Univerzita Mateja Bela v Banskej Bystrici
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PRÁVNE ROZPRAVY ON-SCREEN

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OBSAH

NEW HORIZONS FOR CONSUMERS' PROTECTION: THE ECJ GOES FASTER THAN THE EU LEGISLATOR

Alessandro Palmieri[1]

Abstract

Consumers in Europe require a high level of protection, especially in times of financial crisis. Although much has been done to address this problem, more efforts are needed. The mechanisms for the safeguard of consumers' interests must evolve to keep pace with the development of unfair practices performed by firms and traders. For many years, the EU legislator has offered a great contribution to the improvement of consumers' economic welfare. But more recently, it seems that the European Court of Justice has taken the lead, not only clarifying the existing rules, but also extending the scope of consumers' protection.

Keywords

Consumers' protection, EU legislation, ECJ, unfair terms, payment services

Introduction

For several decades, the EU has been developing a harmonized consumer law. Although much has been done to safeguard consumers' interests, more efforts are needed to reach an adequate level of protection, especially in times of financial crisis. At first, the protagonist of the advancement of this body of law was undoubtedly the legislator. More recently, however, things seem to have changed. Although the legislator is still producing new statutory rules, and revising the old ones, nowadays the European Court of Justice (ECJ) represents the engine of the evolutionary process in this field[2].

The Consumers Rights Directive: a half-failure

Let's go back to 2011. The main event in the field of consumer law in Europe was the approval of the Consumers Rights Directive (2011/83/EU) [CRD]. But the final text of the CRD, if compared to the proposal, was a half-failure[3]. The initial idea was to draft a small code, gathering the most important rules governing consumers' contracts, and replacing the criterion of minimum harmonization (which permits Member States, under certain conditions,

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[2] On the central role of supranational courts in pursuing the objective of the harmonization of European private law, see P. Gallo, *L'armonizzazione del diritto e il ruolo delle corti*, in P. Gallo, G. Magri, M. Salvadori (eds.), *L'armonizzazione del diritto europeo: il ruolo delle corti*, Ledizioni, Milano, 2017, 130.

[3] According to K. Tonner, *From the Kennedy Message to Full Harmonising Consumer Law Directives: A Retrospect*, in K. Purnhagen, P. Rott (eds.), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz*, Springer, 2014, 703, it was a complete failure, due to the rejection of the idea of full harmonization.

to enact extra protection for consumers beyond that agreed in EU legislation[4]) with the principle of maximum, or full, harmonization (which pre-empts Member States within the scope of application of the EU legislative act).

Indeed, only a much-reduced part of the original proposal was adopted by Parliament and Council. The attempt has been largely unsuccessful, especially considering the fact that CRD did not cover crucial areas such as unfair terms and sale of goods. As the old saying goes, "the mountain gave birth to a mouse". Someone argued that this was a clear sign that consumer law had lost the ability to go further.

This did not mean that in the field at stake the EU legislator's activity stopped. For instance, in 2014 the so-called Mortgage Credit Directive was released (Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property).

Something remarkable happened in 2019, when three important pieces of EU legislation regarding consumers were enacted:

1) the directive on certain aspects concerning contracts for the supply of digital content and digital services (2019/770/EU);
2) the directive on certain aspects concerning contracts for the sale of goods (2019/771/EU);
3) the directive on better enforcement and modernisation of Union consumer protection rules (2019/2161/EU).

EU legislation in consumers' field enacted in 2019: some weaknesses

Are we witnessing a resumption of the legislation for consumers? Someone has observed, commenting directives 2019/770/EU and 2019/771/EU, that "[f]or at least the last two decades this has been the main development in European contract law and consumer contract law"[5]. Well, let me say that, to quote another proverb, "not all that glitter is gold". For instance, the directive about the sale of goods – which indeed does not amount to an 'expansion' of the domain of consumer law, because the same issue was covered by the former directive of 1999 – supports explicitly the goal of full harmonisation, but more realistically it

[4] For many years the existence of a mechanism of subsidiarity, which permitted some Member States to go further, was regarded as desirable, since it allowed for a more dynamic development of consumer policy. See the Opinion rendered on 30 March 1995 by the Economic and Social Committee on the «Single market and consumer protection: opportunities and obstacles» (OJ C 39 of 12 February 1996, p. 55).

