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Fundamental Rights In Courts and Regulation

CASEBOOK

EFFECTIVE CONSUMER PROTECTION AND FUNDAMENTAL RIGHTS

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Effective Consumer Protection and Fundamental Rights

Edited by Paola Iamiceli, Fabrizio Cafaggi and Mireia Artigot i Golobardes

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Scientific Coordinator of the FRICoRe Project:

Paola Iamiceli

Coordinator of the team of legal experts on Effective Consumer Protection:

Paola Iamiceli; Fabrizio Cafaggi

Project Manager:

Chiara Patera

Co-editors and co-authors of this Casebook:

Co-editors: Paola Iamiceli (Project Coordinator), Fabrizio Cafaggi and Mireia Artigot i Golobardes
Introduction: Fabrizio Cafaggi and Paola Iamiceli
Appendix: The Status of consumer: Chiara Angiolini
Ch. 1: Chiara Angiolini, Paola Iamiceli and Charlotte Pavillon
Ch. 2: Kati Cseres and Gianmatteo Sabatino
Ch. 3: Mateusz Grochowski, Chiara Patera and Federico Pistelli
Ch. 4: Chiara Angiolini, Sébastien Fassiaux and Cèlia Roig
Ch. 5: Chiara Angiolini, Charlotte Pavillon and Paola Iamiceli
Ch. 6: Chiara Angiolini and Paola Iamiceli
Ch. 7: Sandrine Clavel and Fabienne Jault-Seseke
Ch. 8: Mireia Artigot, Fernando Gómez and Sébastien Fassiaux
Ch. 9: Chiara Angiolini and Sébastien Fassiaux
Ch. 10: Tomàs Garcia-Micó, Carlos Gómez, Rosa Milà and Sonia Ramos

Note on national experts and collaborators:

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José Mª Blanco Saralegui
Aurelia Colombi Ciacchi
Silvia Ciacchi
Marta Fernandez De Frutos
Maud Lagelée Heymann
Federica De Gottardo
Ksenija Dimec
Rossana Ducato
Giuseppe Fiengo
Stéphanie Gargoullaud
Ilaria Gentile
Petri Helander
Thomas Horvath
Mareike Hoffmann
Pamela Ilieva
Monika Jozon
Meeli Kaur
Sil Van Kordelaan
Madalina Moraru
Viola Nobili
Michal Notovny
Sandra Passinhas
Charlotte Pavillon
Tobias Nowak
Valentina Rustja
José Mª Fernández Seijo
Markus Thoma

Table of contents

5. Effective, proportionate and dissuasive remedies.

This chapter analyses the influence on consumers' remedies of general principles of EU law and of the Charter of Fundamental Rights of the European Union. This matter is particularly topical, considering the approach of the *New Deal for Consumers* (COM/2018/0183 final), according to which "*effective enforcement is a top priority*" of the European Commission. The focus will be on private enforcement and, more particularly, on individual redress, whereas the impact of the Charter on administrative enforcement and collective redress has been examined respectively in Chapters 3 and 4 of this Casebook.

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

Relevant CJEU cases in this cluster

- Judgement of the Court (First Chamber) of 14 June 2012, *Banco Español de Crédito SA v Joaquín Calderón Camino*, Case C-618/10 ("**Banco Español de Crédito**")
- Judgement of the Court (First Chamber) of 30 May 2013, *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, Case C-488/11 ("**Asbeek**") - link to the database for the analysis of the lifecycle of the case
- Judgement of the Court (Fourth Chamber) of 30 April 2014, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, Case C-26/13 ("**Kásler**")
- Judgement of the Court (First Chamber) of 21 January 2015, *Unicaja Banco, SA v José Hidalgo Rueda et al.* (C-482/13), and *Caixabank SA v Manuel María Rueda Ledesma* (C-484/13) et al., Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13, ("**Unicaja**")
- Judgement of the Court (Third Chamber) of 14 March 2019, *Zsuzsanna Dunai v ERSTE Bank Hungary Zrt.* Case C-118/17 ("**Dunai**")
- Judegment of the Court (Grand Chamber) of 26 March 2019 *Abanca Corporación Bancaria SA v Alberto García Salamanca Santos* (C-70/17) and *Bankia SA v Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez* (C-179/17), Joined Cases C-70/17 and C-179/17 ("**Abanca**")
- Judgement of the Court (Third Chamber) of 3 October 2019, *Kamil Dziubak and Justyna Dziubak v Raiffeisen Bank International AG, prowadzący działalność w Polsce w formie oddziału pod nazwą Raiffeisen Bank International AG Oddział w Polsce, anciennement Raiffeisen Bank Polska SA*, Case C-260/18 ("**Dziubak**")
- Judgement of the Court (Fifth Chamber) of 7 November 2019, *Nationale Maatschappij der Belgische Spoorwegen (NMBS) v Mbutuku Kanyeba and Others*, Joined Cases C-349/18 to C-351/18 ("**Kanyeba**")
- Judgement of the Court (Fourth Chamber) 9 July 2020, XZ v Ibercaja Banco, Case C-452/18, ("**Ibercaja Banco**")

- Judgement of the Court (First Chamber) of 27 January 2021, *Dexia Nederland BV v XXX and Z.*, Joined Cases C-229/19 and C-289/19 ("**Dexia Nederland**")
- Judgement of the Court (Seventh Chamber) of 29 April 2021, *IW, RW v Bank BPH SA.*, Case C-19/20 ("**Bank BPH**")

Within this cluster, the main case presented as a reference point for the judicial dialogue within the CJEU and between EU and national courts is the *Kásler* case (C-26/13)**.**

Main questions addressed:

Question 1 Must Article 6(1) of Directive 93/13 be interpreted as meaning that it precludes a national law which authorizes the national court to remedy the invalidity of an unfair term by substituting a supplementary provision of national law in a situation in which a contract concluded between a seller or supplier and a consumer may not continue to exist after the deletion of the unfair term?

5.1.1. Question 1 – Substitution of unfair terms

Must Article 6(1) of Directive 93/13 be interpreted as meaning that it precludes a national law which authorizes the national court to remedy the invalidity of an unfair term by substituting a supplementary provision of national law in a situation in which a contract concluded between a seller or supplier and a consumer may not continue to exist after the deletion of the unfair term?

Legal sources

EU level:

Article 6(1) of Directive 93/13:

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

Article 7(1) of Directive 93/13:

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

Article 8b of Directive 1993/13 as modified by Directive 2019/2161 on the better enforcement and modernisation of Union consumer protection rules, approved by the EU Parliament and the Council.

> "1. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

2. Member States may restrict such penalties to situations where the contractual terms are expressly defined as unfair in all circumstances in national law or where a seller or supplier continues to use contractual terms that have been found to be unfair in a final decision taken in accordance with Article 7(2).

3. Member States shall ensure that the following non-exhaustive and indicative criteria are taken into account for the imposition of penalties, where appropriate:

(a)the nature, gravity, scale and duration of the infringement;

(b) any action taken by the seller or supplier to mitigate or remedy the damage suffered by consumers;

(c) any previous infringements by the seller or supplier.

(d) the financial benefits gained or losses avoided by the seller or supplier due to the infringement, if the relevant data are available.

(e) penalties imposed on the seller or supplier for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council (*1);

(f) any other aggravating or mitigating factors applicable to the circumstances of the case.

4. Without prejudice to paragraph 2 of this Article, Member States shall ensure that, when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4 % of the seller's or supplier's annual turnover in the Member State or Member States concerned.

5. For cases where a fine is to be imposed in accordance with paragraph 4, but information on the seller's or supplier's annual turnover is not available, Member States shall introduce the possibility to impose fines, the maximum amount of which shall be at least EUR 2 million.

6. Member States shall, by 28 November 2021, notify the Commission of the rules and measures referred to in paragraph 1 and shall notify it, without delay, of any subsequent amendment affecting them."

National level:

Section 237 of the Hungarian Civil Code:

"1. In the event of ineffectiveness of the contract, the situation existing before it was entered into must be restored.

2. If it is impossible to restore the situation existing before the conclusion of the contract, the court may declare the contract applicable until it has adjudicated. An ineffective contract may be declared valid if it is possible to eliminate the cause of ineffectiveness, particularly in the case of disproportion between the performances required of each party in a usurious contract, by eliminating the disproportionate advantage. In such cases, it will be necessary to order the restitution of any performance outstanding, if need be without consideration".

Section 239 of the Hungarian Civil Code:

"1. In the event of partial ineffectiveness of the contract, the contract will fail in its entirety only if the contracting parties would not have concluded it without the ineffective part. Provisions to the contrary may be laid down by legislation.

2. In the event of partial ineffectiveness of a contract concluded with a consumer, the contract shall fail in its entirety only if it is impossible to perform it without the ineffective part".

Section 239/A(1) of the Hungarian Civil Code:

"The parties may institute proceedings seeking a declaration of ineffectiveness of the contract or of any term of the contract (partial ineffectiveness) without having at the same time to request application of the consequences of the ineffectiveness".

The case

On 29 May 2008, two Hungarian borrowers concluded an agreement for a mortgage loan to the amount of 14,400,000 HUF, denominated in foreign currency and secured by a guarantee *in rem* (mortgage). Under clause I/1, the amount of the loan in foreign currency advanced to the borrowers was to be determined at the buying rate for the foreign currency applied by the bank on the date of transfer of the loan, whereas the interest, administration fee, default interest rate, and other charges would be determined in the foregoing currency. Accordingly, the loan amount was fixed at 94240.84 Swiss francs (CHF). The borrowers were to repay this amount over 25 years, in monthly instalments. Under clause III/2, the lender was to determine the amount in HUF of each monthly instalment by reference to the selling rate of exchange of the foreign currency applied by the bank on the day before the due date of payment.

The borrowers brought an action against Jelzálogbank claiming that Clause III/2 was unfair. They alleged that the clause authorized Jelzálogbank to calculate the monthly due repayment instalments on the basis of the selling rate of exchange for the currency applied by the bank, whereas the amount of the loan advanced was determined by the latter on the basis of the buying rate of exchange that it applied for that currency, which conferred an unjustified benefit on Jelzálogbank within the meaning of Section 209 of the Civil Code.

The court of first instance upheld that action, and the judgement was then upheld on appeal. The second-instance court (Szeged Court of Appeal) held, in particular, that in a loan transaction like the one at issue in the dispute before it, Jelzálogbank did not provide any mercantile financial

services relating to the buying or selling of foreign currency. Accordingly, it was not entitled to apply an exchange rate for the repayment of the loan different from the one used on the date of advance of the sum borrowed, and no payment could be required for a notional provision of services. The court also held that Clause III/2 was not drafted in plain and intelligible language, given that it was impossible to determine the basis for the difference in the method of calculating the amount of the sum lent and the amount of the repayment instalments.

Jelzálogbank then brought an appeal in cassation before the *Kúria* (the referring court) against the judgement of the court of second instance. It argued, in particular, that Clause III/2, in so far as it enabled the bank to obtain income representing the consideration payable in respect of the loan in foreign currency obtained by the borrowers – and because it covered the expenses incurred by the credit institution in purchasing foreign currency on the market – fell within the ambit of the exception under Article 209(4) of the Civil Code, for which reason there could be no review of whether it was unfair under Article 209(1) of the Civil Code. Article 209 (4) exempts from unfairness control the main subject matter of the contract.

Preliminary question:

Must Article 6(1) of Directive 93/13 be interpreted as meaning that it precludes a national law which authorizes the national court to remedy the invalidity of the unfair term by substituting a supplementary provision of national law in a situation in which a contract concluded between a seller or supplier and a consumer may not continue in existence after the deletion of the unfair term?

The question referred to the CJEU concerned terms of the exchange rate mechanisms of consumer loans contracted in national currency and denominated in foreign currency (CHF) that, if declared unfair and void, would have made the entire contract void. Having declared the terms unfair and void, in line with the ruling of the CJEU in *Banco Español de Crédito* (C-618/10), the national court should not replace the unfair terms. However, leaving voided terms out of the contract without replacement would have led to the termination of thousands of contracts by the credit institutions owing to the essential role of the unfair terms in determining the core aspects of the transactions. As a consequence, the consumers would have been obliged under the contract to repay the loans with costs and charges, whereas most of them were in serious payment difficulties, being over-indebted. Such a solution would have caused serious economic and social consequences in Hungary.

This is why the *Kúria*, in search of a solution on how to keep such contracts in force, saw in the default rules of the Civil Code the only way to remedy the nullity of the terms on the exchange rate mechanism. It should be noted that, at that time, there were no special legal provisions in place on how to render the financial consequences between the contracting parties of declaring the terms on the exchange mechanism void. Both the *Kúria* and the Constitutional Court were of the opinion that it is not the task of the judiciary to find innovative solutions to restore the contractual balance in such cases; rather, it is for the legislator to intervene by mandatory rules. Thus, the Hungarian referring court was seeking justification from the CJEU for the only solution at hand before 2014 to provide justice to consumers.

Reasoning of the CJEU:

The CJEU first recalled from its earlier ruling in *Banco Español de Crédito* (C-618/10, paragraph 68) that, given the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness *vis-à-vis* sellers or suppliers, Directive 93/13 requires Member States to provide **adequate and effective means** "to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers" (paragraph 78). It also emphasised (in paragraph 79) that, if it were open to the national court to revise the content of unfair terms included in such contracts, such a power would contribute to eliminating the **dissuasive effect** for sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be adjusted (*Banco Español de Crédito*, C-618/10, paragraph 69).

Then the CJEU established that, **if the lack of substitution of the unfair term leads to the termination of the entire contract and such termination causes particularly detrimental consequences for the consumer, then the substitution of an unfair term for a supplementary provision of national law is consistent with the objective of Article 6(1)** of Directive 93/1. Indeed, "according to settled case-law, that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them, not to annul all contracts containing unfair terms".

In the CJEU's opinion, by requiring the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that **the dissuasive effect** resulting from the annulment of the contract could well be jeopardized (paragraph 83), since in general the consequence of an annulment is that the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the consumer's financial capacities and, as a result, tends to penalize the consumer rather than the lender, who, as a consequence, **may not be dissuaded** from inserting such terms into its contracts (paragraph 84).

Conclusion of the CJEU:

Article 6(1) of Directive 93/13 must be interpreted as meaning that, in a situation such as the one at issue in the main proceedings, in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, that provision does not preclude a rule of national law enabling the national court to remedy the invalidity of that term by substituting it with a supplementary provision of national law.

Impact on the follow-up case:

Decision: *Gfv.VII.30.160/2014/5* of the *Kúria*, rendered on June 3, 2014.

According to the ***Kúria***'s understanding of paragraph 86 of the *Kásler* ruling (C-26/13), if the contract cannot be performed in the absence of the unfair term, it is not incompatible with EU law to substitute the unfair term with the default statutory rules of the national law "as a remedy for invalidity". Accordingly, in the case at hand, which gave rise to the preliminary questions

referred to the CJEU, the *Kúria* declared the terms of the exchange rate mechanism unfair. It applied Article 231 (2) of the (old) Civil Code, which stipulates that debt determined in a currency other than the national one must be calculated on the basis of the exchange rate at the place and time of payment, and that this is not the exchange rate of the credit institution concerned for a currency sale or a currency purchase or an average rate; rather, it is that of the National Bank of Hungary. It further established that the amount of the debt should be fixed at the official exchange rate of the National Bank of Hungary on the date when it was transferred to the debtor, whereas the value in HUF of the reimbursement instalments should be calculated at the official exchange rate of the day before the due date of payment. In support of this solution the *Kúria* cited Article 205 (2) of the (old) Civil Code, which states that, in questions rendered by law, the agreement of the parties is not necessary.

Very shortly after the *Kásler* ruling (C-26/13), the *Kúria* issued a law unification decision (which under Hungarian law is compulsory and **binding on the judiciary**) establishing the applicable default rules of the Civil Code, under which unfair contractual terms on exchange rate mechanisms should be replaced with ones referring to the official exchange rate of the National Bank of Hungary, and also advancing the enactment of a mandatory law on this issue in the future.

Kúria, Decision no. 2/2014 of June 16, 2014 (law unification decision) states:

> In consumer loan agreements denominated in foreign currency, instead of the clauses on purchase and selling exchange rates, the official exchange rate of the National Bank of Hungary will become part of the contract, according to the default rules of § 231 (2) Civil Code, until it is replaced by mandatory rules.

Furthermore, in the summer of 2014, a new law 'codified' the law unification decision (mentioned above) and also the earlier (2012) highest-court case law on the criterion for establishing the unfairness of terms allowing banks to unilaterally amend consumer loan agreements. Law XXXVIII of July 18, 2014 on clarification of the decision by the *Kúria* concerning consumer loan agreements concluded by financial institutions (entered into force on July 26, 2014) states**:**

> **3.** § (1) In consumer loan agreements – not individually negotiated – the term under which the financial institution applies for the transfer of the loan is the purchase exchange rate, whereas for the reimbursement of the loan it is the selling exchange rate, or another exchange rate different from that established when the loan was transferred to the debtor, will be void.
>
> (2) In place of void terms on the exchange rate concerning the transfer of the loan, reimbursement, charges and commission, the official exchange rate of the National Bank of Hungary will apply.
>
> (3) In the case of contracts which have applied the exchange rates stipulated in special laws (Section 200/A of Law CXII of 1996, or Htp. Section 267), or if these rules have been applied on reimbursement of the loans, the official exchange rate will apply only for the transfer of the loan.

[…]

(6) The financial institution will settle the contractual relationship according to the special law provision (introduced by Law XL of 2014 in force as of 15 November, 2014).

Moreover, the Hungarian legislature, pursuant to Law XL of 2014, provided the courts with the legal instrument of sharing between the parties the financial consequences of finding the terms on the exchange mechanism unfair. Law XL of 2014 on the financial settlement stipulated in Law XXXVIII of 2014 on the law unification decision of the *Kúria* on consumer loan contracts states:

"3. § (1) Loans calculated under terms declared void by Article 3 of Law XVIII of 2014 and reimbursement instalments calculated under such terms are over-payments in favour of the consumer.

(2) The financial institution must recalculate the loan transferred to the consumer and the paid reimbursement instalments at the official exchange rate of the National Bank of Hungary applicable on the day of the transfer. If a specific day is established in the contract, the official exchange rate of that day should apply.

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

Elements of judicial dialogue:

The **horizontal dialogue** within the CJEU is of great importance. The *Kásler* ruling (C-26/13) elaborates on its previous case law (*Banco Español de Crédito*, C-618/10, *Asbeek,* C-488/11) in the sense that it refines the policy beyond the power conferred on the national courts by Article 6(1) of Directive 93/13 to render the consequences of unfairness under national law.

Firstly, in *Kásler* (C-26/13) the CJEU did not depart from its earlier approach established in *Banco Español de Crédito* (C-618/10, paragraph 65), concerning a "floor" clause in a mortgage loan and later reinforced in *Asbeek* (C-488/11, paragraph 57), concerning a clause of a tenancy agreement that national courts are required to exclude the application of an unfair contractual term in order that this term may not produce binding effects with regard to the consumer, without being empowered to revise the content of that term, and that such contracts must continue to exist without any amendments other than those resulting from the deletion of the unfair terms, in so far as such continuity of the contracts is legally possible under the applicable national law.

In *Banco Español de Crédito* (C-618/10), the CJEU ruled that the national court could not modify a contract by revising the content of an unfair term under Article 83 of Legislative Decree 1/2007, which provided for, as a consequence of unfairness, the modification of a contract in accordance with the principle of good faith and the provisions of Article 1258 of the Civil Code: "Contracts are concluded by simple consent and from that point are binding, not only as to the performance of the matters expressly agreed, but also as to all consequences which, by their nature, are in accordance with good faith, custom and the law." (paragraphs 22-23)

Asbeek (C-488/11) denied the power of a national court allowed under national law to adjust the penalty clause in consumer contracts (paragraph 60).

Secondly, the *Kásler* ruling (C-26/13) provided the national courts with a new perspective in their search for solutions to remedy contract terms declared unfair only for cases in which the contract could not be kept in force without the unfair terms being declared void. It only allowed the courts to substitute such unfair terms with the provisions of the national default rules, but not to establish what would be fairer terms, or to remedy the nullity by judicial means. The CJEU also emphasized that **the policy behind** this power of the court was **to protect the consumer from the disadvantageous consequences of declaring the contract void**, which would also diminish the **dissuasive effect** of Article 6(1) of Directive 93/13, since the consequence of having declared the contract void would generally be termination of the contract by the consumer and *restitutio in integrum.*

These two cumulative conditions – (a) the existence of a contract being endangered by an unfair term and (b) the termination of such contract would cause significant disadvantage to the consumer – of the power of the national courts to replace an unfair term with the default rules of the applicable national law, **were important** also in the *Unicaja* case (Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13), and the in the other decisions **subsequent to the Kásler case (C-26/13).**

In the *Unicaja* case (Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13), the CJEU dealt with a Spanish law allowing the mortgage enforcement judge to adjust a default rate exceeding a given threshold in a loan contract (not necessarily a consumer contract) and concluded that such law was not precluded by Article 6, Unfair Terms Directive to the extent that, in a consumer contract, the judge may assess a term's fairness regardless of the legal threshold and 'remove' it without adjustment. In fact, but only in the case of consumer contracts, although the CJEU recalled the technique of conform interpretation, it called for disapplication.

It is important to note that, similarly to *Kásler* (C-26/13), *Unicaja* (Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13) makes the power of the national court to substitute unfair terms, where existing, subject to mandatory default rules under national law.

Although *Kásler* (C-26/13) solved the problem of the referring Hungarian court, it did not provide guidance to other national courts on how to proceed if, under their national law, there were no default rules by which the nullity of the unfair term could be remedied.

With regard to other cases subsequent to *Kásler* (C-26/13), in the ***Dunai*** **case (**C-118/17) national provisions classified certain terms related to the exchange difference included in loan contracts as unfair and void; they replaced, with retroactive effect, those terms with ones applying the official exchange rate fixed by the National Bank of Hungary for the corresponding currency; and they converted, with prospective effect, the outstanding amount of the loan into a loan denominated in the national currency. That legislation was introduced after the *Kásler* judgement (C-26/13, see the paragraph "impact on the follow up case"). The three questions referred to the CJEU related, not to the contractual terms included *a posteriori* as such by that legislation in loan contracts (which do not fall within the scope of Directive 93/13, since that Directive does

not apply, in accordance with Article 1(2) thereof) but to the impact of that legislation on the protection guarantees resulting from Article 6(1) of Directive 93/13 in relation to the term concerning the exchange difference initially included in the loan contracts at issue. The CJEU considered that the objective of safeguarding the validity of loan contracts was coherent with the aims of Directive 1993/13. With regard to the replacement of the unfair clauses made by means of legislation, the CJEU stated that this legislative choice cannot have the result of weakening the protection guaranteed to consumers (paragraph 43). In this respect, the Court stated that provisions which prevent consumers from not being bound by the unfair term concerned, where appropriate, by means of the cancellation of the contract at issue in its entirety if that contract cannot continue in existence without that term, violate Article 6(1) of Directive 93/13. The CJEU recalled also the *Kásler* judgment (C-26/13), considering that the application of supplementary provisions is not possible in the specific case considered, because the continuation of the contract would be contrary to the interests of the consumer.

In the ***Abanca*** case (Joined Cases C-70/17 and C-179/17), a new issue was addressed: the role of procedural rules (execution proceedings in this case) in deciding if an unfair clause can be modified or replaced after its non-bindingness declaration. In particular, the referring courts asked if the modification of the unfair clause or the application of a supplementary provision could be justified when it allowed the continuation of a proceeding, and if the impossibility of availing of that proceeding could be contrary to consumers' interests.

With regard to **modification of the clause** declared unfair, relying on its previous case law, **the CJEU ruled that national courts cannot revise the content of an unfair term**. In the CJEU's view, such a power would be likely to compromise attainment of the long-term objective of Article 7 of Directive 93/13, because it would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.

