FRICoRe

Judicial Training Project

Fundamental Rights In Courts and Regulation

# CASEBOOK

## EFFECTIVE CONSUMER PROTECTION AND FUNDAMENTAL RIGHTS

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

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

## 1.1. Consumer status.

**Relevant CJEU case**

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

*Main questions addressed*

Question 1 In light of the principle of effectiveness in consumer protection, shall a judge *ex officio* ascertain the status of the parties in order to conclude whether consumer law is applicable to the case, even though the consumer has not herself/himself made clear her/his status when filing the claim or in her/his defence?

Question 2 If so, shall the judge make this assessment on the basis of the available documents, or shall the judge make investigations or require additional elements from the parties?

*Relevant legal sources*

**EU level**

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

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

Directive 1999/44/EC (Consumer Sales Directive)

Article 1(1). Scope and definitions

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

**National legal sources (Netherlands)**

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

Article 7:5 Consumer sale agreements

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

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

"14. Pursuant to Articles 23 and 24 of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, 'the Rv'), the Court may rule only on the claims of the parties and must confine itself to the legal matters on which the claim, application or defence are based.

15. In appeal proceedings, the court dealing with those proceedings may rule only on the complaints which were put forward by the parties in the first claims lodged on appeal. The court hearing the appeal must, however, apply of its own motion the relevant provisions of public policy, even if such provisions have not been invoked by the parties.

16. However, under Article 22 of the Rv, 'the court may in all circumstances and at each stage of the procedure ask either or both of the parties to explain certain claims or to provide certain documents relating to the case'."

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

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

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

*The case*

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

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

*Preliminary questions referred to the CJEU:*

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

"(1) Is the national court, either on the grounds of the principle of effectiveness, or on the grounds of the high level of consumer protection within the [European] Union sought by Directive 1999/44, or on the grounds of other provisions or norms of European law, obliged to investigate of its own motion whether, in relation to a contract, the purchaser is (a) consumer within the meaning of Article 1(2)(a) of Directive 1999/44?

(2) If the answer to the first question is in the affirmative, does the same hold true if the case file contains no (or insufficient or contradictory) information to enable the status of the purchaser to be determined?

(3) If the answer to the first question is in the affirmative, does the same hold true in appeal proceedings, where the purchaser has not raised any complaint against the judgment of the court of first instance, to the extent that in that judgment that assessment (of its own motion) was not carried out, and the question of whether the purchaser may be deemed to be a consumer was expressly left open? […]

(7) Does the fact that Ms Faber has been assisted by a lawyer in both instances in these proceedings still play a role when answering the foregoing questions?"

*Reasoning of the CJEU:*

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

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

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

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

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

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

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

*Conclusion of the CJEU:*

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

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

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

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

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

*Impact on the follow-up case*

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

*Elements of judicial dialogue:*

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

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

**Italy**

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

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

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

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

**Poland**

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

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

**Slovenia**

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

### 1.2. Declaration of contract terms' unfairness.

**Relevant CJEU cases in this cluster**

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

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

*Main questions addressed*

Question 1 Given the right to an effective consumer protection, the principle of effectiveness, and article 47, CFREU, shall a court declare a consumer contract term unfair of its own motion, even though the consumer has not alleged the term's unfairness in this respect?

a. Given the principle of effective consumer protection, shall a court also conduct an *ex officio* investigation in order to ascertain whether a contract term is unfair?

b. Shall an appeal court declare a consumer contract term unfair even though the consumer has not raised an objection in this regard either in first instance or in appeal?

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

   a. payment order by a court

   b. by an arbitration court

   c. by a non-judicial body

   d. mortgage enforcement procedure

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

Question 2 If and when such a duty exists, given the right to a fair trial (Article 47, CFREU), shall a judge enable the parties to present their views on a contractual term's unfairness and even oppose the declaration of a term as non-binding?

Question 3 Is the judge liable for not declare of his/her own motion? the unfairness of the contractual clause in consumer contracts? What is the scope of the duty of the court to declare a consumer contract term unfair of its own motion? Is there a difference between the duties of first instance judges and those of courts of appeal?

*Relevant legal sources*

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

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

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

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

Article 6(1), Unfair Terms Directive

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

Article 7(1), Unfair Terms Directive

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

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

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

*The case(s)*

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

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

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

In the cases examined here, the issue concerned:

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

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

*Preliminary question referred to the CJEU:*

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

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

1. Can Article 6(1) of Directive [93/13] – pursuant to which Member States are to provide that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer – be construed as meaning that the non-binding nature vis-à-vis the consumer of an unfair term introduced by the seller or supplier does not have effect *ipso jure* but only when the consumer successfully contests the unfair term by lodging the relevant application?

