

Judicial Training Project

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

EXECUTIVE SUMMARY

OF THE CONSUMER CASEBOOK



THE RE-JUS PROJECT IS CO-FUNDED
BY THE JUSTICE PROGRAMME OF THE
EUROPEAN UNION
(JUST/2015/JTRA/AG/EJTR/8703)

Published in October 2018

1 EXECUTIVE SUMMARY – CONSUMER LAW

Summary:

1.1	Introduction	3
1.2	<i>Ex officio</i> powers of civil judges in consumer litigation	3
1.3	Effective consumer protection against violations of consumer and competition law	5
1.4	Effective consumer protection between administrative and judicial enforcement.....	7
1.5	Collective redress and the coordination between collective and individual proceedings	9
1.6	Effective, proportionate and dissuasive remedies	10
1.7	Access to justice and effective and proportionate A.D.R. mechanisms.....	14
1.8	Effective consumer protection in cross-border cases.....	15

1.1 INTRODUCTION

The REJUS Casebook on the impact of fundamental rights on consumer protection has been drafted following the judicial dialogue approach: the full life cycle of each case is investigated – from its birth with the preliminary reference, to its impact in various MS. Indeed, the application of EU Law – with a specific focus on the principle of effectiveness and Article 47 of the CFREU – must be assessed on the basis of the substantive and procedural rules that can be affected by that application. The analysis of the case-law shows that the application of the CFREU, and in particular Article 47, is promoting substantive and procedural changes in consumer protection. In addition, the principles of effectiveness and equivalence have stimulated innovative solutions concerning procedural rules that have proved inadequate to the demands of justice and the judicial control of unfair practices. The jurisprudence on Article 47 can produce similar results at a national level by increasing consumer protection, and at the same time balancing the rights of consumers and those of professionals. Furthermore, despite the circumstance that Article 47 of the CFREU may not be directly applied to administrative enforcement, it is likely that similar principles related to effective judicial protection will emerge in order to coordinate various forms of consumer rights enforcement, including ADR and arbitration, to which EU secondary legislation has already extended important procedural safeguards. Moreover, the Courts will face the issue of coordination with other enforcement agencies to avoid overlapping and to ensure consistency. On the basis of these critical issues, the intention of the casebook is to provide national judges with comprehensive analysis and guidelines in order – as previously noted – to take into account, in the application of EU Law or of a CJEU judgment, both the instances and interests protected by that law, and the analysis of the rules that may be affected by the judgment or by EU Law, in particular as far as Article 47 of the CFREU and the principle of effectiveness are concerned. Lastly, judicial dialogue can be usefully deployed to warrant homogeneity across MS in order to ensure that effective consumer protection is not undermined by excessive variation in procedural rules concerning individual and collective remedies. The casebook is organised on the basis of several selected critical issues, mentioning and examining the relevant CJEU case-law as well as the impact on national case-law, in order to depict a clear and complete framework of the state of the ongoing judicial dialogue with regard to the application of the principle of effectiveness and Article 47 of the CFREU.

1.2 EX OFFICIO POWERS OF CIVIL JUDGES IN CONSUMER LITIGATION

The Court of Justice expanded the role of *ex officio* powers of civil judges in consumer litigation. In the view of the CJEU, *ex officio* powers contribute to the effectiveness of consumers rights (*Oceano* case, C- 240-244/98). In this respect, although Article 7 of Directive 93/13 on the non-binding nature of unfair terms and the general principle of effectiveness has long been the main legal basis for *ex officio* powers, the EU and national courts have more recently referred to Article 47 of the CFREU as well (*Sanchez Morcillo* case, C-169/14; *Online games* case, C-685/15). In addition, CJEU case-law on *ex officio* powers has had a significant impact on the principle of procedural autonomy, as particularly shown by decisions concerning the ascertainment of the consumer status and the declaration of the unfairness of contract terms.

1.2.1 Consumer status

With the *Faber* decision (C-497/13), the CJEU points out that preventing the Court from assessing, on its own motion, the consumer status – in the event that the consumer does not claim the status – would hinder the effective protection of the consumer. Thus, the national Court, in light of the principle of effectiveness, must first of all examine all the elements emerging

from the case, and secondly, if necessary, request clarification from the potential consumer in order to assess his/her status. In some MSs, the rules that authorise the judge to autonomously operate the legal characterisation of the facts or of the claim, have been interpreted in light of the principle of effectiveness (consistent interpretation).