With regard to the **replacement of the unfair clause with a supplementary provision**, the CJEU distinguished between two scenarios:

a) **cases in which the contract is not capable of continuing in existence following the removal of an unfair term**.

Relying on its previous case law, the CJEU stated that in principle national courts should not modify unfair clauses or maintain them in part, because this power of a court would contribute to eliminating the dissuasive effect on professionals. Nevertheless, a national court can remove an unfair term and replace it with a supplementary provision of national law in a situation where

- a contract concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term, i.e. in cases where the invalidity of the unfair term would require the court to annul the contract in its entirety

AND

- the annulment of the contract would expose the consumer to particularly unfavourable consequences. The **Abanca** base is particularly important in this regard, because for the first time the CJEU stated that assessment related to the existence of unfavourable consequences for the consumer of the termination of the contract includes applicable procedural rules. In the specific case, the procedure applicable in the case of the annulment of the contract is considered by the Spanish Supreme Court as less favourable for the consumer. The specific procedure for enforcing the mortgage against the debtor's habitual residence, applicable if the contract is valid, is characterized by the possibility for the debtor to release the mortgaged property until the date of auctioning by depositing the amounts outstanding, by the possibility of obtaining a partial reduction of the debt, and by the guarantee that the mortgaged property will not be sold at a price lower than 75% of its estimated value.

b) **cases in which the contracts concerned are capable of continuing in existence without the unfair terms at issue in the main proceedings**.

In these cases, the unfair clauses should not be applied, **unless the consumer objects.** For example, the consumer may object if s/he considers that enforcement of the mortgage carried out on the basis of an unfair clause would be more favourable to him/her than the ordinary enforcement procedure. The CJEU **stated that the contract must continue in existence, in principle, without any amendment other than that resulting from the removal of the unfair terms, in so far as, in accordance with the rules of national law, such continuity of the contract is legally possible.**

In summary, applying these principles, the CJEU stated that:

i) a national court cannot maintain in part an accelerated repayment clause of a mortgage loan contract, with the elements which make it unfair removed, if the removal of those elements would be tantamount to revising the content of that clause by altering its substance;

ii) a national court can remedy the invalidity of an unfair term by replacing it with the legislative provision on which it was based provided that the mortgage loan contract in question cannot continue in existence if that unfair term is removed, and that the annulment of the contract in its entirety would expose the consumer to particularly unfavourable consequences.

The **Dziubak** case (C-260/18) is particularly important in relation to three issues:

- the criteria that should be adopted in order to evaluate if the contract is capable of continuing in existence following the removal of an unfair term;
- the criteria to be used in order to evaluate the particularly unfavourable consequences to which the consumer would be exposed by termination of the contract;
- the features of the norms that can substitute an unfair clause declared not binding.

With regard to the first issue, the CJEU stated that an **objective perspective** should be adopted by national judges **in determining the criteria with which to evaluate whether a contract is capable of continuing in existence following the removal of an unfair term** (paragraph 39). According to this point of view, the situation of a contracting party cannot be regarded as the decisive criterion determining the fate of a contract. Furthermore, the CJEU stated that a national court, after finding that certain terms of a loan contract indexed in a foreign currency and

associated with an interest rate directly linked to the interbank rate of the currency concerned are unfair, can state, in accordance with its national law, that such a contract cannot exist without those terms on the ground that their elimination would change the nature of the main subject-matter of that contract.

With regard to **the particularly unfavourable consequences to which the consumer would be exposed by termination of the contract**, the CJEU stated that these consequences should be evaluated with account taken of the circumstances existing or foreseeable at the time of the dispute. This solution was based on the argument that the possibility of substituting an unfair term with a supplementary provision is justified by the objective of consumer protection, which requires consideration of the consumer's actual and real interest. The principle of effective consumer protection, though not expressly mentioned here, supports this conclusion.

Therefore, according to the *Dziubak* judgement (C-260/18), if a national court considers that, pursuant to the relevant provisions of its national law, it is not possible to maintain a contract without the terms declared unfair, Article 6(1) of Directive 93/13 does not preclude, in principle, the contract being declared invalid (paragraph 43). Furthermore, **the CJEU clarified that the possibility of application of a supplementary provision after the declaration of non-bindingness of an unfair clause is limited to cases in which the elimination of that unfair clause would oblige the court to declare that contract invalid in its entirety, thereby exposing the consumer to particularly detrimental consequences, with the result that s/he would be penalized** (paragraph 48).

According to the CJEU's reasoning, the consumer must *a fortiori* have the right to oppose protection against the harmful consequences caused by the invalidation of the contract as a whole if s/he does not wish to rely on that protection. Therefore, the consequences for the consumer of the invalidity of a contract in its entirety must be assessed in light of the circumstances existing or foreseeable at the time of the dispute. Moreover, the consumer's acceptance of that assessment is decisive for its purposes. The CJEU's reasoning was based on its previous case law (*Banif Plus*, C-472/11, 21 February 2013), according to which the judge should not declare the unfair clause not binding if the consumer, after having been informed of the unfairness of the clause by the court, expresses a free and informed consent declaring that s/he does not intend to assert the unfairness of the clause and its non-binding status.

It is important to consider that the consumer may oppose the non-bindingness of an unfair term or, if applicable, annulment of the entire contract (including the unfair term), whereas s/he may not oppose the latter without opposing the former. In other words, it is for the judge to *objectively* assess whether the case is one of partial or total invalidity, while the consumer may only waive the protection that is available in the given case, this being either partial or total non-bindingness. In the latter case, when the contract may not exist without the term declared unfair, the only way to remedy the term's unfairness without voiding the entire contract is to substitute the unfair term with a legislative provision suited to balancing the positions of the parties in the given case, thereby providing the consumer with effective protection. However, this substitution may only be made if total invalidity would expose the consumer to particularly detrimental consequences. Moreover, not all legislative provisions are suitable for term substitution.

Indeed, with regard to the **features of the norms that can substitute an unfair clause declared non-binding**, the CJEU stated that the possibility of substitution is to be considered an exception to the general rule that the contract in question remains binding on the parties only if it can exist without the unfair terms contained in it, and that only provisions of national law of a supplementary nature or applicable in the event of an agreement between the parties can substitute the unfair term. Furthermore, the CJEU recalled that the possibility of substitution is based on the presumption that these norms do not contain unfair terms. **Therefore, the CJEU affirmed that it is not possible to substitute an unfair term declared non-binding with national provisions of a general nature which provide for the supplementing of the effects expressed in a legal act** by means, in particular, of the effects resulting from the principle of fairness or custom, provisions which are neither of a supplementary nature nor applicable in the event of agreement between the parties to the contract.

The CJEU has recently answered several questions pertaining to novation agreements. Consumers may enter into a novation agreement the subject of which is a potentially unfair contract term – again provided they do so with a free and informed consent which involves their awareness of the non-binding character of an unfair term and the consequences of waiving that effect (*Ibercaja Banco*, C-452/18). In *Bank BPH* (C-19/20), the CJEU ruled that Article 6(1) of Directive 93/13, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is for the national court, finding that a term in a contract concluded between a seller or supplier and a consumer is unfair, to inform the consumer, in the context of the national procedural rules after both parties have been heard, of the legal consequences entailed by annulment of the contract, irrespective of whether the consumer is represented by a professional representative. Unlike in *Dziubak*, it was not obvious in this case that the consumer would gain from the contract's overall invalidation.

The CJEU held in *Kanyeba* that Directive 93/13 does not, however, seek to harmonise non-contractual liability. It therefore seems that the Directive does not pre-empt claims in torts by the seller concerning the same circumstances to which the penalty clause would have applied. However, a national court cannot decide, *ex officio* so to speak, to grant damages on the basis of supplementary rules of general contract law rules to a party seeking to enforce an unfair term. This was confirmed in the *Dexia* case (C-229/19 and C-289/19).

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

The Netherlands

Follow up judgement of the *Asbeek* case (C-488/11):

Court of Appeal Amsterdam, 29 July 2014 no. 200.055.552/01

The Court of Appeal in Amsterdam found that the contractual penalty clause fell within the scope of the Directive and should be considered unfair in light of Article 1(5) of the Annex to the Directive, which indicates that terms may be unfair when they "have the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in

compensation". The Court of Appeal considered that the contractual penalty was unfair because it stipulated a fixed interest rate that was considerably higher than statutory interest and market interest in the Netherlands (judgement of 21 January 2014 and final judgement of 29 July 2014). Finally, the Court awarded the claim for the rent that was still due plus statutory interest and rejected all other claims.

The Dexia case (C-229/19 and C-289/19) has had a profound impact on Dutch case law: the professional party whose penalty clause has been voided by the court cannot claim the statutory compensation provided for by a supplementary provision of national law which would have been applicable in the absence of that term when the contract is capable of continuing in existence without that term. See for example the District Court of Amsterdam in ECLI:NL:RBAMS:2021:2583:

The case was follows. A landlord claimed damages for illegal subletting by a tenant. The landlord did not invoke the penalty clauses in the lease and only relied on its statutory right to claim a profit transfer from the tenant pursuant to Article 6:104 of the DCC. The lease and the general conditions could continue to exist without the penalty clauses in question. The court considered that the objective and the purpose of Directive 93/13/EEC is not to prevent unfair terms from being invoked in court, but to ensure that unfair terms are removed from contracts concluded with consumers and that professionals are encouraged to do so. In this respect, the penalty for the use of unfair terms must be effective, proportionate and dissuasive.

By virtue of Article 1.4 of the General Provisions, the lessor could claim additional damages to the extent that those damages exceeded the penalty, thus deviating from the statutory system, and the lessee had to pay the profit on the basis of the clause (pursuant to Article 6:104 of the Civil Code). Both penalty clauses are without a maximum. Besides payment of the profit and the loss of his property, the tenant would also have been faced with an unlimited penalty. In contrast to the penalty clauses for the consumer, there is no penalty clause for the landlord. The balance between the parties was significantly disturbed. The fact that the landlord had a strong interest in effectively combating subletting is evident, but that does not mean that an unlimited penalty would not have upset the balance. Now that the terms are deemed unfair and are being disapplied, the lessor cannot invoke Article 6:104 of the DCC either, based on the judgement of the CJEU of 27 January 2021, ECLI:EU:C:2021:68, (Dexia). Resorting to the law would seriously reduce the deterrent character of the Directive. If an unfair term is replaced by statutory damages, professionals have no incentive to remove unfair terms from contracts with consumers. This is true for a contract between a consumer and Dexia, as well as for a rental agreement. Hence, according to the Court, the judgement of 27 January 2021 had a broader scope.

Finland

Finland, Supreme Court, 15 September 2015 S2014/652 (KKO 2015:60)

As to the consequences of unfairness, the Supreme Court, in a case in which the contract can continue in existence after the removal of the unfair term, stated that a national court is required only to exclude the application of an unfair contractual term in order that it does not produce binding effects with regard to the consumer, without being authorised to revise its content (*Banco*

Español de Crédito paragraph 65, C-618/10 and *Asbeek Brusse de Man Garabito C-488/11* paragraph 57). The provisions of the Finnish Consumer Protection Act (Chapter 4 Section 2) should be interpreted in conformity with this requirement in spite of its wording, which allows the adjustment of the terms.

Romania

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

On the issue of the power of a national court to remedy the unfairness of a term concerning the method of calculation of a variable interest rate in a case in which the contract could not continue in the absence of the unfair term, the Romanian highest court established the following:

"Neither Law 193/2000 or Directive 93/13, on one hand, nor the general provisions of the old Code Civil of 1864, on the other hand, allow the courts to intervene in the agreement of the parties, the judge being competent only to establish the nullity of the term, not to modify it.

The impossibility of the courts to amend the contract has been established by the CJEU in *Banco Español de Crédito* (C-618/10). Hence the only derogation allowed by the CJEU is the substitution of the void term with a dispositive rule of the national law as established in *Kásler* (C-26/13). **Such a default rule does not exist in the matter in the case before the court** and this makes [it] impossible to remedy the void term by court.

In this situation, the defendant is obliged to amend the void term in respect of the calculation of the variable interest rate on the basis of agreement reached with the debtors upon real and effective negotiation and subsequent to such amendment to issue a new reimbursement graphic.

Thus, the judgment on appeal was correct in rejecting the claim to establish as the applicable interest rate the fixed interest rate in force at the moment of contract conclusion […]

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

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

The contract cannot stay in force without interest, since **the parties are obliged to negotiate another term on variable interest rate** on the basis of **verifiable, objective criteria**, a term which fulfils the requirement of being **plain and intelligible** […]."

ÎCCJ, Decision no. 886/2016 of May 18, 2016

In this case, the ÎCCJ first recalled its earlier case law (presented above), in which it had established that when, under Romanian law, default rules for the case at hand are void, it is impossible for the court to remedy the nullity of the term in line with the ruling of the CJEU in *Kásler* (C-26/13). It also recalled the interpretation of the CJEU in *Banco Español de Crédito* (C-618/10) establishing that the judge cannot replace the unfair term. **The ÎCCJ also remained consistent with its earlier position that, in the absence of default rules, the creditor is obliged to modify the term declared void on the basis of real and effective negotiation with the debtor.**

However, the ÎCCJ rejected the claim of the plaintiff to order enforcement penalties in the case of refusal by the financial institution to modify the term, and it considered applicable Article 580(3) of the Civil Procedural Code, which in the case of refusal of an obligation to do so, provides civil law penalties from 20 to 50 RON for each day of non-execution to the benefit of the state.

The ÎCCJ further established that, although on the basis of the principle of *restitutio in integrum* the plaintiff would be entitled to the amount of interest paid to the creditor under the unfair terms, the court was not in the situation at the moment of the judgement to establish the exact amount payable, because it had "no reference elements" for the amount of interest, and on the period for which the modification of the term operated. Hence, it could not determine whether undue payments were charged and in what amount. By deciding thus, the ÎCCJ considered itself bound by the provision of Article 379 of the Civil Procedural Code which states that enforcement may take place only for due, certain and liquid debt, whereas in the case at hand the debt was neither certain nor liquid.

ÎCCJ, Resolution of 8 November 2016

The Appeal Court of Bucharest asked the ÎCCJ to refer three questions to the CJEU, one of which was the following:

> "Should Article 6 (1) of Directive 93/13/EC be interpreted [to mean] that in a situation when a loan agreement cannot be in principle kept in force upon the elimination of the terms declared void, as opposing the application of a norm of the national law such as Article 3 of the Civil Code of 1864 or the principle of law according to which in case the contract is only partially valid, its void terms are replaced by law with legal provisions that allow the national court to remedy the nullity of the respective terms by law provisions (Article 9^3 of Government Ordinance no. 21/1992, as amended by Article 2 (d) and (h) and Article 4 (1) (a) of Law 363/2007 or Article 37 (d) of Government Emergency Ordinance no. 50/2007)?"

The ÎCCJ established that there was no connection between Article 6 (1) and Article 3 of the old Civil Code, which stated that "the judge who refuses to judge for the reason that the law does not provide a solution, or is not clear or sufficient, may be held liable for not providing justice" and considered that the plaintiffs did not indicate the legal provision under the principle to which they referred. In the opinion of the ÎCCJ, the question framed by the Appeal Court of Bucharest

raised an issue regarding Article 6 (1) of the Directive, which had been clarified by the CJEU in *Kásler* (C-26/13), and for this reason refused to refer the question to the CJEU.

Nevertheless, although it did not indicate the applicable rule, the ÎCCJ seems to have had a wider understanding of the ruling of the CJEU in *Kásler* (C-26/13) than it had before, concerning the type of national provisions which may substitute a void term: "it follows from Article 6 (1) of Directive 93/13 that it does not forbid the use of the norms of the national law that allow the national court to remedy the nullity of the term by replacing with a provision of the national law". It did not specify, as in previous decisions, that the power of the national courts is limited to the default rules of national law.

France

The rule by which excessive default interest terms may not be replaced by statutory default interest terms has been applied in several decisions by French courts, e.g.: *Tribunal d'instance Thiers*, 13 January 2009, no. 08-147; *Tribunal d'instance Aurillac*, 11 December 2009, no. 09-32; *Tribunal d'instance Montluçon*, 8 February 2011, no. 11-365. The opposite view supporting the application of statutory default interests had been previously held by *Cour de Cassation*, 1re civ., 18 mars 2003, in *Recueil Dalloz*, 2003, 1036.

The Court of Cassation delivered a particularly interesting ruling on 13 March 2019 (no. 17-23.169). The dispute concerned a loan in foreign currency subject to consumer legislation. The appeal invited the Court of Cassation to take a position in regard to the CJEU ruling of 30 April 2014 (to which it was implicitly referring). The appeal considered that the Court of Appeal could not substitute the statutory interest rate for the conventional rate considered unfair because the conditions set out in the *Kašler* judgement (C-26/13) had not been verified (in particular "the case where the invalidation of the unfair term would entail consequences for the consumer such that he would be deterred from acting").

The French Court of Cassation seems to have applied the CJEU's case-law strictly. It stated that:

"But whereas having noted that the stipulation of an interest characterized the loan contract granted on 13 August 2008, the Court of Appeal highlighted the impossibility of providing for its gratuitousness under penalty of causing its cancellation and imposing the immediate return of the borrowed capital, from which it deduced exactly that the statutory interest rate should be substituted for the contractual interest rate, as a provision of national law of a supplementary nature".

Italy

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

In the area of general contract law (e.g. breach of the prohibition of interest capitalization as a mandatory rule in banking law), the *Corte di Cassazione* has allowed replacement of the invalid term by means of application of default rules enabling a re-assessment of the due amount (Cass. 10 September 2013, no. 20688). The Court recalled its previous case law – specifically the decision 8 March 2012, 3649, where the court stated that in case of nullity of the clause which provides for interest capitalisation, the judge should redetermine the interest that the debtor must pay.

By contrast, in the area of unfair terms under the 93/13 Directive, Italian first-instance courts have followed the *Banco Español de Crédito* (C-618/10) rule excluding the replacement of unfair terms by means of applications of default statutory interest in substitution of unfair excessive default interest (Trib Genova, 14.2.2013; Trib. Nola, 19.9.2011). A similar application has been developed in the different domain of penalty clauses, where, consistently with the *Asbeek* decision (C-488/11) by the CJEU, the courts have excluded the possibility to apply article 1384, It. C.c., which, in general contract law, allows the court to moderate an excessive penalty clause (see, e.g. Court of Appeal of Milan, 23.7.2004, Soc. Studio Opera C. G.S.; Tribunal of Milan, 19/07/2016; Tribunal of Nocera Inferiore, 03/04/2014 and, with regard to application of penalty clauses provisions to default interest clauses, Court of Cassation, decision no. 888/2014 and decision no. 23273/2010, and Tribunal of Milan, 28 March 2019).

A less unequivocal approach has been taken by the Banking and Financial Arbitration Committee (*Arbitro Bancario e Finanziario*) in the case of unfair terms providing for excessive default interest: in one case, the Committee of Rome fully adopted the *Banco Español de Crédito* (C-618/10) rule and the principle of dissuasiveness to exclude the possibility of replacing the contractual term on default interest through application of the statutory default rule, which calls for the application of compensatory interest when default interest is not distinctively specified by the parties: see Article 1224, It. Civ. Code (BFA Committee of Rome, 23.5.2014, no. 3415; BFA Coordination Committee decision no. 1875 of 28 March 2014; decision n. 2666 of 30 April 2014). By contrast, a subsequent decision by the BFA Coordinating Committee considered the application of Article 1224, It. Civ. Code to be sufficiently dissuasive, also in light of the CJEU's decisions (BFA Coordinating Committee, 24.6.2014, no. 3955).

In accordance with the proportionality principle, the national case law should be recalled in cases where default interest terms violate the usury thresholds. In this regard, Article 1815 c.c., as modified by Law no. 108/1996 on usury, already provides that usurious interest terms are void and may not be replaced by any default interest rule (the loan becomes gratuitous as a civil penalty for the crime). The threshold above which the default interest is void is periodically determined by a Ministry decree in regard to the type of loan. The validity of the term shall be assessed with respect to the time of stipulation, not the one of payment. However, on the basis of a new law in this area (l. 106/2011), it is held that, although the law on usury thresholds only provides for the future and hence does not apply to contracts concluded previously, and although for this reason a supervening usury threshold may not subsequently make invalid a flat-rate interest term which was valid at the time of stipulation, statutory default interest terms shall be applied in substitution of contractual terms if, at the time of payment, the contractual rate exceeds the legal threshold (see Cass. 11.1.2013, n. 602). Then in these cases contractual interest moderation shall be provided.

Some decisions by the Banking and Financial Arbitration Committee (ABF) are relevant. The ABF in its decision 24 June 2014, no. 3955, addressed the question of whether, in the case of unfairness of the clause defining the amount of default interest, that interest is "always due pursuant to Article 1224, paragraph 1, of the Italian Civil Code", according to which, if before the delay in payment, the parties agreed an interest rate due which was higher than the rate provided by the law, default interest shall be due at the same rate. The ABF considered that on the one hand the effectiveness of the Unfair Terms Directive and of consumer protection must be guaranteed and that, on the other hand, it is also necessary to consider the role played by the discipline on default interest, which has "the essential function of discouraging default in pecuniary obligations", and is functional to the stability of the credit system, being an incentive to pay debts. The ABF confirmed its previous decisions, according to which the clause with which default interest is conventionally agreed is to be considered a penalty clause with consequent application of Directive 1993/13 and the consumer code implementing it. Then, "in the case of contracts with consumers, the non-negotiated clauses that entail the provision of manifestly excessive default interest are null and void" because they are unfair. In such cases, the judge is not allowed to avoid or mitigate invalidity by applying Article 1384 of the Italian Civil Code, which enables the judge to moderate the amount to be paid. The ABF states that, after the declaration of voidness of the clause, "there are no obstacles to the application to the case in question of the rules set forth in Article 1224 of the Italian Civil Code", which is a supplementary provision. Therefore, default interests are due to the same extent as any interest agreed upon. The ABF's reasoning was based on the argument that the application of Article 1224 c.c. does not undermine the principle of dissuasiveness, because the interest rate applicable according to Article 1224 c.c. will be lower than the interest rate due on applying the penalty clause.

Spain

Generally speaking, the rules by which excessive default interest terms may not be replaced by statutory default interest terms are applied in Spanish case law (e.g. *Tribunal Supremo*, 3 June 2016, no. 364, in www.poderjudicial.es; *Tribunal Supremo*, 18 February 2016, no. 79; *Tribunal Supremo*, 22 April 2015).

It is particularly interesting to consider the follow-up judgements of the **Abanca** case (Joined Cases C-70/17 and C-179/17). It is so also because, with regard to two issues, the Spanish referring courts interpreted national laws providing a different solution to the case, although both courts applied the CJEU judgement. The divergent interpretations regarded:

a) the question of whether a contract can continue in existence following the removal of an unfair term;

b) the existence of unfavourable consequences of the application of the normal execution proceeding instead of a specific mortgage proceeding.

The two judgements will be considered with these two issues taken into account.