[5] J. Morais Carvalho, *Sale of goods and supply of digital content and digital services - overview of directives 2019/770 and 2019/771*, in *Journal of European Consumer and Market Law*, 2019, Volume 8, Issue 5, 194-201.

seems inspired by what has been described as "targeted full harmonisation"[6]. According to this alternative technique, Member States remain "free to adopt legislation in sectors where there is no relevant provision in a European legal instrument, but must not alter provisions of the European legislator"[7]. In other terms, the harmonisation is not complete; some aspects are left to the discretion of the single States. This phenomenon is expressly acknowledged insofar as the place of delivery, or the place where the repair or replacement should take place, are involved; these questions should be left to national law[8]. As an author pointed out in a recent publication, "the new consumer sales directive assessed as contract law legislation is incomplete, and […] total harmonisation has not been possible even for the selected matters regulated by the directive"[9].

Furthermore, although in theory Directives 2019/770/EU and 2019/771/EU are not supposed to overlap in their objective scope of application, there is a risk of possible interference, with respect to goods with digital elements (or "ancillary digital services"[10]).

On its side, Directive 2019/770/EU reveals some gaps: for instance, the contract typology is left within the discretion of the Member States

Directive 2019/2261/EU is rather significant. It looks like a history of success. But it hides another failure. The proposal was part of a larger package, labelled "New Deal for Consumers". The initiative was launched by the Commission in April 2018. The package was composed of two proposals: the other dealt with representative actions for the protection of the collective interests of consumers. The second proposal – which is, in my opinion, more important – has not been approved yet. The work on the "Representative actions" proposal continues in the European Parliament and Council (COMPET Council has agreed on a general approach on 28 November 2019).

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[6] See H.-W. Micklitz, *The Targeted Full Harmonisation Approach: Looking behind the Curtain*, in G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, Sellier European Law Pub, Munich, 2009, 47-86.
[7] K. Tonner, cited supra note 2.
[8] See recital 56.
[9] K. Lilleholt, *A Half-built House? The New Consumer Sales Directive Assessed as Contract Law*, in *Juridica International*, 2019, no. 1, 8.
[10] On this issue, see K. Sein, G. Spindler, *The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1*, in *European Review of Contract Law*, Volume 15, Issue 3, 257.

Towards the leadership of the ECJ: what is going on in the case of unfair terms in consumer contracts?

As it happened in other branches of EU law, he ECJ has taken the lead[11].

On the one hand, it has to be noted that its judgments are decisive for the concrete functioning of consumer legislation, especially in regard to the "horizontal" rules about unfair terms.

One can just think about the legal treatment of mortgage loans indexed to a foreign currency[12]: several requests for a preliminary ruling, concerning the interpretation of the provisions of the Unfair Terms Directive (93/13/EEC) [UTD], have been made by national judges (the majority from Hungary, but also from Poland and Rumania) in the last few years[13]. Focusing on the year 2019, three extremely important decisions were delivered on this specific issue: *Dunai*[14], *GT*[15], and *Dziubak*[16].

Starting with the *Dunai* case, on that circumstance the Court held that: (i) Article 6(1) of UTD must be interpreted as meaning that: (a) it does not preclude national legislation which prevents the court seised of the case from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to the exchange difference, provided that a finding that terms in such an agreement were unfair would restore the legal and factual situation that the consumer would have been in had that unfair term not existed; (b) it precludes national legislation which prevents, in some circumstances, the court seised of the case from granting an application for the cancellation of a loan contract on the basis of the

[11] According to J. Sarrión Esteve, *Consumer*, in A. Bartolini, R. Cippitani, V. Colcelli (eds.), *Dictionary of Statuses within EU Law*, Springer, Cham, 2019, 95-106, the ECJ decisions has consolidated the consumer position in the national judicial process.

[12] On the general picture, see I. Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts*, Hart Publishing, Oxford, 2017.

[13] See I.C. Florea, *The Risks of a Borrowing Agreement in a Foreign Currency from the Perspective of Jurisprudence of the Court of Justice of the European Union*, in *International Conference Education and Creativity for Knowledge-Based Society*, Universitatea Titu Maiorescu, 2017, 83.