1.2.2 Declaration on the unfairness of contract terms

According to CJEU case law (*Pannon* case, C-243/08), a national court **must declare** a consumer contract term unfair of its own motion, even if the consumer has not raised the unfairness of the term in this respect, in order to guarantee effective judicial protection given the asymmetry of the relationship between the consumer and his/her counterparty. Moreover, the CJEU (in *Pénzügyi*, C-137/08) ruled that a national court must investigate, on its own motion, whether a term is unfair. National Courts in several MSs have upheld the conclusions of the CJEU and regarded the declaration of the unfairness of the terms an obligation, as well as the subsequent declaration of nullity.

This ruling is applied by the CJEU also in enforcement proceedings in which the assessment of the contractual terms is not within the competence of the court (*Finanmadrid* case, C-49/14; *Asturcom* case, C-40/08) in order to prevent the enforcement of an unfair term for the purpose of ensuring an effective consumer protection.

Although the implementation of the *ex officio* powers in **appeal proceedings** is a matter of national procedural autonomy (*Asbeek* case, C-488/11), this autonomy will be exercised within the limits posed by the principles of effectiveness and equivalence. In this respect, it should be pointed out that the CJEU clarified that Article 6 of Directive 93/13, “*must be regarded as a provision of equal standing to national rules that rank, within the domestic legal system, as rules of public policy*” (*Asbeek* case, C-488/11). Therefore, if national legal systems vest courts with *ex officio* powers to ascertain a violation of public policy, the same applies to a violation of Article 6 of Directive 93/13.

The *ex officio* powers of the national judge must be upheld, according to CJEU case law, also in default proceedings and execution proceedings, always on account of the principle of effectiveness.

The obligation of the judge is coupled with the **consumer’s right to oppose** the declaration of a term as non-binding to the extent that this declaration does not meet the concrete interest of the consumer (*Pannon* case, C-243/08).

The **principle of *audi alteram partem***, as a general rule, requires a national court that has found, of its own motion, that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure (*Banif* case, C-472/11).

Ex officio powers may be limited by the **principle of *res judicata***, as established in many national systems within their procedural autonomy, where a ruling has already been given on the lawfulness of the terms of the contract taken as a whole (*Banco Primus* case, C-421/14). By contrast, when an earlier decision that has become final, has not examined one or more contractual terms within the contract in dispute in that earlier procedure, **a national court is required to assess the potential unfairness of those terms**, whether at the request of the parties or of its own motion, where it is in possession of the legal and factual elements necessary for that purpose (*Banco Primus* case, C-421/14).

In light of the principle of effectiveness, the CJEU also expands the duty to ascertain the unfairness of a term with regard to the **judge’s obligation to carry out an investigation** in order to evaluate a term’s unfairness (*Pénzügyi* case C-137/08, concerning a jurisdiction clause).

However, the CJEU has not yet addressed the question of whether the reasoning of *Pénzügyi* case (C-137/08) could apply to all types of clauses, including those that require complex investigation, or could extend to phases of judicial proceedings in which the parties may be precluded from providing evidence supporting their claims or defences.

From a **national point of view**, the CJEU case-law has already largely influenced national courts' jurisprudence, supporting a consistent interpretation of national procedural law on *ex officio* powers in light of the principle of effectiveness. A more intense judicial dialogue, through preliminary ruling proceedings, might contribute to bring further clarification in this domain.

1.3 EFFECTIVE CONSUMER PROTECTION AGAINST VIOLATIONS OF CONSUMER AND COMPETITION LAW

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

The issue assessed in this section concerns the interpretation of Article 101 of the TFEU in light of the principles of effectiveness and equivalence with regard to two logically connected questions: i) does Article 101 entitle third parties with a relevant legal interest to rely on the invalidity of an agreement, or a practice prohibited by Article 101 of the TFEU, and then claim damages for the harm suffered where there is a causal relationship between the agreement or concerted practice and the harm?; ii) on what grounds can the judge assess such a causal link?

With regard to the first question, according to the CJEU case law (*Manfredi*, C-295-298/04), the principle of invalidity can be relied on by anyone, and the courts are bound by it once the conditions for applying Article 101(1) of the TFEU are met, and so long as the agreement concerned does not justify the grant of an exemption under Article 101(3) of the TFEU. In this respect, the CJEU argues that the full practical effectiveness – *effet utile* – of the prohibition on agreements, decisions and concerted practices would be adversely affected if it were not open to any individual to claim damages for a loss caused to him as a result of undertakings infringing Article 101 of the TFEU.