Tribunal Supremo, N°. de recurso: 1752/2014; n° de resolution: 463/2019, 26 March 2019.

a) With regard to the question of whether a contract is capable of continuing in existence following the removal of an unfair term, the Tribunal Supremo, relying on its previous case law (judgements of the full court 46/2019 , 47/2019, 48/2019 and 49/2019, all of 23 January) considered that, under Spanish law, although a mortgage loan contract includes two different legal figures – the loan (contract) and the mortgage (right *in rem*) – both are essential and form a unitary institution. Therefore, the Tribunal Supremo recalled its judgement 1331/2007, according to which "the credit guaranteed by mortgage (mortgage credit) is not an ordinary credit, since it is subsumed in a real mortgage right, and therefore it is treated legally in a different way". On this basis, the Tribunal Supremo stated that, although in the Spanish legal system the nullity of the early maturity clause does not imply the complete disappearance of the faculties of the mortgagee, it is evident that it entails the restriction of the essential faculties of the mortgage right, which is the one that attributes to the creditor the power to force the sale of the mortgaged thing in order to satisfy with its price the amount due. In particular, in a long-term mortgage loan contract, the guarantee loses its meaning. Therefore, the Tribunal Supremo stated that, under the consideration of the mortgage loan contract as a unitary or complex legal transaction, the basis for the conclusion of the contract for both parties is the obtaining of cheaper credit (consumer) in exchange for an effective guarantee in the event of non-payment (bank).

These arguments led the Tribunal Supremo to declare (a) that a long-term mortgage loan contract cannot survive if enforcement of the guarantee is illusory or extremely difficult, and (b) that, considering that the contract is a complex legal business of lending with a mortgage guarantee, the deletion of the unfair clause affects the guarantee and therefore the economy of the contract and its substance.

b) with regard to identification of unfavourable consequences if the contract does not continue in existence, the court identified as unfavourable consequences the obligation to repay the entire amount of the loan, the loss of the advantages legally provided for in the case of foreclosure, and the risk of the execution of a judgement estimating an action for termination of the contract brought by the lender, with the consequent full claim for the loan.

On these bases, the Tribunal Supremo affirmed the possibility of application of Article 693(2) LEC (version subsequent to the signing of the contract at issue).

Furthermore, the Tribunal Supremo, recalling the CJEU cases *Dunai* (C-118/17) and *Banco Santander* (C-96/16; C-94/17) provided some guidelines for the interpretation of unfairness within Directive 1993/13, relying also on its previous case law. The guidance is to be applied to ongoing foreclosure proceedings where the possession has not yet been transferred to the acquirer. The most important guidelines are the following:

a. Proceedings in which, prior to the entry into force of Law 1/2013, the contract was terminated early by application of a contractual clause deemed null and void, should be terminated without further action;

b. Proceedings in which, after the entry into force of Law 1/2013, the loan expired due to the application of a contractual clause deemed null and void, and the debtor's default does not meet the requirements of gravity and proportionality set forth above, should also be dismissed.

c. The processes referred to in the previous section, in which the debtor's breach is of the gravity provided for in the LCCI, may continue to be processed.

d. The dismissal orders issued in accordance with paragraphs (a) and (b) above shall not have the effect of *res judicata* in respect of a new enforceable claim based, not on anticipated expiration due to contractual provision, but on the application of legal provisions (CJEU of 3 July 2019, Case C-486/16).

Court of First Instance No 1, Barcelona, Spain, decision of 15 May 2019

a) With regard to the question of whether a contract is capable of continuing in existence following the removal of an unfair term, the first-instance court, recalling the CJEU case law, affirmed that the criterion of the possibility of existence of the contract should be interpreted objectively, taking into account:

- the objectively appreciable real possibility of subsequent application of the contract, considering whether excessive contractual loopholes are created;

- disappearance of the substance of the contract or modification of its purpose or nature.

In the specific case the first-instance court of Barcelona affirmed that the accelerated repayment clause is not necessary for the existence of the contract.

b) the court of first instance of Barcelona stated that, in order to evaluate if the termination of the contract implies **unfavourable consequences for the consumer**, the comparison should be made between the actual situation of the consumer and the one which will ensuwe from the termination of the contract. In particular, the court stated that in both cases of application and non-application of the supplementary provision, the legal effect is the termination of the contract, and the entire amount of the debt can be obtained by the creditor.

Moreover, the court questioned whether the consequences are more unfavourable in the case of application of one execution procedure. The court analysed all the procedural differences between the execution proceeding applicable in the case of application of the supplementary provision (the special proceeding of *ejecución hipotecaria*) and in the case of declaration of the unfairness of the clauses (the dismissal of the execution proceeding of *ejecución hipotecaria* and the possible commencement of a new proceeding based on a judgement of declaratory nature and on a standard execution proceeding). The first-instance court estimated that the consumer in the case of termination of the contract does not suffer particularly unfavourable consequences.

On these bases, the first-instance court considered not applicable the legal provision which substitutes the unfair clause, because the contract is capable of continuing in existence after the removal of an unfair term, and the consumer will not suffer particularly unfavourable consequences from the declaration of the clause's unfairness.

Therefore, the first-instance court declared the unfairness of the early maturity clause and denied the judicial order which is necessary to start execution proceedings

Slovenia

The Ljubljana Higher Court referred to the *Kásler* case (C-26/13) in its decision no. III Cp 2452/2016 of 1 January 2017, in which the plaintiffs sought the declaration of nullity and voidness of a credit contract. The court stated that it is true that in the *Kásler* case (C-26/13) the CJEU had urged the greater transparency of credit conditions to the benefit of consumers. However, the court explained that, in the present case, the concrete credit contract did not include unfair terms. Besides, the plaintiffs had only claimed the existence of unfair contract terms for the first time in the complaint, which made this objection inadmissible. Although the court completely accepted the interpretation of EU law given in *Kásler* (C-26/13), it concluded that the *Kásler* decision (C-26/13) could not be applied in the present case (for the reasons mentioned above).

The replacement of unfair terms in the European Commission's Guidance on the interpretation and application of Council Directive 93/13/EEC

On 22 July 2019, the European Commission adopted the "Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts", which considers the CJEU case law until 31 May 2019, in order to clarify certain aspects of the Unfair Terms Directive. It should be noted that the document does not have legal force, and only aims at providing guidance for interpreting Directive 19993/93 in light of the CJEU case law.

The Commission addressed the issue of the consequences of a clause's unfairness for the contract, also with regard to the substitution of unfair terms. Particularly interesting is the Commission's view on the possibility to partially maintain a clause which is considered unfair. In this regard, according to the Guidance:

"- what matters for the severability of contract terms is the content or function of particular stipulations rather than the way in which they are presented in a given contract and that

- a partial deletion is not possible where two parts of a contract term are linked in such a way that the removal of one part would affect the substance of the remaining contract term."

Furthermore, the Commission pointed out that the notion of "supplementary provision of national law" is not defined by Directive 1993/13, and that this concept could be clarified. To be noted in this regard is that the *Dziubak* case (C-260/18) contributed to clarifying which national norms can be considered "supplementary provisions".

5.2. Unfair terms and individual redress: limitation periods

Relevant CJEU cases

- Judgement of the Court (Fifth Chamber) of 21 November 2002. *Cofidis SA v Jean-Louis Fredout*, Case C-473/00 ("**Cofidis**")

- Judgement of the Court (Second Chamber) of 5 March 2020, *OPR-Finance s.r.o. v GK.* Case C-679/18 ("**OPR-Finance**")
- Judgement of the Court (Fourth Chamber) of 9 July 2020, *SC Raiffeisen Bank SA and BRD Groupe Societé Générale SA v JB and KC,* Joined Cases C-698/18 and C-699/18 ("**Raiffeisen Bank and Société Générale**")
- Judgement of the Court (Fourth Chamber) of 16 July 2020, *CY and Others v Caixabank SA and Banco Bilbao Vizcaya Argentaria SA*, Joined Cases C-224/19 and C-259/19 ("**Caixabank**")
- Judgement of the Court (First Chamber) of 22 April 2021, *LH v Profi Credit Slovakia s.r.o., Case C-485/19* ("**Profi Credit Slovakia**")
- Judgement of the Court (First Chamber) of 10 June 2021, *VB and Others v BNP Paribas Personal Finance SA and AV and Others v BNP Paribas Personal Finance SA and Procureur de la République*, Joined Cases C-776/19 to C-782/19 ("**BNP Paribas II**")

Within this cluster, the main case which can be presented as a reference point for the judicial dialogue within the CJEU and between EU and national courts is *Profi Credit Slovakia*.

Main question addressed

Question 1	Whether application of a limitation period to claims brought by consumers in order to assert their rights under Directive 93/13 is compatible with the principle of effectiveness.

Relevant legal sources

EU level

Article 6(1) of Directive 93/13

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

Article 7(1) of Directive 93/13

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

National legal sources

Article 107 of the Slovak Civil Code

"(1) The right to claim restitution on the grounds of unjust enrichment shall be time-barred within two years from the time when the person concerned becomes aware of unjust enrichment and discovers who has enriched himself or herself to his or her detriment.

(2) The right to restitution on the grounds of unjust enrichment shall lapse at the latest within 3 years, and within 10 years in the case of intentional unjust enrichment, from the day on which the unjust enrichment occurred."

5.2.1 Question 1 - Applicability of a limitation period to claims brought by consumers

Is the application of a limitation period to claims brought by consumers in order to assert their rights under Directive 93/13 compatible with the principle of effectiveness?

The case

LH (the applicant) took out a consumer credit loan (€1500) with Profi Credit Slovakia (the defendant) at an interest rate of 70% and an annual percentage rate of charge of 66.31%. The applicant did not receive €1500, but €1132.51, due to a commission of €367.47 charged because of the possibility of deferring repayments. When the agreement had been concluded, the applicant had received no information about the annual percentage rate of charge. Nor were the instalments detailed in the contract, contrary to the relevant provision of national law that required detailed statements that, as a result of another Court case (*Home Credit Slovakia*, C-42/15), were compliant with Directive 2008/48. The applicant repaid the loan, but it was later brought to his attention that the failure to disclose the annual percentage rate of charge constituted an unfair term. The applicant subsequently claimed repayment of the commission.

Preliminary questions referred to the CJEU

"(1) Must Article 47 of the [Charter] and, by implication, the consumer's right to an effective legal remedy, be interpreted as precluding national legislation, such as Article 107(2) of the Občianský zákonník (Civil Code of Slovakia) on the limitation of the consumer's right by a statutory three-year limitation period, in accordance with which the consumer's right to reimbursement which arises from an unfair contractual term may become time-barred even where the consumer is not in a position to evaluate the unfair contractual term and the limitation period starts even without the consumer being aware that the contractual term is unfair?

(2) In the event that, despite a lack of awareness on the part of the consumer, the legislation which imposes a statutory limitation period of three years on the consumer's right is consistent with Article 47 of the Charter and the principle of effectiveness, the national court then asks the following:

Is a national practice contrary to Article 47 of the Charter and the principle of effectiveness if, in accordance with that practice, the burden of proof falls on the consumer, who must prove in legal proceedings that the persons acting on behalf of the creditor were aware of the fact that the creditor was infringing the consumer's rights, in the present case that awareness consisting in the knowledge that, by failing to indicate the precise [APR], the creditor was infringing a legal provision, and must also prove awareness of the fact that, in such circumstances, the loan was

non-interest bearing and, by receiving payments of interest, the creditor obtained unjust enrichment?"

Reasoning of the CJEU

The questions were deemed admissible. Although they did not refer to any act of Union law other than the Charter, it was clear from the grounds set out in the order for reference that there is a clear and sufficient link between the limitation rules laid down in Article 107(2) of the Civil Code, which are applicable to an action brought by a consumer, such as the applicant in the main proceedings, and the provisions of secondary Union law, which are intended to ensure consumer protection. More specifically, the national court was asking whether those national rules are likely not only to affect the right to an effective remedy enshrined in Article 47 of the Charter, but also to undermine the full effect of the provisions on unfair terms contained in Directive 93/13 and the provisions on consumer credit contained in Directive 2008/48. In other words, as the Advocate General indicated in points 31 to 33 and 52 of his Opinion, by its first two questions, that court had sought clarification in order to be able to rule on the conformity with Directives 93/13 and 2008/48 of provisions of Slovak law concerning limitation periods which are applicable to legal proceedings brought in the field of consumer contracts. The CJEU made it clear that the obligation of Member States to lay down detailed procedural rules to ensure respect for the rights which individuals derive from Directive 93/13 against the use of unfair terms implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter, which applies, in particular, to the detailed procedural rules relating to such actions.

It was clear from the information given by the national court, in particular in the context of its first question, that the three-year period provided for in Article 107(2) of the Civil Code began to run from the date on which the unjust enrichment had occurred and that the limitation period applied even if the consumer was not in a position to assess for himself or herself that a contractual term was unfair or has not been made aware of the unfairness of the contractual term in question. In that connection, it was necessary to take account of the weaker position of consumers *vis-à-vis* sellers or suppliers, as regards both their bargaining power and their level of knowledge, and the fact that it is possible that consumers are not aware of the unfair nature of a term in the agreement concluded with a seller or supplier or do not appreciate the extent of their rights deriving from Directive 93/13 or Directive 2008/48. Credit agreements like the one at issue in the main proceedings were generally executed over long periods of time and, therefore, if the event which triggered the three-year limitation period was any payment made by the borrower, which is for the national court to ascertain, it cannot be ruled out that, at least in respect of some of the payments made, the limitation period will begin to run even before the contract in question comes to an end, so that such a limitation period regime is liable systematically to deprive consumers of the possibility of claiming the return of payments made under terms contrary to those directives.

Conclusion of the CJEU

The principle of effectiveness must be interpreted as precluding national legislation which provides that an action brought by a consumer for repayment of sums wrongly paid in connection with the performance of a credit agreement may not be brought on the basis of unfair terms,

within the meaning of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, or terms contrary to the requirements of Directive 2008/48/EC of the European Parliament andof the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, is subject to a limitation period of three years which begins to run from the day on which the unjust enrichment occurred.

Elements of judicial dialogue

Earlier case law of the CJEU had revealed that limitation periods as such are *not necessarily incompatible* with the principles of equivalence and effectiveness in EU law. The question, therefore, is under what circumstances a limitation period should be set aside. The CJEU has confirmed that *knowledge or awareness* on the part of consumers of their rights plays a crucial role in the assessment of cases concerning limitation periods. In *Raiffeisen Bank* (C-698/18 and C-699/18), the CJEU reiterated that reasonable time limits for bringing proceedings, laid down in the interests of legal certainty, do not make it practically impossible or excessively difficult as such for consumers to exercise their rights conferred by EU law, if such time limits are sufficient in practical terms to enable consumers to prepare and bring an effective action. Under the rules in place in *Raiffeisen*, however, a three-year limitation period started to run from the time when the credit agreement had been performed in full: that is, when the consumer was presumed to have known of the unfair nature of one or more unfair terms of that agreement. According to the CJEU, it is nevertheless possible that the consumers involved are not aware of this, which means the limitation period is likely to have expired before they can take action. This is at odds with the principle of effectiveness.

The CJEU held in *Caixabank* that if a limitation period would start at the conclusion of the contract, irrespective of consumers' knowledge or awareness of their rights, this could run counter to the principle of effectiveness and the principle of legal certainty. The limitation period for reimbursement claims should not make it *practically impossible or excessively difficult* for consumers to exercise their rights.

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

Rb Amsterdam 17 augustus 2021, ECLI:NL:RBAMS:2021:4510 (Interbank).

"3. [The applicant claims that the claims are not time-barred. The ECJ has ruled in a number of recent decisions that prescription is not possible when examining an unfair term/determining the unfairness of a term, as the principle of effectiveness precludes this (CJEU 10 June 2021, C-776/19). A consumer may also be unaware of the unfairness of a term (9 July 2020 and 16 July 2020 C Raiffeisen Bank SA vs JBC C-698/18). Even a limitation period of three years starting from the date of full performance of the contract does not then provide effective protection and cannot be accepted. The [plaintiff] bases its claims - in brief - on the fact that it was entitled to assume that the development of the credit remuneration rate in credit agreement 1 would follow an external interest rate (possibly with a liquidity surcharge). In view of the clause (1.2) in conjunction with what is stated in the prospectus, it was entitled to assume this. Only in 2018 did it discover that this was not the case.

12. InterBank invoked the statute of limitations on [plaintiff's] claims. That appeal is rejected. The limitation period for a claim for undue payment is five years. The Directive does not in principle preclude a limitation period for bringing an action seeking to enforce an obligation to make good a loss caused by the invalidity of an unfair term in a consumer contract, in so far as that period is not less favourable than that applicable to similar domestic actions and in so far as the exercise of the rights conferred by the Directive is not rendered practically impossible or excessively difficult (CJEU 9 July 2020, C-698/18 and C-699/18 and CJEU 10 June 2021, C-776/19). The latter conditions imply that the limitation period only commenced from the time when [plaintiff] was/can be aware that she has a claim against InterBank for undue payment. In any case, [plaintiff] has been aware for less than five years that InterBank based the change of interest rate on factors other than the market interest rate. Insofar as InterBank argues that the right to invoke the 'unfairness' of the relevant stipulations as referred to in the Directive has been time-barred, it is not followed. The provisions of the Directive and the requirement that it must offer consumers effective protection preclude the assumption of such a limitation period (cf. inter alia CJEU 21 November 2002, *Cofidis*, C-473/00). The court must also examine, of its own motion - i.e. even if the consumer does not or cannot avail himself of an annulment - whether the terms in question are unfair. And if such an assessment leads to the conclusion that the relevant terms should be annulled, it is only at that moment that a claim for undue payment arises."

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

Relevant CJEU cases

- Judgement of the Court (First Chamber) of 15 March 2012, *Jana Pereničová and Vladislav Perenič v SOS financ spol. S r. o.*, Case C-453/10, ("**Pereničová**")
- Judgement of the Court (Fifth Chamber) of 19 September 2018 *Bankia SA v Juan Carlos Marí Merino, Juan Pérez Gavilán, María Concepción Marí Merino,* Case C-109/17 ("**Bankia SA**")

Main questions addressed

Question 1 To what extent shall the EU principles of effectiveness, proportionality and dissuasiveness influence the identification of civil remedies against unfair commercial practices (see Articles 11 and 13, Directive 2005/29/CE)? More particularly, to what extent shall these principles influence the possibility to set aside the contract stipulated in relation with or as a consequence of an unfair practice?

Relevant legal sources

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

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

Article 6(1), Unfair Terms Directive

Article 11(1), Unfair Commercial Practices Directive

"Enforcement. 1. Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers."

Article 13, Unfair Commercial Practices Directive

"Penalties. Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive."

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

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

The case

The issue may be addressed with special regard to the *Pereničová* case (C-453/10**).**

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

In 2008, a married couple took out a loan of 4,979 euros, which was to be repaid in 32 monthly instalments of ca. 199 euros. The 33rd monthly rate, the last one, was supposed to be equal to the loaned amount, i.e. 4,979 euros. Since the total amount to be repaid was 11,352 euros, according to the court's calculations the yearly interest rate was equal to 58.76%, and not to 48.63% as contractually stated.

When the couple delayed payment of one of the instalments, the company demanded payment of the penalty. Because the consumers believed that the credit agreement included unfair and non-transparent provisions, they started proceedings to avoid the consumer credit contract. One of the main issues addressed by the court was whether a violation of EU law like the one before it would entitle a consumer to set aside the entire contract (and not just single unfair terms) if this type of protection were economically more advantageous for the consumer.

Preliminary question referred to the CJEU:

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

With regard to the application of the Unfair Commercial Practices Directive, the court put the following question to the CJEU:

> "Are the criteria determining what is an unfair commercial practice in accordance with Directive 2005/29 such as to permit the conclusion that, if a supplier quotes in the contract a lower APR than is in fact the case, it is possible to regard that step by the supplier towards the consumer as an unfair commercial practice? If there is a finding of an unfair commercial practice, does Directive 2005/29 permit there to be any impact on the validity of a credit agreement and on the achievement of the objective in Articles 4(1) and 6(1) of Directive 93/13, if invalidity of the contract is more advantageous for the consumer?"

Indeed, the two Directives may be linked to the extent that an unfair practice may determine the existence of unfair terms. If this is the case, the choice of effective remedies should be made taking the objectives of both Directives into account.

Reasoning of the CJEU:

The reasoning of the Court indeed confirmed the existence of a possible link between the occurrence of an unfair practice and the use of unfair terms. However, this link is not automatic:

> **"a finding that a commercial practice is unfair is one element among others on which the competent court may base its assessment of the unfairness of contractual terms under Article 4(1) of Directive 93/13."** (*Pereničová*, C-453/10, paragraph 43)

In the present case, the fact that the service provider gave the consumer an estimate of a yearly interest rate lower than the real one should be seen as an unfair commercial practice. This element should be considered when assessing unfairness on the basis of Article 4 of the Directive 93/13, according to which all circumstances attending the conclusion of the contract are to be taken into account.

The consequences of this finding under EU law should be drawn on the basis of the Unfair Terms Directive rather than on the basis of the Unfair Commercial Practice Directive. Indeed, the latter applies, as Article 3(2) states, without prejudice to contract law and in particular to the rules on the validity, formation or effect of a contract.

According to Article 6, UCTD, Member States should lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that *the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms*.

Therefore, the CJEU held that national courts must, first, use national law principles to assess whether there are unfair contract terms in a consumer contract and, second, assess objectively whether a contract can continue without its unfair terms, rather than simply declaring the whole contract invalid.

The latter assessment shall be conducted in 'objective' terms, without it being possible merely to consider that the invalidity of the whole contract would result in a more beneficial position for the consumer. Indeed,

> "the objective pursued by the European Union legislature in connection with Directive 93/13 consists in restoring the balance between the parties while in principle preserving the validity of the contract as a whole, not in abolishing all contracts containing unfair terms." (*Pereničová*, C-453/10, paragraph 31)

Conclusion of the CJEU:

The CJEU concluded that the occurrence of an unfair practice may influence the assessment of unfair terms in the contract, but no automatic inference may be drawn from the former to the latter. Moreover, remaining within the scope of application of EU Directives, the impact of a single term's non-bindingness on the whole contract may not be based on the mere and subjective consideration of the single consumer's advantage in setting aside the whole contract. This conclusion holds true when the unfair term is the result of an unfair practice.

This conclusion is compatible with the possibility that national legislation provides validity rules applicable to contracts concluded as a consequence of unfair practices. In this respect, the new reform of Directive 2005/29 is relevant. See § p. 176.

Elements of judicial dialogue:

In the ***Bankia*** **case** (C-109/2017, 19 September 2018) the CJEU addressed the question of whether, in accordance with Directive 2005/29, national legislations on mortgage enforcement should provide for the review by the courts, of their own motion or at the request of one of the parties, of unfair commercial practices, in order to ensure the review by the courts of contracts or acts which may contain unfair commercial practices.

The CJEU considered that it is settled case law that Directive 2005/29 leaves the Member States a margin of discretion as to the choice of national measures intended, in accordance with Articles 11 and 13 of that Directive, to combat unfair commercial practices, provided that they are adequate and effective and that the penalties thus laid down are effective, proportionate and dissuasive. Furthermore, the Court stated that, pursuant to recital 9 of Directive 2005/29, that Directive is without prejudice to, in particular, individual actions brought by persons who have been harmed by an unfair commercial practice and without prejudice to EU and national rules on contract law, including the rules on the validity, formation, or effect of a contract. In this respect, the Court stated that:

> "a contract being used as an enforceable instrument cannot be declared invalid solely on the ground that it contains terms that are contrary to the general prohibition of unfair commercial practices laid down in Article 5(1) of that

> directive. It follows that it is not necessary for Member States to authorize the court hearing mortgage enforcement proceedings to review, whether of its own motion or at the request of the parties, the validity of the enforceable instrument in light of the existence of unfair commercial practices in order to give useful effect to Directive 2005/29".

The CJEU's conclusions were the following:

> "Article 11 of Directive 2005/29/EC (…) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prohibits the court hearing mortgage enforcement proceedings from reviewing, of its own motion or at the request of the parties, the validity of the enforceable instrument in light of the existence of unfair commercial practices and, in any event, prohibits the court having jurisdiction to rule on the substance regarding the existence of those practices from adopting any interim measures, such as staying the mortgage enforcement proceedings".

