 of the Rome I Regulation allows choice-of-law provisions in consumer contracts, it also provides that the choice of applicable law is not to result in depriving the consumer of the protection afforded 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, in the case of a consumer with principal residence in a Member State, have to apply this Member State's statutory provisions, which cannot be derogated from by agreement.** It will be up to the referring court to identify these provisions if need be (§69-70).

The Court's Conclusion:

Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts is to 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 insofar 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 he/she 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).

Analysis of the decision of the Court: Relevance of the principle of effectiveness

The Rome I regulation admits the choice of law in consumer contracts, but with safeguards for the consumer's protection (if the conditions of protection are met). Considering that the chosen law may be imposed by the stronger party, who could be inclined to choose the law offering the lowest protection to the consumer, article 6 (2) of the Rome I Regulation rules that the choice of law is not to deprive the consumer of the protection provided by the law of his/her country of residence.

This means that even if there is a choice of law, the consumer may bring a claim pursuant to the law of his country of residence, rely on that law to oppose a claim brought by the professional on the basis of the chosen law.

But what should happen if the professional were to bring a claim pursuant to the law chosen in the contract, without the consumer opposing it with the law of his/her country of residence, despite the fact that that 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 moot among 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*"), the judges should not apply conflict-of-law rules of their own motion. And it is considered that the consumer's right to demand application of the law of his/her country of residence is not of a "public order" nature once the litigation has arisen. Consequently, the judges are not in a position to verify, *ex officio*, whether the law of the consumer's residence is more protective (this is the traditional 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 are to verify, *ex officio*, if the contract terms are unfair.

The question, then, is to decide whether the judges are to apply, *ex officio*, the conflict-of-law rule of the Rome I Regulation to substitute the law of the consumer's residence when it is more favourable than the chosen law.

The Court's reasoning implies that this should be the case, at least in certain circumstances. The Court admits 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 Court's case law according to which judges are to assess, *ex officio*, the unfairness of the contract terms and declare them void if needed, necessarily applies. **The principle of the effectiveness of consumer protection** implies, thus, that, when there is a choice-of-law clause in a consumer contract, the judges are to verify, *ex officio*, whether the 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 on the Court's reasons).

Impact on the follow-up case:

Not available (Austria).

Elements of judicial dialogue:

The CJUE referred to *Kasler (C-26/13)* to point out that, although it is up to the national court to decide if a term meets the requirements of good faith, balance and transparency laid down by Directive 93/13, the Court 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 CJUE referred to *Van Hove* and *Invitel* to propose criteria for 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 when the effects of a term are specified by these provisions (*Invitel*). As a consequence, when the contract includes a term according to which the applicable law is the law of the State where the professional is established, the professional should make it clear to consumers that this choice of law will not result in depriving them of the protection afforded them by the mandatory provisions of their State of residence.

The CJEU did not expressly refer to *Koelzsch* on the law applicable to employment contracts. Nevertheless, it is interesting to read both cases in conjunction to draw a conclusion on the duty for national courts to use *ex officio* powers to guarantee application of protective EU conflict-of-law rules.

Impact on national case law in Member States 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* (n. 2014-02, 7 Nov. 2014): Contractual terms according to which a foreign law is applicable are unfair because they let consumers residing in France 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 n. 593, n. 89-44187 (and, less conclusively, C. Cass., Soc. 5 Dec. 2007, p. n. 06-43352), in which the *Cour de cassation* decided that, in proceedings related to employment contracts (subject to a “protective” conflict-of-law rule, Article 8 Reg. Rome I), 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.

Guidelines for judges emerging from the analysis

Effective consumer protection and courts with jurisdiction over cross-border consumer cases.

The scope of application of the rules on jurisdiction of the Brussels I Regulation protecting consumers is to be defined broadly, based on the principle of effectiveness of consumer protection, mitigated by the principle of proportionality [the need 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 offer guidance in interpreting the rules on jurisdiction set by the Brussels I Regulation for cases involving consumers.

Even if the notion of the “consumer” is to be strictly construed for the purpose of applying art. 15 and 16 of Regulation no 44/2001 (art. 17 & 18, Reg. no. 1215/2012), the judges are to interpret it in light of the principle of effectiveness, taking the concern of consumer protection 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 recognized regardless of 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 insofar as he/she 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 shed further light on the role of collective redress mechanisms in securing access to justice (See, in the framework of the New Deal for Consumers, Art. 16 of the proposal for a directive on representative actions for the protection of the collective interests of consumers, repealing dir. 2009/22, COM (2018) 184 final).

In light of the principle of effectiveness of consumer protection, the judges are to verify, *ex officio*, if a choice-of-court provision included in a transnational consumer contract meets the conditions set by art. 17 of Regulation 44/2001 (corresponding to Art. 19 of Regulation

1215/2012)³⁷ and if not, verify that the consumer knowingly accepts the jurisdiction of the tribunal designated by the clause³⁸.

A national court, before which a consumer brings an individual claim based on an allegedly unfair term, is not to stay its proceedings because of the existence of ongoing parallel proceedings 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 conflict-of-law clause in a consumer contract, the judges are to verify, ex officio, whether 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 choice-of-law clause is unfair when it misleads the consumer about the scope of the protection he/she is entitled to under art. 6(2) of the Rome I Regulation, securing the protection afforded the consumer by provisions that cannot be derogated from in the case of 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 is to apply ex officio the law of the country of residence of the consumer, instead of the chosen law (Amazon case C- 191/15, para. 70). This conclusion cannot change in cases in which an injunction is sought with regard to the future use of contract terms: indeed, whereas the assessment of fairness 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).

³⁷ According to Art. 17 Reg. no. 44/2001 and Art. 19 Reg. 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 the agreement is not contrary to the law of that Member State.

³⁸ According to Art. 24 Reg. no44/2001 and Art. 26 Reg. 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.