As far as the second question is concerned, the CJEU stated that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of the consumers' right to compensation, including those on the application of the concept of a 'causal relationship', provided that the principles of **equivalence** and **effectiveness** are observed. On the basis of the Court's reasoning, it can be argued that the principle of effectiveness is relevant from two different, though intertwined, perspectives: on the one hand, effectiveness in the relationship between the legal systems of the EU and the MSs, meaning that national provisions cannot render impossible or excessively difficult the exercise of rights conferred by EU Law; on the other hand, it implicitly upholds the right to an effective remedy, as also laid out in Article 47 of the CFREU, in close connection with the idea of the practical effectiveness – i.e. *effet utile* – of the treaty provisions.

Some MSs have referred to the conclusions laid out in the *Manfredi* case, and specifically to the principle of effectiveness in the interpretation of causality, with particular regard to the burden of proof, in order to design a legal framework for sharing the burden of proof in a way that provides consumers with an effective mean of judicial protection, in particular through legal presumptions concerning the proof of a causal link.

Directive 104/2014 does not directly address the issue, which remains a matter to be disciplined by national legal systems as long as it is in accordance with the principles of equivalence and effectiveness. The directive contains, nevertheless, certain provisions regarding indirect

purchasers, laying out – in Article 14(2) – a rebuttable presumption in order to prove the “passing on” of the overcharge.

1.3.2 The possibility of a limitation period for seeking compensation

The main issue addressed is the starting point for the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101 of the TFEU. Should it run from the day on which the prohibited agreement or practice was adopted, or from the day on which the agreement or practice comes to an end? The CJEU (*Manfredi*, C-295-298/04) reassesses that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101 of the TFEU, provided that the principles of equivalence and effectiveness are observed. The Court argues that a national provision whereby the limitation period runs from the day on which the agreement or practice was adopted might, in practice, render it impossible to exercise the right to compensation, thus violating the principle of effectiveness. However, it is for the national judge to assess whether or not such a violation actually occurs, and whether national provisions regarding limitation comply with the principles of equivalence and effectiveness, considering which rules can better ensure the effective protection of the right to seek compensation of any individuals who has suffered harm as a result of an antitrust infringement.

The national Courts of some MSs, following the *Manfredi* decision, developed the idea that, for the limitation period to start running, the person claiming compensation should have sufficient grounds to recognise that the harm sustained is causally related to the infringement. Therefore, it is when he/she may reasonably become aware of such a causal connection that the limitation period begins to run.

1.3.3 Punitive damages

A further question relates to the possibility of an effectiveness-oriented interpretation of Article 101 of the TFEU: it might be asked whether national courts must award punitive damages greater than the advantage obtained by the offending operator, thereby deterring the use of agreements or concerted practices prohibited under that article.

According to CJEU case law (*Manfredi*, C-295-298/04), and in the absence of EU rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 101 of the TFEU, provided that the principles of **equivalence** and **effectiveness** are observed. In more recent decisions – i.e. *Arjona Camacho* and *Stowarzyszenie* – the CJEU ruled that there is no theoretical and systemic incompatibility between the EU Legal System and the concept of punitive damages – provided that they do not lead to unjust enrichment – but the national judge may not award punitive damages on the sole basis of EU Law in the absence of a national provision empowering the judge to award them. National courts, when addressing this issue, have so far closely followed the CJEU’s stance.

1.3.4 The rules of jurisdiction

In light of the principle of effectiveness, the question arises whether Article 101 of the TFEU should be interpreted as precluding national provisions under which third parties must bring their actions for damages for an infringement of EU and national competition rules before a

court other than that which usually has jurisdiction in actions for damages of a similar value, thereby involving a considerable increase in cost and time.

According to CJEU case law, (*Manfredi*, C-295-298/04), in the absence of EU law rules governing the matter, it is up to the domestic legal system of each Member State to designate the courts and tribunals with jurisdiction to hear actions for damages based on an infringement of the EU competition rules and to prescribe the detailed procedural rules governing those actions, provided that the principles of equivalence and effectiveness are observed. On the basis of the principle of effectiveness some national Courts stated that increases in cost and time related to the filing of an action before a specific court could render impossible or excessively difficult to exercise the right to compensation.