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

As stated above, the conclusion reached by the CJEU is compatible with the possibility that national legislation provides validity rules applicable to contracts concluded as a consequence of unfair practices and with the wording of the new Directive 2019/6121 (see p. 176). Indeed, in some Member States, like France, the Netherlands, Luxembourg, and the UK, the consumer has been enabled to set aside a contract concluded on the basis of unfair commercial practices by different means (voidness, voidability, unwinding). Without providing a specific remedy concerning the effectiveness or validity of the contract, Article VI.38 of the Belgian Code of Economic Law establishes that, when a consumer concludes a contract in relation with an unfair practice, he or she is entitled either to claim reimbursement of the amount paid, or to refuse payment without a duty to return the goods or to compensate the services provided.

Lacking a specific remedy, the ordinary rules on vices of consent may apply. This is the case of Italy, for example. These rules normally require proof (to be provided by the consumer) of a specific link between the factual circumstances causing the vice of consent and the formation of the contractual consent as materially affected by those circumstances and unfair practices. This restriction may prevent the provision of an effective remedy to the consumer.

Italy

As observed above, without a specific validity rule provided by Italian legislation in relation to the occurrence of unfair practices, ordinary rules on vices of consent would apply. This conclusion remains in place even in light of the restrictive approach taken by the *Corte di Cassazione* which excludes the application of nullity as a remedy for violation of information duties and pre-contractual unfairness (Cass., United Chambers, no. 26725/2007). This latter important decision states that, although nullity may not act as a general remedy in these cases, voidability may do so, if legal requirements are met. In practice, the use of voidability is critical as well, since

the consumer should provide evidence of the specific impact determined by the unfair practice or information breach in the decision-making process (Cass. No. 21600/2013).

Despite these limitations, some lower-instance courts have applied the general contract law rules on vices of consent to unfair practices litigation (see: Trib. Terni 6.7.2004; Pret. Bologna 8.4.1997; Trib. Parma 14.7.2003; Trib. Bologna 28.9.2009). In particular, a recent decision of the Bologna Tribunal (no. 358 of 2 February 2018) stated that once the NCA has ascertained the unfairness of a practice, a contract concluded due to such practice can be annulled according to the contract law rules on vices. As far as the burden of proof is concerned, the Tribunal stated that once the consumer has brought the NCA decision before the Court, it is for the professional or producer to prove that there are no grounds to recognize the occurrence of vices of consent, or that the unfair practice bore no causal link to the consumer's consent, during the conclusion of the contract. Nevertheless, it should be considered that, in other decisions, the Italian Courts have upheld strict rules concerning the proof of vices of consent.

With regard to fraud, the Court of Cassation pointed out that such fraud, in order to justify the annulment, must have been such that the consumer would not have consented to the contract without it (Decision no. 14628/2009). On the other hand, with regard to mistake, the Court of Cassation stated that it is the party asking for an annulment that should bear the burden of proof, without any legal presumption (Decision no. 21600/2013). To summarize, Italian case law appears to gravitate between two points of reference: on the one hand, the general rules concerning vices of consent and their proof; on the other, the value of the ascertainment of the unfair practice in the NCA decision, in light of the effective judicial protection of consumers.

Poland

In Poland, under Article 12 section 1 point 4 of the Unfair Commercial Practices Act of 2007, a consumer that has been affected by an unfair practice can claim invalidation of the relevant contract as well as damages. However, the legislative design of this sanction seems rather unclear, because – according to the most convincing interpretation – it is based upon a consumer's claim to make a contract invalid. In other words, the invalidity in question does not occur *ex lege*, without a consumer making a statement of intent.

The main problem addressed in the *Pereničová* decision (C-453/10) was not dealt with directly by Polish courts. References to this judgement have been made only to establish the general idea of the review of the fairness of clauses in B2C dealings (like the District Court of Łódź in several similar judgements – e.g. of 17 November 2016, III Ca 1427/15), inadvertently with stronger emphasis on the principle of *ex officio* review (judgement of the Regional Court in Kamienna Góra of 27 January 2017, I C 1040/16). In the first group of judgements, the District Court of Łódź ascertained only – with reference to the *Pereničová* decision (C-453/10) – that the application of rules on unfair terms does not always have to lead to the invalidity of the entire contract.

Directive 2019/2161 amending Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernization of EU consumer protection rules

Directive 2019/1261 amending Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernization of EU consumer protection rules provides new rules on the impact of unfair practices on consumer contracts.

There are two amendments to Directive 2005/29 that are particularly important for our purposes:

- Paragraph 5 of Article 3, which in the new wording states:

> "This Directive does not prevent Member States from adopting provisions to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers. Such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection".

- The introduction of a new Article 11a, which in the new wording states:

> *"***Consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies**. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.
>
> Those remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law."

Furthermore, **some amendments to Directive 2011/83** are to be considered. In the new wording of Article 16 of that Directive, the following paragraph was added:

> *"*Member States may derogate from the exceptions from the right of withdrawal set out in points (a), (b), (c) and (e) of the first paragraph for contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers for the purpose of protecting the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices**. Such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection.**"

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

Relevant CJEU cases in this cluster

- Judgement of the Court (First Chamber) of 14 March 2013, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, Case C-415/11 ("**Aziz**")
- Judgement of the Court (Third Chamber) of 10 September 2014, *Monika Kušionová v SMART Capital a.s.*, Case C-34/13. ("**Kušionová**")
- Judgement of the Court (Grand Chamber) of 21 December 2016, *Francisco Gutiérrez Naranjo v Cajasur Banco SAU* (C-154/15), *Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA)* (C-307/15), *Banco Popular Español, SA v Emilio Irles López Teresa Torres Andreu* (C-308/15), Joined Cases C-154/15, C-307/15 and C-308/15 ("**Naranjo**") - link to the database for analysis of the lifecycle of the case
- Judgement of the Court (Second Chamber) of 31 May 2018, *Zsolt Sziber v ERSTE Bank Hungary Zrt.*, Case C-483/16, ("**Sziber**")
- Judgement of the Court (Third Chamber) of 14 March 2019, *Zsuzsanna Dunai v ERSTE Bank Hungary Zrt.* Case C-118/17 ("**Dunai**")

Main questions addressed

Question 1 Is the declaration of the non-bindingness of an unfair term an effective remedy as such or, in order to provide an effective consumer protection, should the judge provide additional and consequential measures concerning the non-bindingness of terms: for instance, in the case of credit contracts, **interim measures** which suspend/interrupt the executive procedure on the consumer's home?

Question 2 Is the declaration of non-bindingness of an unfair term an effective remedy as such or, in order to provide effective consumer protection, should the judge provide additional and consequential measures, such as an order of **restitution** of any sum unduly paid by the consumer?

a. If so, does the principle of effectiveness require that this restitution cover all payments made under a non-binding clause (*ex tunc* effects of non-bindingness) or could the judge apply a national rule, if it exists, which limits such restitution to the sums unduly paid after the time when the non-bindingness was declared by the judge (*ex nunc* effects of non-bindingness)?

Relevant legal sources

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

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

Article 6(1), Unfair Terms Directive

Article 7(1), Unfair Terms Directive

5.4.1. Question 1 – Non–bindingness of unfair terms and interim relief in foreclosure proceedings

> 1. Is the declaration of non-bindingness of an unfair term an effective remedy as such or, in order to provide effective consumer protection, should the judge provide additional and consequential measures, linked with terms' non-bindingness, such as, in the case of credit contracts, interim measures which suspend/interrupt the executive procedure on the consumer's home?

The cases

The above question has been addressed by the CJEU in several decisions. We focus on the *Aziz* and *Kušionová* cases (C-34/13), as those in which the application of the principle of effectiveness has had an important role.

In both cases, a consumer's home was subject (or could have been subject) to a mortgage enforcement procedure based on credit contract terms, these being allegedly unfair.

In the *Aziz* case, the Spanish law applicable at the time of the proceedings only allowed for limited grounds of opposition to the enforcement proceedings. It excluded ascertainment of unfair contract terms. Nor did it enable the different judge in charge of ascertainment of a term's unfairness in the declaratory proceedings to suspend the parallel mortgage enforcement procedure.

Differently, in the *Kušionová* case (C-34/13), the consumer brought an action before the court for the assessment of a credit contract which included a clause enabling home foreclosure through an extrajudicial procedure – as in fact allowed by statutory provisions of Slovak law. However, it was determined during the preliminary reference proceedings before the CJEU that the Slovak legislation allowed (and allows) a court to adopt interim measures, including the suspension of the extrajudicial procedure and the declaration of voidness of the sale of the seized home whenever the mortgage is based on an invalid clause.

Preliminary question referred to the CJEU

For the purposes of the present chapter, we will not consider here the questions – though addressed by the CJEU – concerning the *ex officio* power of the judge to ascertain the unfairness of terms in consumer contracts (see Chapter 1). Instead, we shall focus on the issue of available remedies/measures different from the mere declaration of a term's unfairness as a necessary complement to effective consumer protection against the use of unfair terms. More specifically, we will focus on the role of interim measures applicable to enforcement procedures which are linked, or may be linked, with declaratory proceedings in which the unfairness of terms is or may be assessed.

In the *Aziz* case, the relevant question was formulated as follows:

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

In the *Kušionová* case (C-34/13) the referring court asked whether the national legislation, which enables a creditor to recover sums paid on the basis of a contract's unfair terms by enforcing a charge against a consumer's immovable property, without any assessment of the contract's terms by a court, and despite there being a dispute as to whether the contract term at issue is unfair, is precluded by Directive 93/13 and Directive 2005/29, in light of Article 38 of the Charter. As shown below, the CJEU's built on the existence of procedural and substantive safeguards in Slovak legislation that provide for the adoption of interim measures, invalidity rules, and restitutionary remedies.

Reasoning of the CJEU

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

Indeed, in the *Aziz* case, the CJEU considered the effectiveness of consumer protection to be impaired by the lack of availability of interim measures within the declaratory proceeding in respect of the enforcement proceeding (paragraph 52). More particularly:

"such procedural rules impair the protection sought by the directive, in so far as they render it impossible for the court hearing the declaratory proceedings – before which the consumer has brought proceedings claiming that the contractual term on which the right to seek enforcement is based is unfair – to grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of its final decision (see, to that effect, Case C-432/05Unibet 2007 ECR I-2271, paragraph 77)." (*Aziz*, paragraph 59)

Following an argument proposed by the AG, the CJEU also dealt with the issues of whether alternative remedies could provide an effective protection for the consumer, namely the damages that the consumer could claim once his/her home has been irreversibly seized. Clearly, due to the specific nature of the affected interest, involving the consumer's family home, damages are not considered an effective remedial alternative.

"As also observed by the Advocate General in point 50 of her Opinion, without that possibility, where, as in the main proceedings, enforcement in respect of the mortgaged immovable property took place before the judgment of the court in the declaratory proceedings declaring unfair the contractual term on which the

mortgage is based and annulling the enforcement proceedings, that judgment would enable that consumer to obtain only subsequent protection of a purely compensatory nature, which would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13.

That applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling." (*Aziz,* paras. 60-61)

These arguments may be perfectly compared with those adopted in the *Kušionová* case (C-34/13), where, by contrast, the CJEU found that the Slovak legislation was not precluded by EU law interpreted in accordance with the principles of **effectiveness** and **dissuasiveness**. What is decisive is exactly the power of the judge in charge of the declaratory procedure to stay the enforcement procedure or to declare the nullity of the sale concluded on the basis of such procedure if based on contract terms which are found unfair. Restitution in kind is not expressly mentioned but it is clearly connected with the invalidity of the auction sale.

"With regard to the requirement that the penalty should be effective and dissuasive, first, the written observations submitted to the Court by the Slovak Government state that, during such a procedure for the extrajudicial enforcement of a charge, the national court with jurisdiction may, under Paragraphs 74(1) and 76(1) of the Code of Civil Procedure, adopt any interim measure to prevent such a sale from going ahead.

Secondly, as stated in paragraphs 31 and 32 of the present judgment, it appears that Law No 106/2014 Z.z. of 1 April 2014, which entered into force on 1 June 2014 and is applicable to all charge agreements in the process of being enforced as of that date, amended the procedural rules applicable to a term such as that at issue in the main proceedings. In particular, Paragraph 21(2) of the Law on Voluntary Sale by Auction, in the version in force, allows the court, where the validity of the term providing for the charge is challenged, to declare the sale void, which, retrospectively, places the consumer in a situation almost identical to his original situation and does not therefore limit the compensation for the harm caused to him, where the sale is unlawful, to mere monetary compensation" (*Kušionová*, C-34/13, paras. 60-61).

Moreover, the nature of the consumer's right as also linked with another fundamental right (the right to a family home) is specifically addressed by the CJEU through the lens of the principle of proportionality. The Court seems to acknowledge that interim measures and nullity coupled with restitution are 'strong' remedies, but their strength is totally *proportional* to the affected right. It also refers to the ECHR jurisprudence and puts it in relation to Article 7, CFREU. The *Aziz* decision is conclusively cited.

"With regard to the proportionality of the penalty, it is necessary to give particular attention to the fact that the property at which the procedure for the extrajudicial enforcement of the charge at issue in the main proceedings is directed is the immovable property forming the consumer's family home.

The loss of a family home is not only such as to seriously undermine consumer rights (the judgment in Aziz, EU:C:2013:164, paragraph 61), but it also places the family of the consumer concerned in a particularly vulnerable position (see, to that effect, the Order of the President of the Court in Sánchez Morcillo and Abril García, EU:C:2014:1388, paragraph 11).

In that regard, the **European Court of Human Rights** has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home and, secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed (see the judgments of the European Court of Human Rights in McCann v United Kingdom, application No 19009/04, paragraph 50, ECHR 2008, and Rousk v Sweden, application No 27183/04, paragraph 137).

Under EU law, the right to accommodation is a fundamental right guaranteed under **Article 7 of the Charter** that the referring court must take into consideration when implementing Directive 93/13.

With regard in particular to the consequences of the eviction of the consumer and his family from the accommodation forming their principal family home, the Court has already emphasised the importance, for the national court, to provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated where the grant of such measures proves necessary in order to ensure the effectiveness of the protection intended by Directive 93/13" (see, to this effect, the judgement in *Aziz*, EU:C:2013:164, paragraph 59) (*Kušionová*, C-34/13, paras. 62 seq)."

Conclusion of the CJEU

Mainly on the basis of the **principle of effectiveness**, the CJEU concluded that the lack of interim measures within a declaratory proceeding in respect of an enforcement proceeding makes impossible (effective) consumer protection against the use of unfair terms on which the enforcement proceedings are based:

"the directive must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not permit the court before which declaratory proceedings have been brought, which does have jurisdiction to assess the unfairness of such a term, to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the

> grant of such relief is necessary to guarantee the full effectiveness of its final decision" (*Aziz*, paragraph 64).

Comparatively, in *Kušionová* (C-34/13)*:*

> "In the present case, the fact that it is possible for the competent national court to adopt any interim measure, such as that described in paragraph 60 of the present judgment, would suggest that adequate and effective means exist to prevent the continued use of unfair terms, which is a matter for the referring court to determine."

In both cases the application of the principle of effectiveness is decisive. Dissuasiveness and proportionality, though recalled in *Kušionová* (C-34/13), remain in the background.

Impact on the follow-up case[33]*:*

Immediately after the *Aziz* decision of the CJEU, Spanish lower courts started to implement its reasoning in their decisions. In particular, the *Juzgado de Primera Instancia* no. 13 of Madrid, on 15 March 2013, granted the suspensive effect of executory proceeding if the consumer started a declaratory proceeding, implicitly disapplying the provision of Article 698 CCP.

The Spanish legislator then directly intervened, amending the procedural law with Ley 1/2013 of 14 May 2013. As mentioned above, when the CJEU decided the Aziz case it opened up two possible solutions for the Spanish legislator in order to make the procedural system compliant with the Directive 93/13/EEC: (1) including a new ground of objection based on the unfairness of the contractual terms in the foreclosure proceedings; or (2) giving the judge in the declaratory proceeding the possibility to adopt as a precautionary measure the suspension of the foreclosure proceedings. The Ley 1/2013 adopted the first solution, including a new ground of objection based on the unfairness of contractual terms within those contained in Article 695.1 CCP.

Elements of judicial dialogue:

Vertical judicial dialogue

The national commercial courts of first instance and of appeal sought to overcome the problems generated by the financial crisis for the mortgage sector through dialogue with the national constitutional court.

Because the constitutional court refrained from assuming the role of legislator, the national courts had to choose between a direct disapplication of the national provision upon the basis of conflict with EU law, or the possibility of requesting a preliminary reference. Given the willingness of Spanish courts to engage in a constructive dialogue with CJEU, where the latter granted a high level of protection for the consumer, the national court presented the preliminary reference in order to receive guidance from the CJEU on how to apply national law consistently.

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

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

Furthermore, the decision of the CJEU eventually triggered the reaction of the legislator on the specific issue, allowing a reform of the procedural provisions.

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

Poland

The *Aziz* judgment has been referred to in a number of decisions by Polish courts of the first and second instance. The main emphasis in this respect has been placed on the criterion for reviewing the clauses set forth in p. 68 and 69 of this judgement – i.e. the requirement to verify if a professional could reasonably expect that the particular clause would be accepted by the consumer, if individually negotiated (see e.g. judgments: of the Court of Appeal in Katowice, I Aca 1104/16 and of the District Court in Warsaw of 22 December 2016, XX

VII Ca 3010/16). In the judgement of the Regional Court in Siemianowice Śląskie of 12 December 2016 (I C 741/16), the *Aziz* decision was referred to as an argument for the procedural autonomy of EU law.

To date, the problem of interim measures as a consequence of declaring a clause unfair has not been addressed directly in Polish case law. In principle, Polish procedural law does not allow for the awarding of such measures *ex officio* – however, there are no particular examples as to whether these rules can be interpreted in an EU-conforming way.

The *Naranjo* decision (Joined Cases C-154/15, C-307/15 and C-308/15) was referred to in the judgement of the Supreme Court of 14 July 2017 (II CSK 803/16), although without deep analysis of its impact on the case. The court presented this decision only as an example of a resolution that sets forth the principle of the *ex tunc* effect of the non-binding nature of unfair terms.

Slovenia

The problem of providing additional and consequential measures, such as interim measures including the result of declaring a contract null, was dealt with in the decision of the Ljubljana Higher Court no. II Cp 2109/2015 of July 27, 2015 and similarly also in the decision of the Koper Higher Court no. Cp 1043/2008 of November 18, 2005. In neither of these decisions did the Court explicitly refer to the principle of effectiveness as applied in the *Aziz* case, the *Naranjo* case (Joined Cases C-154/15, C-307/15 and C-308/15), or the *Kušionova* case. In general, according to Slovenian procedural law, courts do not have the power to decide on interim measures *ex officio*.

The Ljubljana Higher court in its decision no. I Cp 517/2017 referred to the *Kušionova* case. However, the reference did not concern interim measures ensuing from the declaration of a clause as unfair; rather, it concerned the interpretation of Article 1, paragraph 2 of Directive 93/13.

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

> 2. Is the declaration of the non-bindingness of an unfair term an effective remedy as such or, in order to provide effective consumer protection, should the judge provide additional and consequential measures, such as the order of restitution of any sum unduly paid by the consumer?
>
> 2.a. If so, does the principle of effectiveness require that this restitution covers all payments made under a non-binding clause (*ex tunc* effects of non-bindingness), or could the judge apply an existing national rule, limiting such restitution with regard to the sums unduly paid after the time in which the non-bindingness has been declared by the judge (*ex nunc* effects of non-bindingness)?

The cases

These questions have recently been addressed by the CJEU in *Naranjo* (Joined Cases C-154/15, C-307/15 and C-308/15).

All three cases were initiated by consumers who concluded a mortgage loan containing a 'floor clause' with a bank. 'Floor clauses' establish a minimum rate below which the variable interest rate cannot fall. These clauses were widely used by Spanish banks and affected many consumers. In all three cases, the consumers brought proceedings against the bank after the judgement of the Spanish Supreme Court – *Tribunal Supremo* (henceforth '**TS**') – of 9 May 2013 regarding the unfairness of floor clauses. They all sought (i) a declaration that the floor clauses in their contracts were null and void, and (ii) restitution of the amounts overpaid on the basis of those clauses from the date when the contract was concluded.

However, the TS limited the retroactive effect of the declaration of nullity. It held that only the amounts overpaid after the date of its judgement had to be repaid, thus limiting the consumers' right to full restitution in time. The judgement of 9 May 2013 concerned a collective action, but on 25 March 2015 the TS extended the temporal limitation to individual actions.

This temporal limitation was highly controversial in Spain, and gave rise to questions about, in short, (i) compatibility with the requirement of Article 6(1) Directive 93/13/EEC that unfair terms be 'not binding', (ii) the reasoning of the TS as to why a temporal limitation was justified (i.e. a risk of serious economic repercussions), and (iii) the relation between individual and collective actions.

Preliminary questions referred to the CJEU

The questions referred to the CJEU in the three proceedings were quite similar, though not totally equivalent. For the sake of clarity, we refer here to the questions referred to in the *Naranjo* case (Joined Cases C-154/15, C-307/15 and C-308/15).

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

From the perspective of **nullity**, the issue was whether the UCTD and particularly Article 6 were compatible with a temporal limitation on the non-bindingness of terms so that these, though unfair, may be considered effective until they are declared unfair by the court. This was the formulation used by the referring court:

> "In such cases, is an interpretation [,] according to which an unfair term declared void nonetheless produces effects until that declaration is made[,] compatible with the interpretation of "non-binding" in Article 6(1) of Directive 93/13/EEC? Therefore, even though the term has been declared void, will the effects produced by that term while it was in force be considered not to be invalidated or ineffective?"

A second perspective, closely connected with the former one, dealt with **injunctions**: although an injunction normally refers to future action or inaction, it may be coupled with a declaration of nullity (so that a question similar to the one seen above arises):

> "Is an injunction that may be issued to desist from using a particular term (in accordance with Articles 6(1) and 7(1)) in an individual action brought by a consumer when such a declaration is made compatible with a limitation of the effects of a declaration of nullity?"

The core issue concerned **restitution**. If non-bindingness could be related to the time of declaration rather than stipulation, then restitution could be limited to sums unduly paid after this time rather than since stipulation. Was this compatible with effective consumer protection? This is the question addressed by the Spanish court in *Naranjo* (Joined Cases C-154/15, C-307/15 and C-308/15):

> "May (the courts) alter the reimbursement of any sums paid by the consumer — which the seller or supplier is obliged to reimburse — under the term subsequently declared void *ex tunc*, for want of information and/or of transparency?"

Reasoning of the CJEU:

The CJEU started by stating that the assessment of the unfairness of a clause relating to the main subject-matter of a contract falls within the scope of Directive 93/13, where the consumer did not have, before the conclusion of that contract, the necessary information as to the contractual conditions and the consequences of entering into that contract (cf. Article 4(2) of Directive 93/13/EEC).

The CJEU continued by affirming that it follows from its previous case law that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. The determination by a court that a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that s/he would have been in if that term had not existed. The obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding 'restitutory effect' in respect of those same amounts.

The Member States can, by means of their national legislation, define the detailed rules under which (i) the unfairness of a contractual clause is established, and (ii) the actual legal effects of that finding are produced. However, national law may not alter the scope and substance of the protection guaranteed to consumers by Directive 93/13/EEC. It is for the CJEU alone to decide upon the temporal limitations to be placed on the interpretation of (the effects of) a rule of EU law.

The analysis was based on both the principles of effectiveness and dissuasiveness.