[14] ECJ 14 March 2019, case C-118/17 [ECLI:EU:C:2019:207]. For comments on this judgment, see A. Tenenbaum, *Les professionnels et le droit matériel de l'Union européenne: des clauses abusives aux pratiques commerciales déloyales*, in *Revue des contrats*, 2019, 122-126; A. Piekenbrock, *Fremdwährungskredite für Verbraucher: süßes Gift, in Zeitschrift für das Privatrecht der Europäischen Union – GPR*, 2019, n. 4, 176-181; J. Hojnik, *Razveljavitev kreditnih pogodb v tuji valuti zaradi varstva potrošnikov*, in *Davčno-finančna praksa: davki, finance, zavarovalnistvo*, 2019, n. 4, 24-27.

[15] ECJ 5 June 2019, case C-38/17 [ECLI:EU:C:2019:461].

[16] ECJ 3 October 2019, case C-260/18 [ECLI:EU:C:2019:819]. On this judgment, see G. Paisant, *Prêt à la consommation basé sur une devise étrangère et clauses abusives*, in *La Semaine Juridique - édition générale*, 2019, n. 44-45, 1951-1955; J. Hojnik, *Interesi potrošnikov pri hipotekarnih kreditih vezanih na tujo valuto*, in *Davčno-finančna praksa: davki, finance, zavarovalnistvo*, 2019, n. 10, 22-26. The texts (in the Italian version) of the three decisions in *Dunai*, *GT* and *Dziubak* can be found in *Il Foro italiano*, 2020, IV, 22, with comments of A. Palmieri, *Il ruolo trainante della Corte di giustizia nella messa in opera della disciplina sulle clausole abusive. Spunti dal caso «Dziubak» e dintorni*; G. Salvi, *I limiti al potere normativo nazionale in materia di abusività della clausola relativa al rischio di cambio*; A. Iuliani, *La trasparenza consumeristica nell'interpretazione della Corte di giustizia e della dottrina*.

unfair nature of a term relating to exchange rate risk where it is found that that term is unfair and that the contract cannot continue to exist without that term; (ii) UTD, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, does not preclude a Supreme Court of a Member State from adopting, in the interest of ensuring uniform interpretation of the law, binding decisions concerning the modalities for implementing that directive, in so far as those decisions do not prevent the competent court from ensuring the full effect of the norms laid down in that directive and from offering consumers an effective remedy for the protection of the rights that they can derive therefrom, or from referring a question for a preliminary ruling to the ECJ in that regard. In *GT*, another piece (as the previous) of the Hungarian saga, it was ruled that Articles 3(1), 4(2) and 6(1) of UTD are to be interpreted as not precluding the legislation of a Member State, as interpreted by the Supreme Court of that Member State, under which a loan agreement is not invalid if it is denominated in foreign currency and, although it specifies the sum corresponding to that set out in the consumer's application for finance in domestic currency, does not indicate the exchange rate applicable to that sum for the purpose of determining the definitive amount of the loan in foreign currency, but at the same time stipulates, in one of its terms, that that rate will be set by the lender in a separate document after the agreement has been concluded: (A) where that term is in plain intelligible language, within the meaning of Article 4(2) of UTD, in that the mechanism for calculating the total amount lent and the exchange rate applicable are indicated transparently, so that a reasonably well-informed and reasonably observant and circumspect consumer may evaluate, on the basis of clear, intelligible criteria, the economic consequences for him of entering into the agreement, including, in particular, the total cost of the loan, or, if it is apparent that the term is not in plain intelligible language; (B) where that term is not unfair, within the meaning of Article 3(1) of UTD, or, if it is unfair, the agreement concerned is capable of continuing in existence without the unfair term, in accordance with Article 6(1) of UTD.

Finally, in *Dziubak* four preliminary questions were answered: (1) Article 6(1) of UTD on unfair terms in consumer contracts must be interpreted as not precluding a national court, after finding that certain terms of a loan agreement indexed to a foreign currency and subject to an interest rate directly linked to the interbank rate of the currency concerned are unfair, from taking the view, in accordance with its domestic law, that that contract cannot continue in existence without those terms because the effect of their removal would be to alter the nature of the main subject matter of the contract; (2) Article 6(1) of UTD must be interpreted as meaning that, first, the consequences for the consumer of a contract being annulled in its

entirety, as referred to in the judgment of 30 April 2014, *Kásler and Káslerné Rábai* [17], must be assessed in the light of the existing or foreseeable circumstances at the time when the dispute arose, and that, second, for the purposes of that assessment, the wishes expressed by the consumer in that regard are the decisive factor; (3) Article 6(1) of UTD must be interpreted as precluding gaps in a contract caused by the removal of the unfair terms contained in that contract from being filled solely on the basis of national provisions of a general nature which provide that the effects expressed in a legal transaction are to be supplemented, inter alia, by the effects arising from the principle of equity or from established customs, which are neither supplementary provisions nor provisions applicable where the parties to the contract so agree; (4) Article 6(1) of UTD must be interpreted as precluding unfair terms contained in a contract from being upheld where their removal would entail that contract being annulled and the court takes the view that that annulment would give rise to unfavourable effects for the consumer, if the latter has not consented to them being upheld.