2. Does the consumer protection provided by Directive [93/13] **require** the national court of its own motion – irrespective of the type of proceedings in question and of whether or not they are contentious – to determine that the contract before it contains unfair terms, even when no application has been lodged, thereby carrying out, of its own motion, a review of the terms introduced by the seller or supplier in the context of exercising control over its own jurisdiction?

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

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

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

*Reasoning of the CJEU:*

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

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

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

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

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

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

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

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

*Conclusion of the CJEU:*

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

1. Article 6(1) of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand.

2. The national court is required to examine, of its own motion, the unfairness of a contractual term when it has available the legal and factual elements necessary for that task. Where it considers a term to be unfair, it must not apply it, except if the consumer opposes that non-application. This duty is also incumbent upon the national court when it is ascertaining its own territorial jurisdiction.

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

*Elements of judicial dialogue:*

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

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

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

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

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

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

**Finland**

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

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

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

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

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

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

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

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

**France**

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

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

**Italy**

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

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

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

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

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

**The Netherlands**

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

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

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

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

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

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

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

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

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

**Poland**

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

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

**Portugal**

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

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

**Romania**

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

**Slovenia**

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

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

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

*The case*

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

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

*Preliminary question referred to the CJEU*

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

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

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

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

*Reasoning of the CJEU:*

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

*Conclusion of the CJEU:*

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

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

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

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

*Elements of judicial dialogue:*

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

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

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

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

**Poland**

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

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

**Portugal**

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

**The Netherlands**

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

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

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

*The case(s)*

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

*Preliminary question referred to the CJEU*

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

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

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

*Reasoning of the CJEU:*

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

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

*Conclusion of the CJEU:*

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

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

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

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

*Elements of judicial dialogue:*

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

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

**Italy**

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

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

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

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

**The Netherlands**

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

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

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

**Poland**

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

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

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

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

**Slovenia**

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

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

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

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

*The case*

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

*Preliminary questions referred to the CJEU:*

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

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

*Reasoning of the CJEU:*

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

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

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

*Conclusions of the Court*

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

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

*Elements of judicial dialogue*

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

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

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

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

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

i. payment order by a court

ii. by a non-judicial body

iii. by an arbitration court

iv. mortgage enforcement procedure

*The case(s)*

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

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

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

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

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

*Preliminary questions referred to the CJEU:*

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

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

*a. Payment order issued by a court*

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

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

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

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

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

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

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

As explained in the judgment,

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

Therefore, the referring court raised the following issues:

(1) Must Directive [93/13] be interpreted as precluding national legislation such as that currently governing the Spanish order for payment procedure (Articles 815 and 816 [of the] LEC), which does not mandatorily provide for either the examination of unfair terms or the intervention of the court, except when the *Secretario judicial* considers it expedient or the debtors lodge an objection, because that legislation hinders or prevents examination by the courts of their own motion of contracts which may contain unfair terms?

(2) Must Directive [93/13] be interpreted as precluding national legislation, such as the Spanish law that does not permit a court to consider, of its own motion and *[in] limine litis*, during subsequent enforcement proceedings [relating to] an enforceable instrument (a reasoned decision issued by the *Secretario judicial* bringing the order for payment procedure to a close), whether the contract giving rise to the reasoned decision whose enforcement is sought contained unfair terms, because under national law the matter is *res judicata* (Articles 551 and 552 in conjunction with Article 816(2) of the LEC)?

(3) Must the [Charter] be interpreted as precluding national legislation, such as that relating to the order for payment procedure and the procedure for the enforcement of judicial instruments, that does not provide for review by the court in every case during the declaratory stages of proceedings and does not permit the court at the enforcement stage to reconsider the reasoned decisions previously taken by the *Secretario judicial*?

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

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

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

*c. Payment order issued by an arbitration court*

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

This is the question referred to the CJEU:

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

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

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

These are the relevant questions referred to the CJEU:

(1)Is it contrary to [Article 3(1) and (2) to Article 6(1) and Article 7(1) of Directive 93/13] and the objectives of that directive for national legislation which establishes a procedure like that of Article 250(1)(7) [of the Code of Civil Procedure], requiring the national court to give a ruling that orders the dwelling subject to enforcement to be handed over to the person who acquired it in extrajudicial enforcement proceedings, in which, under the current regime contained in Article 129 of the Law on Mortgages … and Articles 234 to 236-o of the [Mortgage Regulation] …, there could be no review *ex officio* of unfair terms and the debtor could not raise an effective objection on those grounds, either in the extrajudicial enforcement procedure or in separate legal proceedings?

