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CASEBOOK

EFFECTIVE CONSUMER PROTECTION AND FUNDAMENTAL RIGHTS

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Appendix: The status of 'consumer' and its boundaries

In light of the principles of equivalence, of effectiveness and proportionality, and of Article 47 CFR, could the notion of consumer be interpreted extensively so as to expand the scope of effective consumer protection? Could, in light of the principles of equivalence, of effectiveness and proportionality, and of Article 47 CFR, provisions not mentioning the consumer be interpreted as protecting consumers' interests? With what consequences?

The notion of 'consumer'

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

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 Another approach is taken in Regulation No 864/2007/EC and Regulation No 1215/2012/EU, which repealed Regulation No 2001/44: these Regulations not define the notion of consumer but use it in their texts.

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

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

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

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

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

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

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

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

– the relationship between different definitions and sets of rules.

The interpretation in borderline cases of the definition of a 'consumer'

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

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

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

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

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

The consumer/professional distinction in the online context

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

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

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

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

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

The restriction of the notion of 'consumer' to natural persons

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

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

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

Different definitions and sets of rules. Toward a consumer that is also a 'client' or 'passenger' or 'data subject'?

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

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

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

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

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

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

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

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

[1] New version: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_14600_2019_INIT&from=IT

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

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

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

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

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