With regard to **effectiveness**, the CJEU argued that the temporal limitation at stake:

> "ensures only limited protection for consumers who have concluded a mortgage loan contract containing a 'floor clause' before the date of the judgment in which the finding of unfairness was made. Such protection is, therefore, incomplete and insufficient and does not constitute either an adequate or effective means of preventing the continued use of that type of term, contrary to Article 7(1) of Directive 93/13 (see, to that effect, judgment of 14 March 2013, Aziz, C 415/11, EU:C:2013:164, paragraph 60)." (*Naranjo*, Joined Cases C-154/15, C-307/15 and C-308/15, paragraph 73)

With regard to **dissuasiveness**, the CJEU argued that

> "The absence of such restitutory effect would be liable to call into question the dissuasive effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) of that directive, is designed to attach to a finding of unfairness in respect of terms in contracts concluded between consumers and sellers or suppliers" (*Naranjo*, Joined Cases C-154/15, C-307/15 and C-308/15, paragraph 63).

Conclusion of the CJEU

The CJEU concluded by stating that:

> "the referring courts, being bound for the purposes of the decisions to be given in the main proceedings by the interpretation of EU law given by the Court, must disapply, of their own motion, the temporal limitation which the *Tribunal Supremo* (Supreme Court) applied in its judgment of 9 May 2013, because that limitation does not appear to be compatible with that law."

Hence, on the basis of the above arguments, the CJEU considered the temporal dimension of nullity and restitution to be an intrinsic aspect of effective consumer protection: only if nullity and therefore restitution extend to the entire time-span of the contractual relation since the time of limitation is such protection effective and dissuasive.

Impact on the follow-up case:

The judgement of the CJEU gave rise to several follow-up questions relating to the right of access to justice and the right to an effective remedy.

First, the most urgent question for the Spanish government was how to deal with the massive number of claims. Thousands of consumers were affected, with an estimated damage of 3 to 5 billion euros (source: *El País*). The government therefore issued Royal Decree 1/2017 (see below), obliging financial institutions whose floor clauses have been declared unfair to set up an extrajudicial mechanism for the settlement of claims.

Second, the question was the extent to which the CJEU's judgement affected consumers and financial institutions that were not parties to the collective action leading to TS 9 May 2013. The CJEU did not answer the preliminary question about this particular issue (on this point see the specific comments under Chapter 3 above). On 24 February 2017, the TS held that its previous judgement of 9 May 2013 did not affect consumers who were not explicitly addressed in that judgment, i.e. consumers who had not joined the collective action. The defendant bank, BBVA, was nevertheless bound by the *res judicata* effect of TS 9 May 2013 because it had been involved in the collective proceedings.

It should be noted that Spanish banks have responded in different ways to the CJEU's judgment. Many banks have announced that they will consider individual claims on a case-by-case basis, which means that consumers will not automatically get their money back. The TS appears to condone this approach. In a judgement of 9 March 2017, it held that, in the individual case at hand, the consumer had been sufficiently informed by the civil notary about the economic consequences of the floor clause.

Third, the question is what should happen if consumers have already brought individual proceedings, which have resulted in a final and binding judgment. The CJEU seems to have recognized the principle of *res judicata* as a possible limitation to consumer protection. On 5 April 2017, the TS held that judgements rendered before 21 December 2016 are not affected, even if they violate EU law. Those judgements cannot be revised, and the proceedings cannot be reopened.

Consumers are therefore effectively 'punished' for bringing their claims swiftly. Not all courts were ready to suspend the proceedings while awaiting the outcome of the preliminary rulings. The *Tribunal Constitutional* ruled that there was no obligation to stay or suspend, with a view to individual rights protection (judgement of 19 September 2016).

Elements of judicial dialogue:

Vertical dialogue

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

The TS judgement of 9 May 2013, concerning a collective action, affirmed that a floor clause could be unfair due to a lack of transparency if the consumer was unable to foresee the economic risks and the legal obligations ensuing from the clause. If a floor clause is unfair, it is *de jure* null and void, triggering a right to full restitution (including interest). The TS nevertheless used the CJEU's judgment in *RWE Vertrieb* (C-92/11) to conclude that, because the banks had acted in

good faith, and because of a risk of serious economic repercussions, a temporal limitation was justified until the date of its judgement.

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

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

Horizontal dialogue within the CJEU

The CJEU has dealt with the role of restitution as an effective and necessary complement of the non-bindingness of unfair terms in other cases since *Naranjo* (Joined Cases C-154/15, C-307/15 and C-308/15). In particular, the ***Sziber* case** (C-483/16) should be recalled in this regard. In this judgement, the referring court asked whether Article 7 of Directive 93/13 must be interpreted as precluding national legislation which lays down specific procedural requirements for actions brought by consumers who have concluded loan agreements denominated in a foreign currency which contain a term concerning the difference in exchange rates and/or a term concerning the power to make unilateral amendments. The CJEU, recalling the *Naranjo* case (Joined Cases C-154/15, C-307/15 and C-308/15) and **the right to effective judicial protection** affirmed that, while it is for the Member States to define the detailed rules under which the unfairness of a contractual clause is established and the actual legal effects of that finding are produced, **national provisions must allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed, by, inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier on the basis of that unfair term (paragraphs 34 and 53).**

Furthermore, the CJEU affirmed that the procedures which apply for the assessment of an allegedly unfair contractual term are a matter for the national legal order, **provided that they are not less favourable than those governing similar situations subject to domestic law (principle of equivalence) and that they afford effective judicial protection, as provided for in Article 47 of the Charter.**

The same principle has been applied by the CJEU in another Hungarian case (*Dunai*, C- case), where a similar conclusion was reached, with explicit reference to the Sziber case (C-483/16): "in so far as the action brought by Mrs Dunai is based on the term relating to exchange difference which was included initially in the loan contract concluded with the bank, it is for the referring court to ascertain **whether the national legislation, which declared terms of that nature to be unfair, allowed the legal and factual situation in which Mrs Dunai would have been in the absence of such an unfair term to be restored, in particular by giving rise to a right to restitution of advantages wrongly obtained**, to her detriment, by the seller or supplier on

the basis of that unfair term (see, to that effect, judgment of 31 May 2018, Sziber, C 483/16, EU:C:2018:367, paragraph 53)".

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

Italy

The principle according to which a contract shall be declared null having regard to the time of stipulation, so that no legal effect can be attached to the contract at any point in time throughout the contractual relation, is well-rooted in the Italian legal tradition. In case law, it has been recently applied in the area of credit contracts (regardless of whether these are consumer credit contracts) whose default interest exceeds the usury thresholds under law no. 108/1996 (see *Corte di Cassazione*, 11 January 2013, no. 602 and 603). In other words, it is the judicial declaration of nullity with its effects that must follow the time of contract stipulation and not the legal force of the contract that adapts to the time of judicial declaration**. The consequence is that all interest unduly paid since the time of stipulation has to be returned. In this respect, one can observe a certain degree of coherence between this Italian case law and the *Naranjo* decision** (Joined Cases C-154/15, C-307/15 and C-308/15)**.**

The impact analysis can be taken even further. Indeed, in Italy, judges and scholars discuss what remedy may be applied if the clause on default interest (determined in accordance with a flat rate) was not null at the time of stipulation, but the flat rate subsequently exceeds the usury threshold during the contractual relationship; indeed, the usury threshold changes over time. In this case, although the issue is still rather open to discussion, a recent decision of the Banking and Financial Arbitration Committee has stated that, if the legal threshold subsequently falls below the contractual interest rate which was valid at the time of stipulation, the clause remains valid (being the time of stipulation the one controlling for nullity assessment), but contractual rules should be adapted by means of an integration of statutory default rates in accordance with the general principle of good faith (*Arbitro Bancario Finanziario sez. collegio di coordinamento*, 10.1.2014, n. 77).

With regard to the inclusion of some insurance policy costs within the actual interest threshold applied in the contract, the Coordination Committee of the Banking and Financial Arbitration Committee, with decision no. 10621 of 12 September 2017, applied the remedial scheme of 'nullity + substitution' of the invalid clause, following its own previous case law (see, for instance, the Rome Committee's decision no. 3020 of 20 March 2017; the Palermo Committee's decision no. 4649 of 3 May 2017). The rule of replacement of contractual default interest in accordance with new usury thresholds is also applied both by Italian lower courts (see Messina Tribunal, decision no. 858/2015) and by the *Corte di Cassazione* (though without reference to the good faith principle) in application of the provisions on partial invalidity (Article 1419, It. C.c.), despite acknowledgement of the validity of the contract term as assessed at the time of stipulation (Cass. 11.1.2013, n. 602).

No distinction is made by this case law between consumer credit and ordinary credit. Moreover, it is apparent that the debtor subject to the effects of usury is by definition a weak party, somehow comparable to a consumer. One could therefore ask whether the 'Italian rule' on replacement of

default interest subsequently exceeding usury thresholds could ever represent an evolution of the *Naranjo* (Joined Cases C-154/15, C-307/15 and C-308/15) rule based on the principle of effectiveness: not only may the weak party not be deprived of money unduly paid under the (null) force of an invalid clause, as later so-declared by a court, but that weak party may also enjoy a similar protection when money is paid under the legal force of a valid clause whose effects become not executable and the due performance not payable (*"non esigibile"*) due to a supervening change in the legal framework as interpreted in the light of good faith.

Poland

The unfairness of a clause occurs *ex lege* and has an *ex tunc* effect, which has been referred to in numerous examples of case law (see e.g. judgements: of the Supreme Court of 30 May 2014, III CSK 204/13 and of 14 May 2015, II CSK 768/14, of the District Court of Gdansk of 19 June 2015, III Ca 970/14, of the Regional Court of Warsaw-Śródmieście of 19 July 2016, VIII C 2064/15). This issue was recently reaffirmed in the resolution issued by a panel of seven judges of the Supreme Court on 20 June 2018, III CZP 29/17. Since the declaration of unfairness of a contract term and its non-binding nature is made with regard to the time when the contract is concluded, it is a natural consequence that this provision is declared ineffective from the very beginning. Therefore, on this assumption, the professional is obliged to refund to the consumer everything that s/he had paid on the basis of that provision.

The issue regarding the legal nature of a consumer's claim to obtain full compensation has not been thoroughly analysed by Polish case law. In its judgement of 14 May 2015 (II CSK 768/14), the Supreme Court, hearing a collective action brought by a group of consumers, refused to adopt the interpretation maintained by the District Court and Court of Appeal of Warsaw whereby the bank had breached the contract by setting the amount of interest on the basis of an unfair term. The main reasoning behind this argument was that there is no such thing as a contractual obligation not to use unfair terms in contracts concluded with consumers, as stated by the merit courts. Furthermore, it was noted that the courts did not properly delete the unfair term from the contract. The Supreme Court pointed out that removing such a term cannot result in altering the nature of the contract. As a result, the lower courts improperly ascertained the rights and obligations of the parties. This may suggest that the Supreme Court did not intend to establish a general interpretation that did not allow using a breach of contract as a legal cause of action in such cases.

The second option concerns the general rules on restitution and undue consideration (one of the unjustified enrichment provisions). A declaration of the abusiveness of a clause – leading to its non-bindingness – should, in principle, allow consumers to obtain full compensation. However, a consumer must commence judicial action within the legal time limit applicable to the case. This is identified on a case by case basis, such as, for example, in the resolution of 10 August 2018 (III CZP 20/18), where the Supreme Court held that a consumer's claim for the payment of the surrender value of a life insurance contract with an insurance capital fund (ICF), derived from a declaration on the grounds of the abusiveness of a clause, is time-barred according to the general

rule specified in Article 118 of the Civil Code (until 9 July 2018, this period was 10 years, currently it is 6 years).

Slovenia

In its decision no. I Cp 1218/2017 of December 12, 2017, the Ljubljana higher court declared the consumer credit contract null and void. In its decision, the Court stated that one of the consequences of declaring the nullity of the contract is that each contracting party must return to the other party everything that was received on the basis of the contract (paragraph 1, Article 87 of the Slovenian Obligations Code). In the case under analysis, the plaintiffs themselves claimed to pay the sum of 19,419.30 euros to the defendant. The sum represented the difference between the money received in line with the consumer credit contract and the money already returned in instalments as agreed upon in the consumer credit contract. The Court satisfied the claim by the plaintiffs, and decided that they had to pay 19,419.30 euros to the defendant. The court stressed that the defendant had opposed the amount of money in the civil procedure but had not lodged a counterclaim. The Court did not refer explicitly to the *Naranjo* case (Joined Cases C-154/15, C-307/15 and C-308/15); however, one can observe a certain degree of coherence between this case and the *Naranjo* case (Joined Cases C-154/15, C-307/15 and C-308/15).

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

Relevant CJEU cases in this cluster

- Judgement of the Court (First Chamber) of 16 June 2011, *Gebr. Weber GmbH v Jürgen Wittmer* (C-65/09, "**Weber**") and *Ingrid Putz v Medianess Electronics GmbH* (C-87/09, "**Putz**"), Joined Cases C-65/09 and C-87/09 ("**Weber and Putz**") - link to the database for analysis of the lifecycle of the case
- Judgement of the Court (First Chamber) of 4 June 2015, *Froukje Faber v Autobedrijf Hazet Ochten BV.*, Case C-497/13 ("**Faber**")
- Judgement of the Court (First Chamber) of 23 May 2019, *Christian Fülla v Toolport GmbH.* C-52/18, ("**Fülla**") - link to the database for analysis of the lifecycle of the case
- Judgement of the Court (Fifth Chamber) of 13 July 2017 *Christian Ferenschild v JPC Motor SA,* C-133/16, ("**Ferenschild**") - link to the database for analysis of the lifecycle of the case

Within this cluster, the main cases which can be presented as reference points for the judicial dialogue within the CJEU and between EU and national courts are: *Weber and Putz* (Joined Cases C-65/09 and C-87/09), for questions nos. 1, 2 and 3, *Fülla* (C-52/18) for question no. 4, *Faber* (C-497/13) for question no. 5, and *Ferenschild* (C-133/16) for question no. 6.

Main questions addressed

Question 1 What is the relation between effectiveness and proportionality in making a choice between repair and replacement in consumer sales contracts?

Question 2 Does the principle of proportionality allow for the sharing of the costs of replacement of a non-conforming good between a consumer and a seller? If so, can a consumer refuse to have the good replaced?

Question 3 Is it possible to deny enforcement of a remedy in consumer sales – if only one out of many options is available – solely because it entails disproportionate costs for the seller?

Question 4 In light of the effectiveness and proportionality principles, should the seller be considered obliged to advance to the consumer the transport costs of defective goods, where the transport serves to bring them into conformity?

Question 5 What is the allocation of the burden of proof while claiming non-conformity of a consumer good? How is it affected by the principle of effectiveness?

Question 6 Is a national provision compatible with Directive 1999/44 if it provides a limitation period for action by the consumer shorter than two years from the time of delivery of the goods where the seller and consumer have agreed, according to national law, on a period of liability of the seller of less than two years (a one-year period), for the second-hand goods concerned?

Main case for questions 1, 2 and 3

- Judgement of the Court (First Chamber) of 16 June 2011, *Gebr. Weber GmbH v Jürgen Wittmer* (C-65/09, "**Weber**") and *Ingrid Putz v Medianess Electronics GmbH* (C-87/09, "**Putz**"), Joined Cases C-65/09 and C-87/09 ("**Weber and Putz**")

Relevant legal sources

EU level

1999/44/EC Directive (especially recital 11 of the preamble and Article 3 sections 2 and 3)

Charter of Fundamental Rights of the EU (especially Article 47)

Article 3 Directive 1999–44 - Rights of the consumer

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

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

3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate. A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account: - the value the goods would have if there were no lack of conformity, - the significance of the lack

of conformity, –nd - whether the alternative remedy could be completed without significant inconvenience to the consumer. Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

4. The terms "free of charge" in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.

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

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

National level (Germany)

§ 437 of the German Civil Code (*Bürgeliches Gesetzbuch* – hereinafter: BGB). This provision determines remedies for the non-conformity of consumer goods and belongs among the regulations that transpose the 1999/44/EC Directive. The provision sets forth a general framework of remedies, referring to other provisions that specify particular remedies and premises under which consumers may claim this protection. Among them:

§ 439 BGB refers to the replacement of a non-conforming good, stating that:

"1. By way of subsequent performance, the purchaser may require the repair of the defect or the delivery of goods which are free from defect, according to his preference.

2. The seller shall bear the costs necessary for the purposes of subsequent performance, in particular the costs of transport, carriage, labour and materials.

3. The seller may […] refuse the type of subsequent performance chosen by the purchaser if it is possible only at disproportionate cost. In that regard, account must be taken in particular of the value of the goods in the non-defective state, the significance of the defect, and whether the alternative type of subsequent performance could be resorted to without significant disadvantage for the purchaser. In such a case the right of the purchaser shall be limited to the alternative type of subsequent performance; this is without prejudice to the right of the seller also to refuse the alternative remedy, subject to the conditions laid down in the first sentence."

5.5.1 Question 1 – Effectiveness vs. proportionality in selection of remedies

What is the role of the principle of proportionality in making choices between repair and replacement, and price reduction and rescission, in consumer sales contracts?

The case

In *Weber*, the dispute originated from a consumer sales contract on polished tiles purchased to be laid on the floor of the buyer's house. After the tiles had been fixed to the floor, it became apparent that they were defective (because the polish had visible shading). After claiming non-conformity, the buyer was notified that repair of the tiles would not be technically possible and that the only way to remedy the non-conformity would be to remove the tiles and replace them with new ones. Therefore, the buyer's claim for repair was rejected by the seller. Taking the requisite construction work into account, the cost of replacing the tiles was estimated by an expert at 5,830.57 euros (the tiles having been originally purchased for 1,382.27 euros). Having his claim rejected, the buyer sued the seller for 5,830.57 euros for removing the tiles and for delivery of non-defective ones. In the first instance, the court awarded only a price reduction of 273.10 euros. However, after the consumer's appeal, the court of second instance awarded a payment of 2,122.37 euros and the delivery of other tiles, free of defects. The judgement was challenged by the seller before the German Federal Court (*Bundesgerichtshof*), which referred the above question to the CJEU.

In *Putz*, the case originated from the sales contract regarding a dishwasher acquired by a consumer for 367.00 euros. The delivery costs were ascertained at 9.52 euros. After the machine had been installed in the consumer's house, it proved to be defective and could not function properly. The parties agreed on replacement; however, the buyer demanded that the seller uninstall the device and install the new one (or, alternatively, that the seller cover the costs of these services). After having this claim rejected, the buyer sued the seller, demanding reimbursement of the price that she had paid for the machine. After courts decided the case in two instances (which endorsed the consumer's claim in its entirety), the seller made recourse to the German Federal Court (*Bundesgerichtshof*), which referred a preliminary question to the CJEU.

Preliminary question referred to the CJEU:

The crux of the legal issues addressed in both cases was the question of the precise meaning of the 'disproportionate cost' criterion set forth in § 439, sections 3 BGB. The national court therefore referred to the CJEU to establish more detailed criteria for the assessment of the adequacy of costs of repair and replacement. By means of this inquiry, the court also wanted to ascertain under which precise circumstances it was possible to set aside remedies from the first 'sequence' described by the 1999/44/EC Directive (i.e. repair or replacement) and apply remedies from the second 'sequence' (i.e. price reduction and termination of a contract).

On these grounds, the German Federal Court (henceforth the BGH) referred two preliminary questions to the CJEU. They addressed in parallel the same problem of criteria for comparison between the value of a consumer good and the costs of repair or replacement – in order to establish whether they should be assessed in a relative or absolute way.

The question in the *Weber* case (Joined Cases C-65/09 and C-87/09) was:

"Are the provisions of the first and second subparagraphs of Article 3(3) of [the Directive] to be interpreted as precluding a national statutory provision under which, in the event of a lack of conformity of the consumer goods delivered, the seller may refuse

the type of remedy required by the consumer when the remedy would result in the seller incurring costs which, compared with the value the consumer goods would have if there were no lack of conformity, and with the significance of the lack of conformity, would be unreasonable (absolutely disproportionate)?"

The question in the *Putz* case was:

"Are the provisions of Article 3(2) and the third subparagraph of Article 3(3) of [the Directive] to be interpreted as precluding a national statutory provision under which the seller, in the event that he has brought consumer goods into conformity with the contract by way of replacement, does not have to bear the cost of installing the subsequently delivered consumer goods into a thing into which the consumer has, in a manner consistent with their nature and purpose, incorporated the consumer goods not in conformity, if installation was not originally a contractual requirement?"

Reasoning of the CJEU:

Explaining the grounds for its decision, the CJEU based its reasoning on an attempt to balance **two opposing values**: **effectiveness of consumer protection** under the 1999/44/EC Directive (and domestic transposing provisions) and **preventing sellers from incurring unreasonably excessive costs** of restoring conformity to a good, applying the **principle of proportionality**. The domestic provision (§ 439 BGB) allowed sellers to refuse replacement (if under the particular circumstances of a case repair was not available), provided that the cost of this operation would be **disproportionate regarding the price of a good**.

According to the CJEU, to understand this rule it is necessary to take the following issues into consideration:

1) From an economic point of view, the remedies in the first 'sequence' are the ones most convenient for consumers, because they allow them to directly fulfil the economic goals that drove them to conclude a contract. The remedies from the second 'sequence' provide only protection of buyers' financial interests – assuming, however, that they will remain with a defective good (in the case of price reduction) or will have to conclude another contract (if the original one has been rescinded). In other words, as the CJEU emphasised (p. 72),

"the Directive favours, in the interest of both parties to the contract, **the performance thereof by means of the two remedies provided for in the first place, rather than cancellation of the contract or reduction in the selling price**."

Furthermore, this approach has been founded on the assumption that

"generally, those two last alternative remedies do not ensure the same level of protection for consumers as the bringing into conformity of the goods."

2) On making these observations, **the CJEU referred implicitly to the effectiveness of protection of a consumer's economic interest** embedded in the sales contract, which should allow selection of the remedy that provides the most convenient way to cure non-conformity and

is adequate to the actual needs and aims of the buyer. This includes specific performances (in particular, replacement of a defective good with a conforming one). Therefore, it seems justified to apply repair or replacement first – which, according to the CJEU, can be advantageous for both parties.

3) At the same time, however, the CJEU noted that **the preference for the remedies in question is not absolute**. The 1999/44/EC Directive lists two exceptions in this regard: **impossibility and disproportionality**. The second of them **allows sellers to avoid remedies that would be excessively costly for them**. In other words, while providing protective measures for consumers, Article 3 section 3 of the Directive also assumes, according to the CJEU, "**effective protection of the legitimate financial interests of the seller"** (p. 73).

4) The CJEU thus clearly stated that, under Article 3 section 3 of the Directive, it is necessary to **maintain a balance** between the protection of buyers' and sellers' economic interests. In other words, **while selecting among the remedies available in the case of non-conformity**, the court must assess whether any of them – even if convenient for consumers – **create unreasonably excessive economic burdens for professionals**. According to the CJEU, this mechanism of proportionality is intrinsic to the remedies set forth in Article 3 of the Directive. As pointed out (p. 75), the provision

"aims to establish **a fair balance between the interests of the consumer and the seller**,

> by guaranteeing the consumer, as the weak party to the contract, complete and effective protection from faulty performance by the seller of his contractual obligations, while enabling account to be taken of economic considerations advanced by the seller."

5) The CJEU established a more precise understanding of proportionality by referring to two provisions of the 1999/44/EC Directive. Firstly, it pointed out that **Article 3 section 3 of the 1999/44/EC Directive refers to two separate meanings of (dis)proportionality**:

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

Whilst the first expression refers merely to a lack of proportionality in the costs of repair and substitution assessed in economic terms, the second one assumes **comparison between two remedies that can be enforced alternatively**: **repair or substitution of a good**. Secondly, the CJEU also considered **recital 11 of the Directive's preamble**, which provides further explanation regarding the concept of proportionality in the selection of remedies. The provision in question also refers to the relative view of proportionality, obliging a court to compare the costs of two alternative remedies. Consequently, a **disproportionate remedy** is one that entails **unreasonable costs** – which means that the costs of applying one remedy are **substantially higher** than those of employing the other remedy available.