(3) Are the abovementioned provisions of Directive [93/13], the objective it pursues and the obligation it imposes on national courts to examine of their own motion the existence of unfair terms in consumer contracts without the consumer having to request it to be interpreted as allowing the national court, in proceedings such as that established in Article 250(1)(7) [of the Code of Civil Procedure] or in the "extrajudicial sale"

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

*Reasoning of the CJEU:*

*a. Payment order issued by a court*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*c. Payment order issued by an arbitral tribunal*

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

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

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

Indeed,

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

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

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

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

*<u>d. Mortgage enforcement procedure and proceeding initiated by the successful bidder of an auction</u>*

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

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

*<u>Conclusion of the CJEU:</u>*

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

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

*a. Payment order issued by a court*

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

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

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

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

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

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

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

*c. Payment order issued by an arbitral tribunal*

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

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

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

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

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

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

*Elements of judicial dialogue:*

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

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

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

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

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

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

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

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

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

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

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

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

**The Netherlands**

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

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

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

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

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

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

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

**Poland**

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

**Estonia**

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

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

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

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

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

*c. Payment order issued by an arbitration court*

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

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

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

[2] The relevant provisions of the Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik*) read as follows:
**Article 718 - Validity of arbitral agreement**
"(1) The object of an arbitral agreement may be a proprietary claim. An arbitral agreement concerning a non-proprietary claim is valid only if the parties are able to reach a compromise concerning the object of the dispute.
(2) An arbitral agreement shall be null and void if its object is:
1) a dispute concerning the validity or cancellation of a residential lease contract, and vacating a dwelling located in Estonia;
2) a dispute concerning the termination of an employment contract;
3) *a dispute arising from a consumer credit contract* [entry into force 01.07.2015]
… "

[3] **Article 718[1] - Agreement in arbitration proceeding with consumer**
"(1) An agreement in an arbitration proceeding shall not be entered into before a claim falls due if one of the parties to the agreement is a consumer.
(2) Before entering into an agreement in an arbitration proceeding, a consumer is presented with information about differences between judicial and arbitration proceedings in a format which can be reproduced in writing. Among others, the following information shall be presented to the consumer:
1) the procedure for forming an arbitral tribunal, the principles of conducting arbitration proceedings and the applicable rules, including the presumption provided in subsection 732 (2) of this Code;
2) the procedure for contesting a decision of an arbitral tribunal as well as information that upon reviewing an appeal against a decision of an arbitral tribunal the court does not examine lawfulness of adjudication of the dispute on the merits;
3) the provisions contained in subsections 753 (1) and (1[1]) of this Code as well as information that a decision of an arbitral tribunal that has been declared enforceable has the same effect as a court decision in enforcement proceedings.
(3) If a consumer is a party to an arbitration proceeding, the residence or place of work of the consumer at least to the accuracy of the county is agreed on as the place of the arbitration proceeding.
(4) If a consumer is a party to an agreement in the arbitration proceeding, such agreement shall be set out in a document bearing the hand-written or digital signature of the consumer.
(5) If the requirements provided in subsections (1)–(4) of this section were violated upon entry into an agreement in the arbitration proceeding with a consumer, the agreement is void.
(6) If, at the time of entry into an agreement in the arbitration proceeding, the residence or place of work of the consumer was not in the place of the arbitration proceeding indicated in such agreement or if an agreement in the arbitration proceeding is not set out in a document bearing the hand-written or digital signature of the consumer, the agreement is valid if the consumer himself or herself relies thereon."

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

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

*The case(s)*

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

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

*Preliminary question referred to the CJEU*

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

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

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

*Reasoning of the CJEU*

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

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

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

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

*Conclusion of the CJEU:*

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

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

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

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

*Elements of judicial dialogue:*

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

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

**Italy**

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

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

- as a consequence, once the decision becomes *res judicata*, the issue of the invalidity of that contract may not be brought before a court on different grounds; the opposite solution would hamper the functioning of the process and the stability of decisions (see paragraph 6.14);

*(ii)* when the claimant invokes a **partial nullity** (i.e. with respect to a 'separable' clause), the judge has the power/duty to ascertain the nullity of the entire contract (and reject the claim for partial nullity); vice versa, when the claimant invokes a total nullity, the judge shall ascertain the partial nullity if she/he believes that it exists (and then reject the total nullity). However, due to the different scopes of partial v. total nullity, the judicial ascertainment – if it divergent from the claimant's request – may not constitute *res judicata* (see paragraphs 6.16, 6.17).