A foreign currency mortgage loan agreement was involved also in the national proceedings where the Budapest High Court referred to the ECJ the questions that were answered with the *Lintner* judgment of 11 March 2020[18]. On this occasion the Court provided clarifications regarding the limits of the judge's power in assessing the unfair nature of certain terms in the aforesaid agreement. According to the ECJ: (I) Article 6(1) of UTD must be interpreted as meaning that a national court, hearing an action brought by a consumer seeking to establish the unfair nature of certain terms in a contract that that consumer concluded with a professional, is not required to examine of its own motion and individually all the other contractual terms, which were not challenged by that consumer, in order to ascertain whether they can be considered unfair, but must examine only those terms which are connected to the subject matter of the dispute, as delimited by the parties, where that court has available to it the legal and factual elements necessary for that task, as supplemented, where necessary, by measures of inquiry; (II) Article 4(1) and Article 6(1) of UTD must be interpreted as meaning that, while all the other terms of the contract concluded between a professional and that consumer should be taken into consideration in order to assess whether the contractual term forming the basis of a consumer's claim is unfair, taking such terms into account does not entail, as such, an obligation on the national court hearing the case to examine of its own motion whether all those terms are unfair.

[17] ECLI:EU:C:2014:282.
[18] ECLI:EU:C:2020:188

And talking about mortgage loan agreements with a variable interest rate, one has to mention the judgment of 3 March 2020 in the case *Gómez del Moral Guasch*[19], where the Court held – among the others – that Article 6(1) and Article 7(1) of UTD must be interpreted as not precluding the national court, where an unfair contractual term setting a reference index for calculating the variable interest of a loan is null and void, from replacing that index with a statutory index applicable in the absence of an agreement to the contrary between the parties to the contract, in so far as the mortgage loan agreement in question is not capable of continuing in existence if the unfair term is removed and annulment of that agreement in its entirety would expose the consumer to particularly unfavourable consequences.

In these subdivisions of consumer law (but probably in the entire realm of consumer law), the ECJ is becoming the real decision-maker, influencing national judges more than the text of UTD, and even more than the legislation of the Member States.

Let me refer, as an illustration, to the Italian case law regarding the personal guarantees made on behalf of a third-party by a natural person who is not a professional.

The problem concerns the situation where the said person acts as a guarantor on behalf of a professional (for instance, a company). Is she acting as a consumer, or not?

Until 2016, the Italian Supreme Court repeatedly said that, in situation like the ones described, the guarantor could not be considered as a consumer.

The precedent has been overruled in 2018. Why? In the past, the Italian Supreme Court used to take inspiration from a judgment delivered by the ECJ in 1998 (*Dietzinger* case)[20]. But in an order of 2015 (*Tarcău* case)[21], the ECJ changed its mind and held that it all depends on the existence, or not, of a functional link between the guarantor and the professional activity exercised by the person in respect of which the first one acts (for

[19] ECLI:EU:C:2020:138.

[20] ECJ 17 March 1998 [ECLI:EU:C:1998:111]. For further information about this judgment, see K. Troch, *Protection en droit européen de la caution dans le cadre des contrats de cautionnement conclus en dehors de l'entreprise du banquier: To be or not to be?*, in *Euredia*, 1999, 249-253; J. Breslin, *The Impact of European Law on the Enforceability of Bank Security Documents*, in *The Bar Review*, 1999, Vol. 4, 291-292; M. Granieri, *Natura accessoria della fideiussione nei contratti conclusi fuori dei locali commerciali*, in *Il Corriere giuridico*, 1998, 771-773; A. Tucci, *Contratti negoziati fuori da locali commerciali e accessorietà della fideiussione*, in *Banca, borsa e titoli di credito*, 1999, II, 132-140.