With regard to the cost of replacement of the good, the CJEU stated that Article 3 of the Directive must be interpreted as meaning that the seller is in fact obliged to bear the cost of removing the goods not in conformity and installing the replacement goods. Otherwise the 'free

of charge' requirement provided by Directive 1999/44 would not be fulfilled, thereby undermining **the high level of consumer protection** intended by the Directive. Furthermore, the duty for the seller to pay is also justified by the fact that the seller, by not delivering the goods free of defects, has not completely fulfilled its contractual obligations.

Conclusion of the CJEU:

Relying on these arguments, the CJEU stated that, when consumer goods not in conformity with the contract which were installed in good faith by the consumer in a manner consistent with their nature and purpose before the defect became apparent are restored to conformity by way of replacement, **the seller is obliged either to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and the installation of the replacement goods**. That obligation on the seller exists regardless of whether he was obliged under the contract of sale to install the consumer goods originally purchased.

Impact on the follow-up case:

The CJEU's decision was directly followed by two judgements of the German Federal Court (BGH), deciding upon the two cases that were the basis for referral of the preliminary questions:

(a) judgement of 21 December 2011, VIII ZR 70/08 [*Weber* case, Joined Cases C-65/09 and C-87/09];
(b) judgement of 17 October 2012, VIII ZR 226/11 [*Putz* case].

Both judgements directly implemented the guidelines provided by the CJEU, adopting the view that both the tiles, and the dishwasher ought to be replaced by the sellers – even though the costs of this operation would have been disproportionately excessive.

Elements of judicial dialogue:

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

Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU:[34]

Bulgaria

Supreme Administrative Court, 14 December 2012, no. 11172/2012

The case concerned the appeal of a commercial company trading cell phones against the decision of the lower administrative court, which had issued the obligation to replace a cell phone with a new one or to refund the amount paid by the consumer. The decision, although it did not explicitly mention the CJEU decision in *Weber and Putz* (Joined Cases C-65/09 and C-87/09), consistently applied the Court's reasoning as regards the interpretation of Directive 99/44. The Supreme administrative court affirmed that the request of the consumer to replace the

[34] Information retrieved from: Center for Judicial Cooperation Database: http://judcoop.eui.eu/data/?p=data&fold=6&subfold=6.7&idPermanent=327

commodity with a new one, after several failed repairs, was not disproportionate in the light of Article 112, par. 1 of the Bulgarian Consumer Protection Act.

5.5.2 Question 2 – Proportionality and division of costs of replacement

> Does the principle of proportionality allow for the sharing of the costs of replacement of a non-conforming good between a consumer and a seller? If so, can a consumer refuse to have the good replaced?

Preliminary question referred to the CJEU:

The problem in question pertained to a more general issue of the **relationship between proportionality and effectiveness in the context of replacement of non-conforming goods**. Although the issue of precise allocation of costs had not been addressed in any of the preliminary questions referred to the CJEU by the German Federal Court (BGH), it directly ensued from the main findings of the CJEU in the *Weber and Putz* cases (Joined Cases C-65/09 and C-87/09). These supplement the general observations as to the interplay between effectiveness and proportionality in assessing the admissibility of replacement of a non-conforming good.

The problem in question may be phrased as follows: if a seller may not refuse to replace a non-confirming good (if repair is impossible) by claiming that doing so would be disproportionate, is the seller obliged to cover the entire costs of replacement? If the costs can be shared between the parties, what are the criteria for such a division? Finally, if the buyer is obliged to incur the costs of replacement, can s/he refuse to have his/her remedy applied, and instead claim one of the remedies from the second sequence?

Reasoning of the CJEU:

In answering these questions, the CJEU clearly based its reasoning on the observation that Article 3 of the Directive assumes a **balancing between the seller's and the buyer's economic interests**. Consequently, consumers may be entitled to obtain reimbursement of only a part of costs incurred due to the replacement. The threshold set forth in this respect by the CJEU was **proportionality**. Only the costs that meet this requirement may be shifted to the seller – the others have to be borne by the consumer. Especially, as the Court pointed out, the proportionality test must take two criteria into account: "**the value the goods would have if there were no lack of conformity and the significance of the lack of conformity**". This conclusion applies, in particular, to situations in which (as in the cases decided by the German Federal Court) repair is not possible, and replacement is the only way to restore a good's conformity with a contract.

The Court reached a further conclusion: that in a case in which the costs of replacement are to be divided between the parties, **a consumer has the right to reject having a good replaced and instead claim price reduction or rescission of a contract**. Granting this option was justified in terms of the **principle of effectiveness** (p. 77): "since the fact that a consumer cannot

have the defective goods brought into conformity without having to bear part of these costs constitutes significant inconvenience for the consumer".

Conclusion of the CJEU:

The CJEU concluded that if replacement is the only remedy available to a consumer (because repair is impossible), its costs may be **shared between the parties to a contract**. The criterion of division is the threshold of proportionality, which is ascertained *ad casum* by referring to the **value of the good and the extent of its non-compliance with a contract**. The final assessment of whether particular costs meet the threshold of proportionality should be carried out by a domestic court applying these guidelines to the particular circumstance. In this case, the **consumer may reject replacement (and, consequently, partially incur its costs) and switch to the second 'sequence' of remedies – claiming price reduction or the rescission of a sales contract**.

Impact on the follow-up case:

The reasoning of the CJEU has been applied in the two judgements of the German Federal Court (BGH) referred to above (under question 1). Taking into account the interpretation provided by the ECJ, the German court decided to divide the costs of replacement between the parties, allocating them in equal halves, 600 euros each. As explained in the judgement, the threshold of proportionality (due to the general point of view of the CJEU) was established accordingly to two criteria: the significance of non-conformity and the value of the good (i.e. the criteria set forth explicitly by the CJEU). Consequently, the seller could eventually claim this sum to the extent to which it has not been previously paid by the buyer.

Elements of judicial dialogue:

See above, under question 1.

Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU:[35]

Netherlands

Rechtbank Overijssel, 22 January 2014, ECLI:NL:RBOVE:2014:500.

The decision assessed whether the non-conformity of goods – defective swimming pools, in this case – could be recognized and the consequences in terms of allocation of replacement cost could be determined. The district court affirmed that the swimming pools were non-conforming as per the contract. It took into account the timely notifications by the consumers to the sellers about the non-conformity in order to rectify the defect by enabling many attempts to repair the swimming pools. In its assessment of the costs, the district court cited the CJEU's decision in *Weber and Putz* (Joined Cases C-65/09 and C-87/09) and decided what should be determined as 'proportional' limitation of the reimbursement. Although the reasoning seemed to allocate a very strong responsibility to the seller, the district court decided in the end that the consumer had to contribute 75% of the replacement costs, allocating a very large contribution to the consumer.

[35] Information retrieved from: Center for Judicial Cooperation Database: http://judcoop.eui.eu/data/?p=data&fold=6&subfold=6.7&idPermanent=327

5.5.3 Question 3 – Effectiveness and allocation of costs of replacement

What is the relevance of the principle of effectiveness for allocation of costs of replacement if a good has been installed by a consumer within its due handling process?

The case and the preliminary question referred to the CJEU

The issue of the allocation of costs of replacement of a non-conforming good between a seller and a buyer was directly addressed in both of the preliminary questions put to the ECJ by the German Federal Court (BGH). Both of them sought to ascertain whether – in the case of replacing a good – a seller is obliged to bear the costs of removing a good if, in due course of its use, the buyer has installed the good, incorporating it into a more complex structure.

The question in the *Weber* case (Joined Cases C-65/09 and C-87/09) was:

> "Are the provisions of Article 3(2) and the third subparagraph of Article 3(3) of [the Directive] to be interpreted as meaning that, where the goods are brought into conformity by replacement, the seller must bear the cost of removing the consumer goods not in conformity from a thing into which, in a manner consistent with their nature and purpose, the consumer has incorporated them?"

The question in the *Putz* case was:

> "Are the provisions of Article 3(2) and the third subparagraph of Article 3(3) of [the Directive] to be interpreted as meaning that the seller, in the event that he has brought consumer goods into conformity with the contract by way of replacement, must bear the costs of removing the consumer goods not in conformity from a thing into which the consumer has, in a manner consistent with their nature and purpose, incorporated them?"

Reasoning of the CJEU:

The main point of reference for the Court was **the principle of effectiveness of consumer protection, derived from the 1999/44/EC Directive** (expressed directly on p. 52), supported by the wording of its Article 3, as well as the materials from the legislative procedure. All of these arguments led to the conclusion that replacement of a non-conforming good must take place **free of charge**. This applies, in particular, to situations in which the seller is not only obliged to deliver a new good, but also to remove the previous one that was installed in accordance with its normal mode of use and without awareness of any defect. The opposite solution – making consumers liable, in principle, for the costs of replacement – could hinder the proper functioning of consumer protection in sales contracts, **and therefore be contrary to the principle of effectiveness**.

The gratuitous nature of remedies in the case of non-conformity applies to the broad array of costs exemplified only in Article 3 section 4 of the 1999/44/EC Directive. As emphasised by the CJEU, the costs mentioned in this provision (i.e. "the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials") **do not exhaust all the**

possible options. It is therefore the responsibility of a domestic court to ascertain if particular costs fall within the scope of this rule and should therefore be borne by the seller.

Conclusion of the CJEU:

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

The problem in question interrelates with the issue addressed above, under question 2. On these premises, the consumer may be required to share a part of the costs of replacement of a good.

Impact on the follow-up case:

The reasoning of the CJEU has been applied in the two judgements of the German Federal Court (BGH) referred to above (under question 1).

Elements of judicial dialogue:

See above, under question 1.

5.5.4 Question 4 - delivery of defective goods in distance contracts

In light of the effectiveness and proportionality principles, should the seller be considered obliged to advance to the consumer the transport costs of defective goods when the transport is aimed at bringing them into conformity?

Main case:

- Judgement of the Court (First Chamber) of 23 May 2019, *Christian Fülla v Toolport GmbH*. C-52/18, ("**Fülla**")

Relevant legal sources

EU level

Recitals 1 and 10 to 12 Directive 1999/44:

"(1) Whereas Article 153(1) and (3) of the Treaty provides that the Community should contribute to the achievement of a high level of consumer protection by the measures it adopts pursuant to Article 95 thereof

(…)"

"(10) Whereas, in the case of non-conformity of the goods with the contract, consumers should be entitled to have the goods restored to conformity with the contract free of charge, choosing either repair or replacement, or, failing this, to have the price reduced or the contract rescinded;

(11) Whereas the consumer in the first place may require the seller to repair the goods or to replace them unless those remedies are impossible or disproportionate; whereas whether a remedy is disproportionate should be determined objectively; whereas a remedy would be disproportionate if it imposed, in comparison with the other remedy, unreasonable costs; whereas, in order to determine whether the costs are unreasonable, the costs of one remedy should be significantly higher than the costs of the other remedy;

(12) Whereas in cases of a lack of conformity, the seller may always offer the consumer, by way of settlement, any available remedy; whereas it is for the consumer to decide whether to accept or reject this proposal;"

Article 1 'Scope and definitions' Directive 1999/44, paragraph 1

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

Article 2 'Conformity with the contract' Directive 1999/44, paragraph 1

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

Article 3 of 'Rights of the consumer'

National legal sources – German law

Provisions which transpose Directive 1999/44 in German law:

Article 269 BGB "Place of performance"

"1. Where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made in the place where the obligor had his residence at the time when the obligation arose.

2. If the obligation arose in the commercial undertaking of the obligor, the place of the commercial undertaking takes the place of the residence if the obligor maintained his commercial undertaking at another place.

3. From the sole circumstance that the obligor has assumed the costs of transport it may not be concluded that the place to which shipment is to be made is to be the place of performance."

Article 439 BGB "Repair"

"1. By way of subsequent performance, the purchaser may require the repair of the defect or the delivery of goods which are free from defect, according to his preference.

2. The seller shall bear the costs necessary for the purposes of subsequent performance, including in particular the costs of transport, carriage, labour and materials.

3. The seller may refuse the manner of subsequent performance chosen by the purchaser if such performance is possible only at disproportionate cost. In that regard, account must be taken in particular of the value that the goods would have if there were no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be applied without significant inconvenience to the purchaser. In such cases the right of the purchaser shall be restricted to the alternative means of subsequent performance; this is without prejudice to the right of the seller also to refuse the alternative remedy, subject to the conditions laid down in the first sentence.

4. Where a seller delivers goods free from defects for the purposes of subsequent performance, he may require the purchaser to return the defective goods pursuant to Paragraphs 346 to 348."

The case

On 8 July 2015, Mr. Fülla bought from Toolport, by telephone, a tent. After the tent had been delivered to Mr. Fülla's place of residence, he found that it was not in conformity and thus asked Toolport to bring it into conformity at his residence. Toolport rejected Mr. Fülla's complaints regarding the lack of conformity of the tent, claiming that they were unfounded. At the same time, Toolport failed to inform Mr. Fülla that the tent had to be returned to its place of business and did not offer to advance the cost of that return to him. In those circumstances, Mr. Fülla requested the rescission of the contract and reimbursement of the purchase price of the tent as consideration for his returning the item. Since Toolport failed to comply with that request, Mr. Fülla brought an action before the *Amtsgericht Norderstedt* (Local Court, Norderstedt, Germany). The court referred a preliminary reference to the CJEU.

Preliminary questions referred to the CJEU

The referring court formulated six preliminary questions:

- Whether the third subparagraph of Article 3 of Directive 1999/44 should be interpreted as meaning that a consumer must, in all cases, offer goods acquired under a distance contract to the seller to enable repair or replacement only at the place **where the goods are located (1),** or if question 1 is answered in the negative, **(2) at the seller's place of business**
- If also question 2 is answered in the negative, **what criteria can be derived from the third subparagraph of Article 3(3) of Directive 1999/44** as regards how to specify **the place where the consumer must make goods** acquired under a distance contract available to the seller in order to enable repair or replacement **(3)**
- Whether, if **the place** where the consumer must offer goods acquired under a distance contract to the seller for examination and to enable repair is **the seller's place of business,** it is compatible with the first subparagraph of Article 3(3) of Directive 1999/44, in conjunction with Article 3(4) thereof, that the consumer must pay the costs of outward and/or return transport, or if it follows from the requirement 'to repair free of charge' that the seller is required to make an advance payment **(4)**
- Whether, **if** the **place where the consumer must make goods** acquired under a distance contract available to the professional for examination and to enable repair **is** — in all cases or in this specific case — **the professional's place of** business and **a requirement for the consumer**

to pay costs in advance, **it is compatible** with the first subparagraph of Article 3(3) of Directive 1999/44, in conjunction with Article 3(4) thereof; and whether **the third subparagraph of Article 3(3) of that Directive, in conjunction with the second indent of Article 3(5) thereof, should be interpreted as meaning that a consumer who has merely notified a defect to the seller is not entitled to have a contract rescinded without offering to transport the goods to the place where the seller is located (5)**

- Whether, **if the place where the consumer must make goods acquired under a distance contract available to the seller for examination and to enable repair is** – in all cases or in this specific one – **the sellers's place of business, and a requirement for the consumer to pay costs in advance is not compatible** with the first subparagraph of Article 3(3) of Directive 1999/44, in conjunction with Article 3(4) thereof; and whether **the third subparagraph of Article 3(3) of that Directive, in conjunction with the second indent of Article 3(5) thereof**, should be interpreted as meaning **that a consumer who has merely notified a defect to the seller without offering to transport the goods to the place where the seller is located is not entitled to have a contract rescinded**.

Reasoning of the CJEU

The CJEU, recalling the *Weber and Putz* cases (Joined Cases C-65/09 and C-87/09), ruled that, although Article 3(3) of Directive 1999/44 does not specify the place where goods not in conformity are to be made available to the seller to be repaired or replaced, that provision lays down certain limits. These limits were interpreted by the CJEU as **the expression of the intention of the EU legislature to ensure effective protection for the consumer**. The Court stated that **the place** where goods not in conformity are to be made available to the seller to be repaired or replaced **must be suited to ensuring that they are brought into conformity in compliance with the following conditions, set forth by Directive 1999/44 and interpreted by the CJEU:**

- **The goods should be brought into conformity "free of charge"**

The CJEU considered that in accordance with Article 3(4) of Directive 1999/44, the notion of 'free of charge' refers to the necessary cost incurred to bring the goods into conformity (particularly the cost of postage, labour and materials), and that the Directive seeks to strike a balance between the buyer's interests and economic considerations advanced by the seller. **Relying on these arguments, the CJEU stated that the seller has an obligation to reimburse to the consumer the cost of transporting that property to the seller's place of business, but not the obligation systematically to advance those costs to the consumer**. Nevertheless, the transport costs paid by consumers do not constitute a burden likely to deter the average consumer from asserting his/her rights. In this regard, when the national court examines whether a burden is such to deter such a consumer from asserting his/her rights, it must take into account the circumstances specific to each individual case, including factors such as the amount of transport costs, the value of the goods not in conformity, or the possibility, in law or fact, that the consumer is entitled to assert his/her rights in the event of non-reimbursement by the seller of the transport costs paid by the consumer.

- **…within a reasonable time**

The concept of 'reasonable time' varies according to the place where the consumer is required to make the goods available to the seller for repair.

- **…without significant inconvenience to the consumer.**

A 'significant inconvenience' is a burden likely to deter the average consumer from asserting his/her rights. In order to assess whether, in the context of bringing goods into conformity, a situation might be a significant inconvenience for the average consumer, account must be taken of the nature of the goods (*e.g.* size, weight) and the purpose for which the consumer acquired the goods.

With regard to the preliminary questions 5 and 6, the CJEU stated that the consumer, who clearly informed the seller of the existence of a lack of conformity in an item acquired under a distance contract, the transport of which to the place of business of the seller was likely to cause him/her a significant inconvenience, and who made the item available to the seller at his/her home for it to be brought into conformity, without having obtained, in return, any information from the seller regarding the place where the item was to be made available for it to be brought into conformity or any other adequate positive action to that end, and who therefore did not make the item available to the seller in the place in question, satisfied the obligation of diligence imposed on him/her by the first subparagraph of Article 3(3) of Directive 1999/44.

Conclusion of the CJEU

The CJEU stated that, according to Directive 1999/44, the Member States are competent to establish the place where the consumer is required to make goods acquired under a distance contract available to the seller, for them to be brought into conformity in accordance with that provision. That place must be suitable for ensuring that the goods can be brought into conformity free of charge, within a reasonable time and without significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer acquired the goods.

Moreover, the consumer's right to the bringing of goods, acquired under a distance contract, into conformity 'free of charge' does not include the seller's obligation to advance the costs of transporting those goods from the consumer, for the purposes of bringing them into conformity, to the seller's place of business, unless the fact that the consumer must advance those costs constitutes such a burden as to deter him/her from asserting his/her rights, which it is for the national court to ascertain. On this point, the CJEU stated (paragraph 54):

"the striking of a balance between the interests of the consumer and of the seller which Directive 1999/44 seeks to achieve does not require that the obligation on the seller to bring the goods into conformity free of charge also include, beyond the obligation on the seller to reimburse to the consumer the cost of transporting that property to the seller's place of business, the obligation systematically to advance those costs to the consumer."

Furthermore, the CJEU stated that a consumer is entitled to rescission of the contract as a result of the failure to ensure a remedy for the lack of conformity within a reasonable time if:

- s/he informed the seller of the non-conformity of goods acquired under a distance contract;
- s/he made the goods available to the seller at his/her home for them to be brought into conformity;
- the transport of the goods to the seller's place of business was likely to cause a significant inconvenience to the consumer;
- the seller failed to take any adequate steps to bring those goods into conformity, including that of informing the consumer of the place where those goods were to be made available so that the seller could bring them into conformity.

It was for the national court, by means of an interpretation in conformity with Directive 1999/44, to ensure the right of that consumer to rescission of the contract.

Elements of judicial dialogue

In the *Fülla* case (C-52/18) the CJEU expressly recalled the *Weber* and *Putz* cases (Joined Cases C-65/09 and C-87/09, see questions 1, 2 and 3), and the application of the principle of effective consumer protection made in those judgements with regard to the remedies granted to the consumer in the case of non-conformity (paragraph 32). The CJEU confirmed the interpretation according to which Directive 1999/44 favours, in the interest of both parties to the contract, the performance of that contract by means of the two remedies first provided for (substitution or repairment), rather than the rescission of the contract (§ 61). The CJEU also recalled the *Weber* and *Putz* cases (Joined Cases C-65/09 and C-87/09) in order to highlight that Directive 1999/44 strikes a balance between the position of the consumer and the economic interest of the seller (paragraph 41).

5.5.5 Question 5 – Burden of proof and *ex officio* evidence in consumer sales disputes

Main case:

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

What is the allocation of the burden of proof with respect to the claim of non-conformity of a consumer good? How is it affected by the principle of effectiveness?

Relevant legal sources

Article 5 section 3 of the 1999/44/EC Directive:

"Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity."

The case

Ms. Faber bought a used Range Rover (a car) for 7,002 euros from a company called 'Hazet' on the 27th of May 2008. On the 26th of September 2008, the car caught fire on the highway and completely burned out on the side of the road. In response to Ms. Faber's claim for compensation, the seller pointed out *inter alia* that it had not been proven that the car was non-compliant with the contract (in the meantime the wreck had been scrapped). According to Ms. Faber, the firemen and policemen who arrived at the scene of the incident stated that the vehicle had had a technical failure. The court of the first instance rejected Ms. Faber's claim. After her recourse, the court of second instance referred a preliminary question to the CJEU.

Preliminary question referred to the CJEU:

While asking the preliminary question in the *Faber* case (C-497/13), the Dutch court addressed, amongst other problems, the issue of **the general outline of burden of proof in consumer sales cases**.

Firstly (in question 5), the national court inquired **whether it was possible to oblige a consumer to present on his/her own the facts and evidence relevant for claiming remedies for the non-conformity of goods.** The question especially concerned the issue of whether domestic law may oblige consumers to prove that they notified a seller about a lack of conformity within the terms set forth in Article 5 section 2 of the 1999/44/EC Directive. The court intended to establish whether such an obligation is consistent with the **principle of effectiveness**.

Secondly (in question 6), the national court sought to clarify **how precise a claim of the lack of conformity made by a consumer on the grounds of Article 5 section 3 of the 1999/44/EC Directive must be** – and, respectively, how detailed the evidence provided by a buyer ought to be. Also, in this respect, the court asked, in particular, about the relevance of the principle of effectiveness to ascertaining this matter.

Lastly (in question 7), the Dutch court wanted to establish whether the burdens in terms of factual statements and evidence differ if the consumer **receives professional legal assistance in claiming his/her rights concerning non-conformity**.

Reasoning of the CJEU

Referring to the aforementioned problems, the CJEU observed that the national legislation transposing the 1999/44/EC Directive may oblige consumers to notify the lack of conformity of goods and, further, prove before a court that the notification has been made within the term required by law. The details that have to be communicated by a consumer cannot be excessive nor too far-reaching – rather, it should be sufficient to indicate the lack of conformity with no need to indicate its reasons precisely. The scope of obligations regarding proof that the

notification has been made ought to **comply with the principle of effectiveness**. In particular, the consumer cannot be subjected to unnecessary burdens that would be "capable of making it impossible or excessively difficult for the consumer to exercise the rights which he derives from Directive 1999/44" (p. 64).

Further, as regards the precise allocation of the burden of proof in the case of non-conformity, the Court emphasised that, in principle, the 1999/44/EC Directive reverses this burden if the buyer makes his/her claim within the period of six months, as specified in **Article 5 section 3**. If this requirement is met, **it is presumed that non-conformity existed at the time of delivery of a good**.