1.3.5 Access of information considering leniency programs

The issue addressed concerns granting those who are adversely affected by a cartel, for the purpose of bringing civil-law claims, with access to leniency applications, or to information and documents voluntarily submitted by applicants for leniency that the national competition authority of a Member State has received within the framework of proceedings for the imposition of fines, which are (also) intended to enforce Article 101 of the TFEU. The relevant CJEU case law (*Pfleiderer AG*, C-360/09; *Donau Chemie AG*, C-536/11) focuses on the concept of balancing the various interests at play, and rules that EU law does not lay down common rules on the right of access to documents relating to a leniency procedure that have been voluntarily submitted to a national competition authority pursuant to a national leniency programme. Accordingly, it is for the Member States to establish and apply national rules on this right of access. More particularly, it is for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused, by weighing the interests protected by EU law, i.e. the effective application of Articles 101 and 102 of the TFEU, on the one hand, and the right of any individual to claim damages for a loss caused to him by conduct that is liable to restrict or distort competition, on the other. In particular, the effective application of Articles 101 and 102 of the TFEU must not render impossible or excessively difficult to exercise the right to compensation. The issue is now also regulated by Articles 5, 6 and 7 of Directive 104/2014 setting out specific provisions and limits regarding access to leniency.

1.4 EFFECTIVE CONSUMER PROTECTION BETWEEN ADMINISTRATIVE AND JUDICIAL ENFORCEMENT

Depending on the applicable national law, consumer rights may be enforced through judicial or administrative mechanisms. These mechanisms affect different functions, but their development may be linked. For example, an infringement might be found by an administrative authority, whereas civil or criminal judicial proceedings concerning the same violation are already pending. To what extent these proceedings are coordinated is determined by national law. However, the general principle that steers relations between these two means of enforcement are **the right to effective judicial remedy** (in particular the right to be heard) derived from Article 47 of the Charter, and **the right to good administration** (Article 41 of the Charter).

1.4.1 The personal scope of effects of *in abstracto* review as regards consumers

More specifically, in light of the general principles of EU law (particularly, equivalence, effectiveness and proportionality), the CJEU has increasingly influenced this coordination with special regard to the effects of administrative decisions concerning the unfairness of general contract terms *in abstracto* with a view to the judicial ascertainment of unfair contract terms *in concreto* (*Invitel*, C-472/10 and *Biuro*, C-119/15 cases). According to the CJEU case law, the right to effective judicial protection (Art. 47 of the CFR) provides an argument for **extending the effects of a declaration of unfairness** beyond the array of the parties to the particular civil proceedings in favour of any consumer that, even in future contracting, may be regarded by the use of terms found unfair by a court or an administrative authority (*Invitel*, C-472/10 and *Biuro*, C-119/15 cases). In particular, a judicial injunction can be effective towards every consumer, regardless of the date when they concluded the contract or of their participation in the proceedings where the injunction is issued. Such conclusions directly stem from the need to ensure an effective judicial protection for consumers.

1.4.2 Fundamental rights and the judicial/administrative enforcement relation

Nevertheless, the same Article 47 operates from two different perspectives: on the one hand it requires that the injunction is effective beyond the arrays of the parties involved in the proceedings, while on the other hand it lays out the need to guarantee the right of a defence (also taking the form of the right to be heard) when the applicable law empowers the enforcing authorities to sanction businesses for the use of contract terms already found to be unfair in proceedings in which they were not parties. Article 47 of the CFREU is not directly applicable to administrative decisions, including decisions of domestic regulatory authorities. Therefore, the CJEU, though not directly applying Article 47, uses it as the source of the right to an effective judicial protection. In carrying out the balance between the two perspectives of the principle of effectiveness – i.e. *erga omnes* efficacy of the declaration of unfairness and the meaning of effective judicial protection, in particular, in respect of the right to be heard – the CJEU implicitly refers to the principle of proportionality, which should function as a guiding criterion for judges when assessing the *in abstracto* efficacy of the unfairness declaration on a case-by-case approach.

Specifically, the **right to be heard** implies:

- the possibility of challenging the conclusion that a particular clause is similar enough to another clause previously declared unfair;
- that every professional and every consumer has the possibility to demand a separate review of a contract clause, even if an (apparently) similar clause has already been declared unfair;
- that the right to an effective judicial remedy should also entail the measures that allow for the sanction itself to be reviewed (especially for re-assessing whether the amount of the fine is adequate and just). In this respect, according to Article 7 of Directive 93/13, as interpreted by the CJEU (*Biuro* case C-119/15), in the assessment of the adequacy and the effectiveness of the remedy, the interests of both consumers and competitors should be considered. With regard to sanctions, although the fixing of a fine due to use of a term that has been held to be unfair is undoubtedly one way of putting a stop to that use, it must nevertheless comply with the principle of proportionality. Thus, MSs must guarantee that any seller or supplier that believes that the fine imposed on it does not comply with the general principle of EU law has the possibility to bring proceedings to challenge the amount of the fine;

- in light of the principle of effectiveness and effective judicial protection, professionals must be vested with a right to present their point of view before a Court. Otherwise an administrative declaration of unfairness ought to be rendered ineffective to them.