[21] ECJ 19 November 2015 [ECLI:EU:C:2015:772]. Regarding this judgment, see E. Terryn, *'Consumers, by Definition, Include Us All' . . . But Not for Every Transaction*, in *European Review of Private Law / Revue européenne de droit privé / Europäische Zeitschrift für Privatrecht*, 2016, 271-286; A. Zurimendi Isla, *Los contratos de garantia entre particulares y entidades de crédito siguen siendo relaciones de consumo aunque los créditos garantizados no lo sean. Auto del TJ (Sala Sexta), de 19 de noviembre de 2015 (asunto C-74/15). Aplicabilidad de la Directiva 93/13/CEE, sobre protección de los consumidores, a los contratos de garantía suscritos por personas físicas que actúan con propósito ajeno a su actividad profesional y que carecen de vínculos funcionales con la sociedad mercantil de la que se constituyen en garantes*, in *Revista Aranzadi Unión Europea*, 2016, nº 6, 99-107.

instance, he is a director of the company; he holds a non-negligible amount of shares of the said company).

The subsequent judgments of the Italian Supreme Court on the same matter (in 2018 and in January of 2020) followed this new approach to the problem.

Th ECJ is expanding the scope of consumers' protection: safeguarding the consumer as payer for services provided via a website

On the other hand, one may argue that, in a certain way, Luxembourg judges expanded the protection to unchartered areas, considering pre-existing provisions devoted to solving different problems as useful tools for the benefit of consumers.

Let's focus on the recent case-law.

In the *Verein für Konsumenteninformation* case (decided in 2019)[22], ECJ was asked to clarify rules related to technical and business requirements for credit transfers and direct debits, set out by Regulation 260 of 2018.

The ECJ provided a favourable interpretation for consumers: it imposed a ban on discrimination between different classes of purchasers.

It is useful to give a short description of the case. The main German railway operator offers consumers the possibility to book international train journeys on its website. Bookings made on Deutsche Bahn's website may be paid for by credit card, via PayPal, by credit transfer or under the SEPA direct debit scheme. However, according to that clause, payment by SEPA direct debit is only accepted subject to the observance of several conditions; one or them requires that the payer has a place of residence in Germany.

The direct debit payment method is deemed to be consumer-friendly in the framework of e-commerce. With SEPA direct debits, the merchant bears the risk of the customer's solvency and willingness to pay, since it usually fulfils its obligation to deliver or supply before receiving the purchase price.

In order to have the said limitation declared illegal, a consumers' association brought an action for an injunction before the Commercial Court of Wien, which referred the case to the ECJ. The relevant provision was art. 9, par. 2, of the Regulation 260 of 2018: "A payee [accepting a credit transfer or] using a direct debit to collect funds from a payer holding a

[22] ECJ 5 September 2019 [ECLI:EU:C:2019:673]. On this judgment see S. Ernst, *Online-Zahlungssystem der Deutschen Bahn unionsrechtswidrig ("Verein für Konsumenteninformation")*, in *Entscheidungen zum Wirtschaftsrecht*, 2019, 709-710.

payment account located within the Union shall not specify the Member State in which that payment account is to be located, provided that the payment account is reachable".

Is there any connection with the place of residence of the payer?

The ECJ observed that usually consumers have a payment account in the Member State in which they are resident.

The aforementioned condition therefore indirectly indicates the Member State in which the payment account must be located, thus producing effects comparable to those resulting from such an indication of a specific Member State.

Will this judgement lead – as some commentators observed – to the rejection of the direct debit payment method for the merchant's customers? There could be such a danger. However, the benefits seem to overcome the odds. Since consumers in the digital environment combine the roles of buyers (often characterized as users or licensees) and payers, strengthening the position of the payers will highly likely result in an overall enhancement of the digital consumers' economic welfare.

Conclusion

Unquestionably the ECJ has played – and it is still playing – an active role in improving the conditions of consumers in Europe. But, in the absence of a synergy between the decision makers, its efforts are limited and risk to be vain. Sometimes the lack of clarity in legislative instruments cannot be corrected in courts[23].

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[23] See, with respect to Directives 2019/770/EU and 2019/771/EU, A. Savin, *Harmonising Private Law in Cyberspace: The New Directives in the Digital Single Market Context*, Copenhagen Business School, CBS LAW Research Paper, No. 19-35, 18.

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