However, as the CJEU pointed out, to benefit from this rule, the consumer needs to evidence two facts:

(a) that the good **does not conform with a contract**; it is not required, however, to prove the origins of non-conformity, nor its cause or the possibility to attribute it to the seller;
(b) **that there was an apparent non-conformity** within the period of six months, as provided for in Article 5 section 3 of the 1999/44/EC Directive.

If these prerequisites are complied with, the burden of proving the opposite facts – i.e. that non-conformity did not exist at the time of delivery – rests on the seller.

Furthermore, the result in question cannot be altered because the consumer is assisted by a professional lawyer or acts in the proceedings independently (p. 47). As the main point of reference, the CJEU indicated in this respect the principles of equivalence (between the procedural rules regarding EU-law related claims and other claims), as well as **the principle of effectiveness**. The Court ascertained that the scope of these principles ought to be framed in a unified way and should be "independent of the specific circumstances of each case".

Conclusion of the CJEU:

With regard to these arguments, the CJEU pointed out that a consumer, while claiming non-conformity of a good with a contract (Article 5 section 2 of the 1999/44/EC Directive), may be subjected to rules on evidencing non-conformity only so long as these do not make it excessively difficult or impossible for the consumer to exercises his/her rights. In such a case, the consumer is not obliged, in particular, to evidence the precise cause of non-conformity. A similar rule also applies to notifying non-conformity within the period of six months as specified in Article 5 section 3 of the 1999/44/EC Directive. The way in which the burden of proof is administered is not altered by the fact that a consumer receives professional legal assistance or acts on his/her own.

Impact on the follow-up case

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

The case was discontinued.

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

Austria

There is no express reference to *Faber* (C-497/13) in Austrian case law. The burden of proving the conformity of a good is covered by § 924 of the Austrian Civil Code, amended in 2001 in implementation of Directive 1999/44.

Austrian civil-procedural law envisages the general separation of burden of proof: each party has to furnish and make evident all the facts which are in favour of the party. There are exceptions to this general rule, e.g. the proximity of a party to the evidence. These rules are regarded as an expression of a fair trial (Article 6 ECtHR, Article 47 CFR).

Italy

The *Faber* case (C-497/13) was specifically referred to by a decision taken by the *Consiglio di Stato* (the national appeal court) when assessing the adequacy and proportionality of fines imposed on Apple for unfair practices consisting in offering as a distinct guarantee the repair service after the first six-month period corresponding to the period specified in Article 5 section 3 of the 1999/44/EC Directive in respect of the presumption concerning the occurrence of a defect at the time of delivery (see *Consiglio di Stato* 17.11.2015, no. 5250). Indeed, although this guarantee perfectly overlaps with the guarantee provided by law (for which no additional payment may be charged to the consumer), Apple unfairly induced the consumer to believe that after six months the seller would not be legally obliged to provide any assistance in the case of non-conformity in order to verify the causes of and remedies for such non-conformity. Apple asserted that the burden of proof concerning the existence of non-conformity and its causes was on the consumer. By referring to the CJEU's decision in *Faber* (C-497/13) and the principle of effectiveness therein applied, the Italian court ruled that Apple's conduct was an unfair practice to be sanctioned with effective, proportionate, and dissuasive penalties.

A judgement of the first-instance court of Naples of 9 January 2017 can be considered. In this case, the court dismissed the defendant's line of defence that he was not involved in the manufacture of the good. In particular, the court pointed out that pursuant to the Consumer Code – Article 130 – the seller/retailer is liable for any defect displayed by the goods sold. Moreover, according to Article 5 § 3 of Directive no. 1999/44, if the defect becomes apparent within six months from the good's sale, it is presumed that the defect existed at the moment of the sale. After giving proof that the good is defective and that the defect became apparent within six months from the sale, the consumer has fulfilled his/her burden of proof and it is for the seller to prove that the defect did not exist at the moment of the sale. In order to justify its reasoning in regard to allocation of the burden of proof, the court made explicit reference to the CJEU decision in the *Faber* case (C-497/13), according to which – § 70-73 – the consumer is relieved of "the obligation of establishing that the lack of conformity existed at the time of delivery of the goods" once he/she has "alleged and furnished evidence that the goods sold are not in conformity with the relevant contract" and proved "that the lack of conformity in question

became apparent, that is to say, became physically apparent, within six months of delivery of the goods".

Poland

The *Faber* judgement (C-497/13) has not been directly referred to by Polish courts. On the general rules on burden of proof and providing evidence that are applicable also to consumer sales, see the comments on Poland under the section above.

Estonia

The same principle embodied in Article 5(3) of Directive 1999/44 as interpreted in the CJEU's case law is comprised in the Law of Obligations Act (*Võlaõigusseadus*). There are no references to the *Faber* judgement (C-497/13) in Estonian case law.

According to Article 218(2) of the Law of Obligations Act (LOA), in the event of a consumer sale, the seller is liable for any lack of conformity of an item which becomes apparent within two years from the date of delivery of the good to its purchaser. In the event of a consumer sale, it is presumed that any lack of conformity which becomes apparent within six months from the date of delivery of a good to its purchaser already existed before the delivery, unless such presumption is contrary to the nature of the good or to the lack of conformity.. The LOA, including that provision, entered into force on 1 July 2002. This sub-paragraph is based on Article 39(2) of the Convention on Contracts for the International Sale of Goods and Article 4:302(3) of the Principles of European contract law.

The relevant provisions of the LOA in the interests of consumer protection are:

- If a good is delivered to the purchaser by the seller or by a carrier authorised by the seller on the basis of a contract, reimbursement of transport costs may be claimed from the purchaser only if the amount of the costs was communicated to the purchaser not later than upon entry into the contract (Article 215(3) of the LOA);
- A good does not conform to a contract if it does not possess the quality usual for that type of good which the purchaser may have reasonably expected based on the nature of the good and considering the statements made publicly with respect to particular characteristics of the good by the seller, producer or previous seller of the good or by another retailer, in particular in the advertising of the good or on labels (Article 217(6) of the LOA);
- The consumer has to notify the seller of any lack of conformity of a good within two months (in other cases within a reasonable period of time) from becoming aware of the lack of conformity (Article 220(1) of the LOA). A detailed description of the lack of conformity is not required (Article 220(2) of the LOA).
- If a good does not conform to the contract, the purchaser may demand repair of the good or delivery of a substitute item from the seller even if the lack of conformity does not constitute a fundamental breach of contract (Article 222(1)(2) of the LOA);
- Any unreasonable inconvenience caused to the purchaser by the repair or substitution of a good is also deemed to be a fundamental breach of contract by the seller (Article 223(2)

of the LOA). In this case, the purchaser is not required to determine an additional term and has the right, *inter alia*, to withdraw from the contract (Article 223(3) of the LOA);

- Specifications for warranty against defects in the event of consumer sale (Article 231 of the LOA).
- Agreements which are related to the legal remedies to be used in the case of a breach of contract and which derogate from the relevant provisions of the LOA to the prejudice of the purchaser are void (Article 237(1) of the LOA).

5.5.6 Question 6 – Limitation period

Is compatible with Directive 1999/44 a national provision which provides the limitation period for action by the consumer shorter than two years from the time of delivery of the goods when the seller and consumer have agreed, according to national law, on a period of liability of the seller of less than two years, namely a one-year period, for the second-hand goods concerned?

Main case:

- Judgement of the Court (Fifth Chamber) of 13 July 2017 *Christian Ferenschild v JPC Motor SA,* C-133/16, ("**Ferenschild**")

Relevant legal sources

EU level

Directive 1999/44

Recital 7: "Whereas the goods must, above all, conform with the contractual specifications; whereas the principle of conformity with the contract may be considered as common to the different national legal traditions; whereas in certain national legal traditions it may not be possible to rely solely on this principle to ensure a minimum level of protection for the consumer; whereas under such legal traditions, in particular, additional national provisions may be useful to ensure that the consumer is protected in cases where the parties have agreed no specific contractual terms or where the parties have concluded contractual terms or agreements which directly or indirectly waive or restrict the rights of the consumer and which, to the extent that these rights result from this Directive, are not binding on the consumer"

Recital 16 "Whereas the specific nature of second-hand goods makes it generally impossible to replace them; whereas therefore the consumer's right of replacement is generally not available for these goods; whereas for such goods, Member States may enable the parties to agree a shortened period of liability"

Recital 17"Whereas it is appropriate to limit in time the period during which the seller is liable for any lack of conformity which exists at the time of delivery of the goods; whereas Member States may also provide for a limitation on the period during which consumers can exercise their rights, provided such a period does not expire within two years from the time of delivery; whereas where, under national legislation, the time when a limitation period starts is not the time of delivery of the goods, the total duration of the limitation period provided for by national law may not be shorter than two years from the time of delivery"

Recital 24

"Whereas Member States should be allowed to adopt or maintain in force more stringent provisions in the field covered by this Directive to ensure an even higher level of consumer protection."

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

Article 3(1) and (2)

See Chapter 1, §1.2.1

Article 5(1)

"The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery."

Article 7(1)

"Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.

Member States may provide that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in Article 5(1). Such period may not be less than one year."

Article 8

"1. The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability.

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

National legal sources

Provisions which transpose Directive 1999/44 in Belgian law:

Article 1649 quater of the Civil Code

"1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered where the lack of conformity becomes apparent within two years of their delivery. (...)

By way of derogation from the first subparagraph, the seller and the consumer may, for second-hand goods, agree on a period shorter than two years; such period may not be less than one year. (...)

3. Actions by the consumer shall be brought within a period of one year from the day on which the consumer detected the lack of conformity; such limitation period may not expire before the end of the two-year period provided for in [paragraph 1]"

The case

On 21 September 2010, Mr. Ferenschild, a Dutch national residing in Belgium, purchased a second-hand car from JPC Motor. On the 22 of September the registration of the vehicle was refused by the Vehicle Registration Department. On 7 October Mr. Ferenschild notified JPC Motor that the vehicle had a "hidden functional defect", claiming lack of conformity. He gave formal notice to take the vehicle back and reimburse the sale price. It then became apparent that it was not the vehicle itself but the vehicle's documents that were defective. Accordingly, the vehicle bought by Mr. Ferenschild was duly registered by DIV on 7 January 2011.

On 21 October 2011, Mr. Ferenschild's adviser put JPC Motor on formal notice to pay compensation to his client for the damage sustained as a result of the lack of conformity. Since JPC Motor disputed the claim for compensation, contending that it was out of time, Mr. Ferenschild initiated legal proceedings against that company on 12 March 2012 before the *Tribunal de commerce de Mons* (Commercial Court, Mons, Belgium).

By judgement of 9 January 2014 the tribunal dismissed Mr. Ferenschild's application. On 3 April 2014, Mr. Ferenschild brought an appeal against that judgment before the *Cour d'appel de Mons* (Court of Appeal, Mons, Belgium). On 8 June 2015, the Court found that the vehicle sold lacked conformity within the meaning of Article 1649 bis et seq. of the Civil Code, but that the lack of conformity appeared to have been resolved following registration of the vehicle.

However, the Court ordered, of its own motion, that the hearing be reopened in order to allow the parties to make submissions, inter alia, on whether the action was time barred, the issue being that, according to the agreement of the parties and in accordance with Article 1649 quater of the Civil Code, the limitation period for action by the consumer seemed to have expired before the two-year period from delivery of the second-hand car had elapsed.

The referring Court affirmed that article 1649 could be incompatible with Directive 1999/44, in particular with Article 5(1) and the second subparagraph of Article 7(1). Therefore, the judge decided to stay the proceedings and to refer the question to the Court of Justice for a preliminary ruling.

Preliminary questions referred to the CJEU

The referring court asked if Article 5(1) of Directive 1999/44 in conjunction with the second subparagraph of Article 7(1) thereof, should be interpreted as precluding a provision of national

law which is interpreted as allowing, for second-hand goods, the limitation period for action by the consumer to expire before the end of the two-year period elapsing from the delivery of goods which are not in conformity with the contract, where the seller and the consumer have agreed on a guarantee period of less than two years.

Reasoning of the CJEU

In its decision the CJEU clarified the distinction between two types of time limits provided for by Article 5(1) of Directive 1999/44:

- **period of liability of the seller**, which refers to the period during which the seller is liable under Article 3 of the Directive when a lack of conformity of the goods at issue becomes apparent and, accordingly, this gives rise to the rights set out in that article in favour of the consumer. The duration of the period of liability of the seller is, as a rule, two years from the time of delivery of the goods. As an exception set forth in Article 7(1) of the Directive 1999/44, Member States may provide that, in the case of second-hand goods, the seller and consumer may agree a time period for the liability of the seller shorter than that set out in Article 5(1) of the Directive, provided that that period is not less than one year.
- **period of time during which the consumer can actually exercise the rights** that arose in the period of liability of the seller. Whether to impose a limitation period for action by the consumer is a matter for national legislation, but the mandatory minimum duration of that period must always be, as a rule, at least two years from the time of delivery of the goods concerned. The wording of the first subparagraph of Article 7(1) of the Directive, read in light of recital 7 thereof, also confirms the binding nature of that general minimum duration in so far as, under that provision, the parties cannot derogate from it by means of an agreement and Member States must ensure that it is complied with. Accordingly, the possibility for Member States to provide that, in the case of second-hand goods, the parties may reduce the duration of the period of liability of the seller to one year from the time of delivery of the goods does not enable Member States to provide also that the parties may reduce the duration of the limitation period caught by the second sentence of Article 5(1) of the Directive.

A national rule such as that at issue in the main proceedings, which would allow the limitation period afforded to consumers to be shortened as a consequence of the reduction of the period of liability of the seller to one year, would result in a lesser level of consumer protection. The CJEU emphasised that, in that case, the consumer would be deprived of the exercise to the full extent of the legal remedies granted by EU law. The national law provision must, therefore, be interpreted in conformity with the Directive.

Although the **principle of effectiveness** is not expressly recalled in the judgement, the CJEU's interpretation of the possibility of derogation as an exception, as well as the emphasis on the importance of granting to consumers the possibility to exercise their rights can be seen as an implicit reference to that principle.

Conclusion of the CJEU

The CJEU stated that Article 5(1) and the second subparagraph of Article 7(1) of Directive 1999/44/EC must be interpreted as precluding a rule of a Member State which allows the limitation period for action by the consumer to be shorter than two years from the time of delivery of the goods when the Member State has made use of the option given by the latter of those two provisions, and the seller and consumer have agreed on a period of liability of the seller of less than two years, namely a one-year period, for the second-hand goods concerned.

Elements of judicial dialogue

The CJEU mentioned and applied the reasoning of the *Faber* decision (C-497/13, see Question 5), confirming the interpretation according to which the general minimum duration of the limitation period has a binding nature, and that the parties cannot, as a rule, derogate from it by means of an agreement and Member States must ensure that it is complied with.

5.5.7 The reform of the consumer sales Directive and the importance of the digital environment: Directive 2019/771 and 2019/770

On 20 May 2019, the Directive (Eu) 2019/771 on certain aspects concerning contracts for the sale of goods was approved; **it repealed Directive 1999/44/EC**. On the same day, the **Directive (EU) 2019/770** on certain aspects concerning contracts for the supply of digital content and digital services was adopted.

By 1 July 2021, the Directive stated, Member States should adopt and publish the measures necessary to comply with these Directives, and the related national provisions would be applied from 1 January 2022.

It should be noted that the context of the digital environment was taken into account in the new Directives, as shown by the title of Directive 2019/770 and by certain provisions of Directive 2019/771, such as the definitions provided by Article 2 (*e.g.* "good with digital elements", "digital content" and "digital service", "compatibility" with regard both to hardware and software).

The differences between the new Directives and Directive 1999/44 on the aspects referred to above are analysed in the following part of this section, also in order to identify the possible influence of the considered CJEU case law on the interpretation of Directive 2019/770 and 2019/771.

Effectiveness and proportionality in the selection of remedies (Question 1,2 and 3 above)

Article 13 Directive 2019/771 provides:

> "In the event of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in this Article.
>
> 2. In order to have the goods brought into conformity, the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or,

compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including:

(a) the value the goods would have if there were no lack of conformity;

(b) the significance of the lack of conformity; and

(c) whether the alternative remedy could be provided without significant inconvenience to the consumer.

3. The seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances including those mentioned in points (a) and (b) of paragraph 2.

4. The consumer shall be entitled to either a proportionate reduction of the price in accordance with Article 15 or termination of the sales contract in accordance with Article 16 in any of the following cases:

(a) the seller has not completed repair or replacement or, where applicable, has not completed repair or replacement in accordance with Article 14(2) and (3), or the seller has refused to bring the goods into conformity in accordance with paragraph 3 of this Article;

(b) a lack of conformity appears despite the seller having attempted to bring the goods into conformity;

(c) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract; or

(d) the seller has declared, or it is clear from the circumstances, that the seller will not bring the goods into conformity within a reasonable time, or without significant inconvenience for the consumer.

5. The consumer shall not be entitled to terminate the contract if the lack of conformity is only minor. The burden of proof with regard to whether the lack of conformity is minor shall be on the seller.

6. The consumer shall have the right to withhold payment of any outstanding part of the price or a part thereof until the seller has fulfilled the seller's obligations under this Directive. Member States may determine the conditions and modalities for the consumer to exercise the right to withhold the payment.

7. Member States may regulate whether and to what extent a contribution of the consumer to the lack of conformity affects the consumer's right to remedies".

The new Directive 2019/771 was more specific than Directive 1999/44. The reasoning of the *Weber* and *Putz* cases (Joined Cases C-65/09 and C-87/09) seems to be coherent also with the

new norms, considering that the new Directive contained a specific provision (Article 8), on the incorrect installation of goods. Nevertheless, the hierarchy of remedies in the new Directive (first repair or replacement, and then termination or price reduction) was more flexible than the one provided in Directive 1999/44. For example, the consumer is entitled to either a proportionate reduction of the price or the termination of the contract if the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract. Moreover, in *Weber and Putz* (Joined Cases C-65/09 and C-87/09) the CJEU stated that Directive 1999/44 intended to give the seller the right to refuse repair or replacement of the defective goods only if this is impossible or relatively disproportionate. According to that judgement, if only one of the two remedies is possible, the seller may therefore not refuse the only remedy which allows the goods to be brought into conformity with the contract. The wording of the new Directive 2019/771 could be interpreted as changing this rule, providing that if a remedy – the substitution or the repairment – is disproportionate, and the other one is impossible, the seller can refuse both.

With regard to **Directive 2019/770**, Article 14 states the conditions for exercising the remedies in the case of lack of conformity of a digital content or service. The distinction between that Directive and Directive 2019/771 is closely related to the scope of application of the former Directive, which is to be applied also in some cases where the price is not paid (see Chapter 9 of this Casebook). In those cases, a reduction of price cannot be requested by the consumer.

The allocation of replacement costs (Questions 2 and 3 above)

Article **14 of Directive 2019/771** provides that

> "Where a repair requires the removal of goods that had been installed in a manner consistent with their nature and purpose before the lack of conformity became apparent, or where such goods are to be replaced, the obligation to repair or replace the goods shall include the removal of the non-conforming goods, and the installation of replacement goods or repaired goods, or bearing the costs of that removal and installation."

On comparing this norm with the interpretation of Directive 1999/44 provided by the CJEU, the application of principles of proportionality and effectiveness appears quite different: the new Directive does not expressly provide the possibility, in cases similar to the *Weber and Putz* one, to limit the consumer's right to reimbursement of the cost of removing the defective goods and of installing the replacement goods, applying the principle of proportionality. Therefore, a future question for discussion could be:

Could Article 14 of the Directive 2019/771 related to the cost of removing the defective goods and of installing the replacement goods be interpreted in light of the application of the proportionality principle made by the CJEU in the *Weber and Putz* case (Joined Cases C-65/09 and C-87/09)?

Burden of proof and ex officio evidence (question 5 above)

The new Article 11 **Directive 2019/771**, entitled "Burden of proof" and Article 10(2) regulating the liability of the seller, can be compared with the interpretation of Directive 1999/44 provided by the CJEU. The reasoning of the Court in the ***Faber* case** (C-497/13) seems to be important also in interpretation of the new Directive, considering that the most important change is related to the time of the presumption rule in favour of the consumer (one year instead of six months), and not the structure of the system of burden of proof.

It should be considered also that Directive **2019/770**, in relation to the **lack of conformity of a digital content or service**, in Article 12 provides that:

a) The burden of proof with regard to whether the digital content or digital service was supplied, in accordance with Article 5, shall be on the trader.
b) In cases in which a contract provides for a single act of supply or a series of individual acts of supply, the burden of proof with regard to whether the supplied digital content or digital service was in conformity at the time of supply shall be on the trader for a lack of conformity which becomes apparent within a period of one year from the time when the digital content or digital service was supplied.
c) Where the contract provides for continuous supply over a period of time, the burden of proof with regard to whether the digital content or digital service was in conformity within the period of time during which the digital content or digital service is to be supplied under the contract shall be on the trader for a lack of conformity which becomes apparent within that period.

The rules referred to in points b) and c) do not apply if the trader demonstrates that the digital environment of the consumer is not compatible with the technical requirements of the digital content or digital service, and if the trader informed the consumer of such requirements in a clear and comprehensible manner before the conclusion of the contract.

Furthermore, **the consumer shall cooperate with the trader**, to the extent reasonably possible and necessary, to ascertain whether the cause of the lack of conformity of the digital content or digital service at the time specified in letters b) and c), as applicable, lay in the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are least intrusive for the consumer. If the consumer fails to cooperate, and if the trader informed the consumer of such requirement in a clear and comprehensible manner before the conclusion of the contract, the burden of proof with regard to whether the lack of conformity existed at the time referred to in letters a) and b), as applicable, shall be on the consumer.

The *rationale* of the provisions of Directive 2019/770 seems to be similar to that of Directive 2019/771 and Directive 1999/44. Nevertheless, the rules provided are quite different, such as the ones referred in letters b) and c) above, or those related to the duty of cooperation of the consumer. The differences may be seen as due to the specificities of the digital environment, where data protection rules are normally at stake. Therefore, a future question for discussion could be:

Could the principle of effectiveness and the right to data protection provided by Article 8 CFREU have an impact on the interpretation of the duty of cooperation for the consumer? More specifically, in light of Article 8 CFREU and of the principle of effectiveness, could the meaning of "least intrusive" means for the consumer be interpreted in light of Regulation UE 2016/679 ?

Limitation period (Question 6 above)

Pursuant to Directive 2019/771, the seller shall be liable to the consumer for any lack of conformity which exists at the time when the goods were delivered, and which becomes apparent within two years from that time (Article 10 (1)). This rule applies also to goods with digital elements, but it should be coordinated with Article 7(3). In the case of goods with digital elements where the sales contract provides for a continuous supply of the digital content or digital service over a period of time, the seller shall also be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within two years from the time when the goods with digital elements were delivered. Where the contract provides for a continuous supply for more than two years, the seller shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract (Article 10).

Moreover, according to Article 10(3), in the case of goods with digital elements, the seller shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep those goods in conformity, for the period of time:

a) that the consumer may reasonably expect given the type and purpose of the goods and the digital elements, and taking into account the circumstances and nature of the contract, where the sales contract provides for a single act of supply of the digital content or digital service; or

b) indicated in Article 10(2) or (5), as applicable, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time.

Furthermore, Member States may provide that, in the case of **second-hand goods**, the seller and the consumer can agree to contractual terms or agreements with a liability or limitation period shorter than the general one, provided that such shorter periods are not less than **one year**.

With regard **to the period of time during which the consumer can actually exercise the rights**, Article 10(5) Directive 2019/771 provides that it is possible for Member States to provide a limitation period for the remedies against the lack of conformity of the good, but this provision must allow the consumer to exercise the remedies for a lack of conformity for which the seller is liable under Article 10(1) and (2).