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

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

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

**Spain**

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

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

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

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

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

**The Netherlands**

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

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

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

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

*The case*

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

*Preliminary question referred to the CJEU:*

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

1. Are the procedures of a national court consistent with Article 7(1) of [the Directive] if, when a contract term is held to be unfair, and the parties did not submit a claim to that effect, the court informs them that it holds sentence 4 of clause 29 of the standard contract terms of the loan agreement between the parties to the proceedings to be invalid? That invalidity arises from breach of the legislation, namely Paragraphs 1(1I) and 2(j) of Government Decree No 18/1999 …

2. In the circumstances of the first question, is it permissible for the court to direct the parties to the proceedings to make a statement in relation to the contract term in question, so that the legal implications of any unfairness may be established and so that the aims expressed in Article 6(1) of [the Directive] may be achieved?

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

*Reasoning of the CJEU:*

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

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

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

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

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

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

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

*Conclusion of the CJEU:*

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

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

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

*Elements of judicial dialogue:*

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

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

**Italy**

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

**Poland**

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

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

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

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

**Slovenia**

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

## 1.3. Judge liability

### 1.3.1. Question 3 – Judge liability

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

**Relevant CJEU case**

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

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

*Relevant legal sources*

**EU level**

Article 3 of Directive 93/13/EEC

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

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

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

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

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

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

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

*The case*

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

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

*Preliminary questions referred to the CJEU*

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

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

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

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

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

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

*Reasoning of the CJEU*

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

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

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

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

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

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

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

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

*Conclusion of the CJEU*

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

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

*Elements of judicial dialogue*

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

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

**Portugal**

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

### 1.4. Information, transparency and other violations

**Relevant CJEU cases**

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

*Main questions addressed*

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

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

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

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

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

*Relevant legal sources*

**EU level**

Directive 93/13

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

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

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

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

Article 6(1) of that Directive

Article 7 of the Directive:

Directive 2008/48

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

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

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

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

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

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

<u>Article 22 of Directive 2008/48,</u> entitled 'Harmonisation and imperative nature of this Directive', states in paragraph 2:

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

<u>Article 23 of the directive</u>, entitled 'Penalties', provides as follows:

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

**National legal sources**

Insolvency proceedings

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

Consumer protection legislation

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

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

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

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

*The case*

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

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

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

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

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

*Preliminary questions referred to the CJEU*

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

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

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

*Reasoning of the CJEU*

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

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

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

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

*Conclusion of the CJEU*

"2. **Article 10(2) of Directive 2008/48/EC** of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC

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

*Impact on the follow-up case*

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

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

*Elements of judicial dialogue*

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

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

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

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

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

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

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

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

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

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

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

- a contract cannot be declared invalid solely on the ground that it contains terms that are contrary to the general prohibition of unfair commercial practices laid down in Article 5(1) of Directive 2005/29;

- Directive 1993/13 clearly provides, in Art. 6(1) thereof, that unfair terms are not to be binding on the consumer, and that because that mandatory provision aims to replace the formal balance

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

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

**The Netherlands**

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

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

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

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

*Relevant legal sources*

**EU level**

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

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

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

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

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

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

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

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

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

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

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

…

5. The consumer may require an appropriate reduction of the price or have the contract rescinded: — if the consumer is entitled to neither repair nor replacement, or

— if the seller has not completed the remedy within a reasonable time, or

— if the seller has not completed the remedy without significant inconvenience to the consumer.

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

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

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

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

"Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive …"

**National legal sources**

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

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

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

Article 5.1 of Law 23/2003 provides:

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

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

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

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

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

Article 218.1 of the Code of Civil Procedure provides:

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

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

Article 400 of the Code of Civil Procedure states:

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

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

Article 412.1 of the Code of Civil Procedure provides:

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

*The case*

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

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

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

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

*Preliminary questions referred to the CJEU*

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

*Reasoning of the CJEU*

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

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

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

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

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

*Conclusion of the CJEU*

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

*Impact on the follow-up case*

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

*Elements of judicial dialogue*

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

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

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

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

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

*Consumer status*

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

*Declaration of unfair contractual terms*

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

*The duty of the judge to investigate*

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

*Judge's liability*

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

*Information and transparency violations*

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

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

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

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

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