With regard to Directive **2019/770 on digital contents and services**, its Article 11 (2,3) provides:

> "If, under national law, the trader is only liable for a lack of conformity that becomes apparent within a period of time after supply, that period shall not be less than two years from the time of supply, without prejudice to point (b) of Article 8(2).

If, under national law, the [consumer] rights laid down in Article 14 are also subject or only subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 14 for any lack of conformity that exists at the time indicated in the first subparagraph and becomes apparent within the period of time indicated in the second subparagraph.

3. Where the contract provides for continuous supply over a period of time, the trader shall be liable for a lack of conformity (…), that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the contract.

If, under national law, the rights laid down in Article 14 are also subject or only subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 14 for any lack of conformity that occurs or becomes apparent during the period of time referred to in the first subparagraph."

Taking into account the similarities between the new Directives and Directive 1999/44, the CJEU's reasoning in the *Ferenschild* case (C-133/16) related to the limitation period's rules in Directive 1999/44 could be a reference for national legislators in the implementation of Directive 2019/770 and Directive 2019/771 in national legal systems.

5.6 Effective, proportionate and dissuasive penalties for breaches of Directive 2008/48

Relevant CJEU cases in this cluster

- Judgement of the Court (Fourth Chamber), 27 March 2014, LCL *Le Crédit Lyonnais SA v Fesih Kalhan*, Case C-565/12, ("**Le Crédit Lyonnais**")
- Judgement of the Court (Third Chamber) of 9 November 2016, *Home Credit Slovakia a.s. v Klára Bíróová*, Case C-42/15 ("**Home Credit Slovakia**")
- Judgement of the Court (Second Chamber) of 5 March 2020, *OPR-Finance s.r.o. v GK.* Case C-679/18 ("**OPR-Finance**")
- Judgement of the Court (Sixth Chamber) of 10 June 2021, (Luxembourg*) S.A. v KM Ultimo Portfolio Investment* (Luxembourg) SA, Case C-303/20 ("**Ultimo Portfolio Investment**")

Within this cluster, the main case presented as a reference point for judicial dialogue within the CJEU and between EU and national courts is the *Ultimo Portfolio Investment* (C-303/20)**.**

Main questions addressed:

Question 1 Does the penalty of liability for a minor offence that is imposed in Article 138c(1[a]) of the [Code of minor offences] for a failure to comply with the obligation to assess a consumer's creditworthiness laid down in Article 8(1) of Directive [2008/48] constitute proper and sufficient implementation of the

requirement, imposed on the Member State in Article 23 of that Directive, to lay down in national law effective, proportionate and dissuasive penalties for a breach by the creditor of the obligation to assess the creditworthiness of a consumer?

Relevant legal sources

EU level

Recitals 26 and 47 of Directive 2008/48

"(26) … In the expanding credit market, in particular, it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so. … creditors should bear the responsibility of checking individually the creditworthiness of the consumer. To that end, they should be allowed to use information provided by the consumer not only during the preparation of the credit agreement in question, but also during a long-standing commercial relationship. The Member States' authorities could also give appropriate instructions and guidelines to creditors. Consumers should also act with prudence and respect their contractual obligations.

(47) Member States should lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and ensure that they are implemented. While the choice of penalties remains within the discretion of the Member States, the penalties provided for should be effective, proportionate and dissuasive."

Article 8 of Directive 2008/48

"Member States shall ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database. Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement."

Article 23 of Directive 2008/48

"Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive."

National legal sources

Article 138c of the code of minor offences

"1a. The same penalty [a fine] shall be imposed on anyone who fails to comply with the obligation to assess creditworthiness when concluding a consumer credit agreement with a consumer.

4. If the trader is not a natural person, the liability provided for in paragraphs 1 to 3 shall be borne by the person in charge of the undertaking or the person authorised to conclude agreements with consumers."

5.6.1 Question 1 – The selection of effective, proportionate and dissuasive penalties based on Article 23 of Directive 20008/48

Should national courts take into account all the available and applicable legal rules under national law when interpreting Article 23 of Directive 2008/48?

The case

The lender Aasa Polska and the defendant KM concluded a loan agreement. At the date of conclusion of the agreement, KM had commitments under 23 loan and credit agreements (total amount PLN 261 850). At the date of conclusion of the agreement, KM's spouse (AB) had commitments under 24 loan and credit agreements (total amount PLN 457,830). On the date of conclusion of the agreement, KM was employed under an employment contract providing for net wages of PLN 2,300. KM's husband had no income due to illness. Prior to the conclusion of the agreement, the lender failed to make any assessment of KM's assets or of the amounts she owed. The claim under the loan agreement was transferred to Ultimo Portfolio Investment (Luxembourg). The legal successor to the lender requested the referring court to order KM to pay PLN 7,139.76 plus statutory default interest. KM moved for dismissal of the claim in its entirety.

Preliminary questions referred to the CJEU

The referring court asked whether Article 23 of the Directive must be interpreted to mean that in determining the effectiveness, proportionality, and dissuasiveness of the penalties, courts could only take into account provision(s) of the national law specially adopted to implement Article 23 of the Directive.

Reasoning of the CJEU,

In its reasoning, the CJEU acknowledged that the low amount of the penalty or the fact that it only applies to natural persons may be indicative of its shortcomings. Referring to its earlier case law, it reiterated that for penalties to be effective and dissuasive, they must remove the economic benefit of the infringement and must have a positive effect on the consumer in question.

However, the CJEU recalled that, under Article 288 TEFU, Directives are legal instruments that are result-oriented. Although binding on the result to be achieved, they leave discretion to the Member States in regard to the form and method of implementation. Consequently, transposition does not necessarily require legislative action. The existence of general principles and general rules may render a legislative action superfluous. It follows that, in order to determine whether a national law adequately implements the obligations resulting from the given Directive, it is important to take into account not only the legislation specifically adopted for the purposes of transposing the Directive but also "all the available and applicable legal rules". National courts

must therefore consider the whole body of rules of national law and interpret them in light of the wording and purpose of the Directive in order to achieve the outcome that is consistent with the objectives pursued by the Directive.

In the case considered here, the court highlighted that Polish law benefits from a range of civil penalties in addition to those in the Code of Minor Offences. Importantly, the CJEU also stressed that the case at hand would benefit from the penalty applicable for using unfair terms. Thus, Directive 1993/13/EC on unfair contract terms was implemented in Polish law to render excessive charges not binding on consumers.

Conclusion of the CJEU

The CJEU ruled that in interpreting Article 23 of the Directive, national courts must take into account not only the special national provisions that are adopted to transpose the Directive but also the other provisions of the relevant law that should be interpreted in light of the objectives of the Directive, so that those penalties meet the requirements laid down in Article 23 thereof.

Elements of judicial dialogue

The CJEU decision should be read in connection with earlier preliminary rulings on the extent to which the EU principles of effectiveness, proportionality, and dissuasiveness influence the identification of penalties for breaches of the Consumer Credit Agreement Directive. It gives useful hints on how to interpret what is effective and dissuasive in the case of a breach of the obligation to assess the creditworthiness of a consumer.

In *Le Crédit Lyonnais* (C-565/12), the CJEU had already clarified the conditions under which application of the forfeiture of entitlement to contractual interest is, as a penalty under French law for a creditor's breach of its pre-contractual obligation to assess a borrower's creditworthiness, compatible with the Directive. This penalty, laid down in Articles L. 311-8 – L. 311-13 *Code de la Consommation*, leads to the credit granted being deemed interest-free and free of charges. As such, it was interpreted restrictively by the *Cour de Cassation*, which only applied the penalty to the contractual interest and not to the statutory rate. According to the CJEU, "if the penalty of forfeiture of entitlement to interest is weakened, or even entirely undermined, by reason of the fact that the application of interest at the increased statutory rate is liable to offset the effects of such a penalty, it necessarily follows that that penalty is not genuinely dissuasive". In this regard, "the severity of sanctions must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while respecting the general principle of proportionality".

In its *Home Credit Slovakia*-judgement (C-42/15), the CJEU further elaborated on the latter principle. It held that failure by a lender to include in the credit agreement all the information which, under the Directive, must necessarily be included in such an agreement may be sanctioned by forfeiture of entitlement to interest and charges if failure to provide such information may actually compromise the ability of a consumer to assess the extent of his/her liability. Therefore, "the imposition, in accordance with national law, of such a penalty, having serious consequences for the creditor in the event of failure to include those items of information referred to in Article 10(2) of Directive 2008/48 which, by their nature, cannot have a bearing on the consumer's

ability to assess the extent of his liability, such as, inter alia, the name and address of the competent supervisory authority referred to in Article 10(2)(v) of that directive, cannot be considered to be proportionate". The proportionality of the sanction hinges on the scope and essential nature of the infringed information duty. If the possibility of the consumer to take an informed decision is a stake, the forfeiture sanction is adequate. If not, the sanction goes further than is necessary to achieve the protection goal of the Directive.

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

The Netherlands

The Dutch Supreme Court held that an 'all-in telephone subscription' including telecommunication services and a 'free' handset could be classified as a consumer credit contract, and that this contract may be partially voidable if no separate price for the handset has been determined by the parties and if the consumer has not been informed about this separate price, since the Consumer Credit Directive mandates this information to be given (ECLI:NL:HR:2016:236). The provider is then obliged to refund the amounts it received for the handset to the consumer. The consumer must return the handset but is in principle not obliged to pay compensation for enjoyment or usage of the handset. By opting for this remedy, the court went further than simply restoring the consumer's rights and served the general consumer interest of preventing further infringements on the Consumer Credit Directive.

After being invited to do so by the Supreme Court in its preliminary ruling (ECLI:NL:HR:2021:1677, see paragraph 1.3.1), lower courts in the Netherlands have reached a common agreement that, in default payment cases, the price to be paid by a consumer will be (partially) nullified *ex officio* if the professional party has omitted to provide the consumer with essential information laid down in Directive 2011/83/EU (the breach needs to be sufficiently serious). Courts may opt for a price reduction of 25% or 50% depending on there being sufficiently serious breaches of the law. In contrast to the entire contract being voided, there are no restitution duties for the buyer.

5.7 Guidelines for judges that emerge from the analysis

The application of Article 47 CFREU and of the principles of effectiveness, proportionality and dissuasiveness has largely influenced the choice and scope of civil remedies against the breach of consumer protection duties, with special regard to those concerning the use of unfair terms, unfair commercial practices and non-conformity of goods in consumer sales.

The judicial dialogue between the EU and national courts has increasingly assumed a horizontal dimension, enabling courts from different jurisdictions to benefit from or refer to preliminary rulings presented in other Member States. More and more, it has involved legislators, whose attempts to comply with EU law in a way consistent with the CJEU's jurisprudence often create a further need for clarification and new waves of judicial dialogue. The recent adoption of new consumer directives and the upcoming reform of existing ones pay especial attention to the need

for effective protection through effective, proportionate, and dissuasive remedies. New guidance will be needed to ensure full conformity of interpretation with Article 47 and the principles of effectiveness, proportionality and dissuasiveness.

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

According to the principles of effectiveness and dissuasiveness, the CJEU has limited the possibility of a national court to attempt to remedy the invalidity of an unfair contractual term by substituting it through the application of a supplementary (default) provision of national law. In this respect, the CJEU has stated that the national courts are only required to exclude the application of an unfair contractual term so that it does not produce binding effects with regard to the consumer, without being authorized to revise its content (*Banco Español*, C-618/10). The contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as such continuity of the contract is legally possible. As a general rule, substitution of unfair terms would undermine the dissuasiveness of the non-bindingness provided by the Directive.

Moreover, **according to the *Kásler* case** (C-26/13) concerning a consumer loan agreement, the CJEU, applying the principle of dissuasiveness, stated that in a situation in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, national law may enable the national court to cure the invalidity of that term by substituting it with a supplementary provision of national law.

In the ***Abanca*** (Joined Cases C-70/17 and C-179/17) and ***Dziubak*** (C-260/18) judgements, the CJEU provided some clarifications in regard to cases in which the replacement of an unfair clause with a supplementary provision is allowed. **The replacement is possible only if**:

34) **the contract cannot continue in existence after the removal of an unfair term**

This assessment should be performed objectively by national judges.

and

b) **the annulment of the contract will expose the consumer to particularly unfavourable consequences, unless the consumer objects.**

The CJEU stated that these consequences should be evaluated with account taken of the circumstances existing or foreseeable at the time of the dispute.

With regard to the **features of the norms that can substitute an unfair clause declared not binding**, the CJEU stated that with regard to the **replacement of unfair clauses made by means of legislation**, **the legislative choice cannot have the result of weakening the protection guaranteed to consumers** (*Dunai* case, C-118/17). Moreover, when a clause is declared unfair, it is necessary to restore the legal and factual situation in which the consumer would have been in the absence of such an unfair term in particular by giving rise to a right to restitution of advantages wrongly obtained (*Dunai* case, C-118/17).

Furthermore, the CJEU stated that provisions that prevent consumers from being bound by the unfair term concerned, where appropriate, by cancellation of the contract at issue in its entirety

if that contract cannot continue in existence without that term, violate Article 6(1) of Directive 93/13. Therefore, in these cases, annulment of the entire contract may be the effective remedy to be provided.

Moreover, it is not possible to substitute an unfair term declared not binding with national provisions of a general nature which provide that the effects ensuing from a legal transaction are to be supplemented, *inter alia*, by the effects arising from the principle of equity or from established customs, which are neither supplementary provisions nor provisions applicable where the parties to the contract so agree (*Dziubak,* C-260/18). See also *Bank BPH* C-19/20.

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

In proceedings on the declaration of non-bindingness of an unfair term, in order to provide effective consumer protection, the judge should provide additional and consequential measures linked with the non-bindingness of contractual terms: for example, in the case of credit contracts, interim measures intended to suspend/halt the executive procedure on the consumer's home.

Mainly on the basis of the **principle of effectiveness**, the CJEU, in the *Aziz* and t*Kušionová* cases (C-34/13), stated that the lack of interim measures within a declaratory proceeding in respect of an enforcement proceeding precludes (effective) consumer protection against the use of unfair terms on which the enforcement proceedings are based. The above question has been addressed by the CJEU in several decisions. The principles of dissuasiveness and proportionality, though recalled in *Kušionová* (C-34/13), have remained in the background.

Non-bindingness of unfair terms and restitutionary remedies

With respect to the effectiveness and dissuasiveness of consumer protection, the availability of **restitution** is particularly important. In this regard, in the *Naranjo* case (C-154/15), **the CJEU stated that national case law cannot temporally limit the restitutory effects connected with a finding of unfairness by a court, in respect of a clause contained in B2C contracts, to amounts overpaid under such a clause after issuance of the decision in which a finding of unfairness is made**. The CJEU noted that the absence of such a restitutory effect would be liable to call into question the dissuasive effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) thereof, is designed to attach to a finding of unfairness in respect of terms in contracts concluded between consumers and sellers or suppliers. In short, the CJEU considers the temporal dimension of nullity and restitution to be an intrinsic aspect of effective consumer protection: only if nullity, and therefore restitution, extends to the entire time-span of the contractual relation since the moment of limitation is such protection effective and dissuasive. *Sziber* (C-483/16) and *Dunai* (C-118/17) confirmed this interpretation. They stated that national provisions must allow restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed; and they must do so by, *inter alia*, creating a right to restitution of advantages wrongly obtained by the professional**.**

To sum up, generally speaking, in cases of a declaration of the non-binding nature of an unfair term, in order to provide effective consumer protection, the judge should be able to provide additional and consequential measures linked with the term's non-binding nature, bearing in mind that:

- the principle of effectiveness requires the availability of interim measures, at least in foreclosure proceedings;
- the principles of effectiveness and dissuasiveness hinder the limitation of the restitutory effects connected with a finding of unfairness by a court;
- in the application of the principles of effectiveness, proportionality and dissuasiveness, fundamental rights are involved, such as the one set out in Article 7 of the CFR and they should be considered.

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

Unfair practices and individual redress: the role for contract invalidity

The question arises as to whether the EU principles of effectiveness, proportionality and dissuasiveness can influence the identification of civil remedies for unfair commercial practices. In this regard, according to the *Pereničová* case (C-453/10), the occurrence of an unfair practice may influence the assessment of unfair terms of the related contract; but no automatic inference can be made from the former to the latter.

The conclusion reached by the CJEU is compatible with the possibility that national legislation provides for validity rules applicable to contracts concluded as a consequence of unfair practices. Indeed, in some Member States, consumers have been enabled to set aside contracts concluded on the basis of unfair commercial practices through different means (nullity, voidability, unwinding). If the proposal developed by the EU Commission within the *New Deal for Consumers* (COM (2018) 183 final) is approved, similar remedies would be required under EU law, extending the possible impact of Article 47 CFR on the identification of effective remedies and the conforming interpretation of national law.

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

Replacement and reimbursement

The principles of effectiveness and proportionality strongly affect the choice among the remedies against non-conforming goods set out in Article 3 section 3 of Directive 1999/44/EC. In light of these principles, the seller's possibility to deny replacement because of unreasonably high costs is excluded when the consumer – due to the specific nature of the case – cannot claim reimbursement, and replacement is the only available remedy in kind. Indeed, the principle of proportionality is relative: it will be applied by comparing repair and replacement, taking into account the priority of remedies in kind over other remedies (*Weber* and *Putz*, joined cases C-65/09 and C-87/09). The entry into force of the new Directive 2019/771 will raise the question of the interpretation of the proportionality criteria with regard to the selection of remedies in the new legislative framework. The wording of the new Directive 2019/771 could be interpreted as providing that if one remedy – substitution or repair – is disproportionate, and the other one is impossible, the seller can refuse both.

However, if a national provision on remedies in the case of the non-compliance of a good with a contract does not allow that to be replaced in the circumstances set forth in EU law, the national court is obliged to **interpret it in a Directive-conforming way** or **not to apply it**.

While deciding any case regarding the **hierarchy of remedies in consumer sales provided by Directive 1999/44** – especially by **making a choice between repair and replacement, and the remedies consisting in price reduction and contract termination** – the national court must observe the general framework of reasoning established by the CJEU in the *Weber* and *Putz* cases (Joined Cases C-65/09 and C-87/09):

(a) The first and predominant criterion to be taken into account is the **effectiveness of consumer protection** – which underpins all of the choices in the sphere of remedies regarding consumer sales.
(b) Secondly, the remedies ascertained in this way ought to be balanced with the protection of a seller's interests. As the *Weber* and *Putz* decisions (Joined Cases C-65/09 and C-87/09) clearly indicate**, consumer protection in sales agreements is not absolute** – *i.e.* should be granted only to the extent necessary for protection of the economic interests of a buyer and should not be unreasonably burdensome for a seller. Therefore, domestic courts are obliged to verify **whether any remedy that they apply should not be moderated by way of proportionality**.

The allocation of replacement costs

All the costs of replacement should be borne, in principle, by the seller. The list of the respective costs provided in the 1999/44/EC Directive is not exhaustive. Therefore, it is the task of the national court to indicate precisely the costs that the seller should incur – both directly (e.g. by paying another contractor for installation services) or indirectly (reimbursing expenses incurred by the consumer when replacing a defective good). The overriding guideline in this respect ought to be **the principle of effectiveness of consumer protection** – as framed by the CJEU in the *Weber* and *Putz* (joined cases C-65/09 and C-87/09) judgements.

If a national court adjudicates that a consumer good ought to be replaced, **it can nevertheless assess the costs of this operation from the perspective of proportionality**. If the costs of replacing a good are excessively high from the perspective of the seller, **the national court is entitled to share them between the parties**. In this situation, the consumer may be obliged to pay part of the costs of replacing the non-compliant good with a proper one.

If a court makes the aforementioned findings, the **consumer should be granted the possibility to decide** whether to have **a good replaced** (sharing the cost with the seller), or to remain with the non-conforming item but with **a price reduction** – alternatively, to **rescind the contract** and obtain full reimbursement of the price.

Delivery of defective goods in distance contracts

The *Fülla* case (C-52/18) could be useful for interpreting the new Article 14 of Directive 2019/771 related to the place where the consumer is required to make defective goods acquired available to the seller, so that they can be brought into conformity. According to *Fülla* (C-52/18), that place must be appropriate for ensuring that the defective goods can be brought into conformity free of charge, within a reasonable time, and without significant inconvenience to the

consumer, taking into account the nature of the goods and the purpose for which the consumer purchased the goods. New Article 14 Directive 2019/771 could be interpreted in light of that case law, considering that it provides that when the lack of conformity is to be remedied by repair or replacement of the goods, the consumer shall make the goods available to the seller.

On the contrary, with regard to the seller's obligation to advance the costs of transporting the goods in order to eliminate the lack of conformity, the new Directive 2019/771 and the CJEU's case law may differ. According to *Fülla* (C-52/18), the consumer's right to the bringing of defective goods, acquired under a distance contract, into conformity 'free of charge' does not include the seller's obligation to advance the costs of transporting those goods from the consumer, for the purposes of bringing them into conformity, to the seller's place of business, unless the fact that the consumer must advance those costs constitutes such a burden as to deter him/her from asserting his/her rights, which is for the national court to ascertain. The wording of Article 14 of the new Directive 2019/771 may induce the CJEU to make a different interpretation, considering that it states that the seller shall take back the replaced goods at the seller's expense.

The rules concerning the burden of proof

The rules on the burden of proof regarding consumer sales ought to be interpreted and applied **with a direct view to the principle of effectiveness of consumer protection** (*Faber* case, C-497/13). This requirement also applies to two types of provisions tackling the issue of evidence:

(a) the provisions **transposing directly** into domestic orders the 1999/44/EC Directive, and for the future Directive 2019/770 and Directive 2019/771 (i.e. Italian case law);

(b) the **other provisions on evidence** – especially the general rules of civil procedure that exist (although they are not harmonised directly by EU law, they have to meet the principle of equivalence – i.e. provide the same standard for claims related to provisions originating from EU law and cases without a European element).

In particular, **the principle of effectiveness** requires the array of factual statements, as well as the corresponding evidence, to be limited to **the circumstances that are necessary to establish a claim and ascertain the date when it was made**. With regard to all other statements and evidence, in particular those regarding the nature of non-conformity and the person liable for it, when the burden of proof is on the consumer, domestic courts should, when looking at this distribution of the burden of proof in light of the principle of effectiveness, consider whether it can cause an excessive obstacle in claiming remedies for the lack of conformity.

Those guidelines emerging from the CJEU's case law could be useful also in the application of Directive 2019/771 and 2019/770, considering that those Directives do not provide specific rules which impose an interpretation which is different from the reasoning of *Faber* (C-497/13).

Limitation period

In interpreting the time limits provided by Article 5(1) of Directive 1999/44, national judges should consider, in accordance with the CJEU's ruling in *Ferenschild* (C-133/16), that there are two different types of time limit:

- **period of liability of the seller**, which refers to the period during which the seller is liable under Article 3 of the Directive when a lack of conformity of the goods at issue becomes apparent and, accordingly, gives rise to the rights set out in that Article in favour of the consumer.

- **period of time during which the consumer can actually exercise the rights** that arose in the period of liability of the seller. Whilst imposing a limitation period for action by the consumer is a matter for national legislation**,** the mandatory minimum duration of that period must always be, as a rule, at least two years from the time of delivery of the goods concerned.

These guidelines could be useful for interpretation of Article 10 of Directive 2019/771 and Article 11 of Directive 2019/770, which provide that the limitation period eventually provided by the law must allow the consumer to exercise the remedies for any lack of conformity for which the seller is liable according to those Directives. A specific provision in Directive 2019/771 concerns second-hand goods. Article 10 (6) states that Member States may provide that, sellers and consumers can agree to contractual terms or agreements with liability or limitation periods shorter than those established by the Directive, provided that such shorter periods are not less than one year.