1.5 COLLECTIVE REDRESS AND THE COORDINATION BETWEEN COLLECTIVE AND INDIVIDUAL PROCEEDINGS

The mechanisms of collective redress in consumer contracts ought to be applied with a clear view to the fundamental rights sphere. On the one hand, in the perspective of effective judicial protection and of Article 47 of the CFREU, collective redress is a specific case where the redress itself is a means to overcome some of the difficulties of individual actions that may hamper access to justice, such as the underreporting of individual claims due to the high economic costs of litigation. On the other hand, as coordination between collective and individual redress is needed, the coordination mechanisms must comply with the procedural guarantees laid out in Article 47 of the CFREU.

1.5.1 The relationship between individual and collective redress: power/duty to suspend a standing procedure

A possible coordination mechanism between individual and collective redress is the suspension of one standing procedure, when both the collective and the individual redress are pending on the same issue.

In this respect, the CJEU dealt with the case in which both an individual action for the declaration of the unfairness of contract terms and a collective one, seeking to prevent the continued use of terms similar to those at issue in that individual action, were pending. According to the CJEU judgment in the *Sales Simnés* case (C-381-385/14), **national law cannot impose the automatic suspension of an individual action**. Within the scope of national procedural autonomy, suspension may be foreseen to the extent that it:

- corresponds to procedural requirements relating, in particular, to the sound administration of justice and to the need to avoid incompatible judicial decisions;
- does not lead to a weakening of consumer protection, as provided for by Directive 93/13 and does not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law on consumer protection associations (principle of effectiveness);
- is not based on less favourable rules than those governing similar situations subject to domestic law (principle of equivalence);
- ensures the adequacy and the effectiveness of the remedies (including penalties) for bringing to an end the use of unfair terms in B2C contracts.

The CJEU clarified that suspension is not necessarily justified since the individual and collective redress mechanisms, although included in the same article within Directive 93/13, serve a different purpose and have a different nature: the imbalance between consumers and sellers/suppliers is not the same as the relationship between consumer protection associations and sellers; consumer protection associations do not have an inferior position. Therefore, the coordination mechanism that consists in the suspension of the individual process is not necessary. The reasoning of the CJEU is based also on the principle of effectiveness of consumers' individual entitlements, applied to the specific case.

1.5.2 The effects of decisions

With regard to the effects of the decisions given on collective redress, both the effectiveness of consumer protection and procedural guarantees set out in Article 47 of the CFREU must be taken into account.

In this respect, on the one hand the principle of effectiveness should lead to interpretations of national procedural rules on the effects of decisions given on collective redress in an extensive way (*Invitel case*, C-472/10) and on the other hand, the procedural guarantees set out in Article of the 47 CFREU should be granted to all those affected by the decision (*Biuro* case, C-119/15, see above § 1.4). More specifically, in the *Invitel case* (C-472/10) the CJEU stated that, due to the principle of effectiveness, the clauses found unfair in a decision given within collective redress proceedings ought to be non-binding on all the consumers, regardless of whether or not they were parties to the proceedings where the injunction was issued.

In practice, the conclusion drawn in the *Invitel* decision (C-472/10) is especially important for those cases where consumers are represented by public bodies or non-governmental organisations acting in favour of collective consumers' interests. Injunctions that are effective *erga omnes* allow these entities to effectively protect all consumers contracting with particular professionals. In this regard, some national Courts upheld the conclusions of the CJEU and pointed out that the decision given in collective proceedings ought to have *erga omnes* efficiency. As far as the collective prohibitory effect of the unfairness control, in *Biuro Podróży Partner* the CJEU implicitly addresses the issue and concludes that the business party may be made liable for using a clause that has been found unfair in other proceedings and prohibited from being used with a general injunction. The result in question is admissible, but only as long as the domestic law provides the professional with effective measures to challenge the decision that found the clause used by him to be identical to a clause previously prohibited as unfair. The measure in question should satisfy the requirement of "effective judicial remedy" set out in Article 47 of the CFREU.

1.6 EFFECTIVE, PROPORTIONATE AND DISSUASIVE REMEDIES

The principles of effectiveness, proportionality and dissuasiveness have been used by the CJEU in a wide number of cases, shaping remedies.

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

In cases of a declaration of the non-binding nature of an unfair term, the principle of effectiveness requires that the judge can provide additional and consequential measures necessary to ensure the effectiveness of consumers' rights, provided by Directive 93/13. Such measures may include, for example, in the case of credit contracts, interim measures regarding the suspension or interruption of the executive procedure on the consumer's home. In the CJEU's reasoning, **the availability of interim measures is held as an important complement of effective consumer protection**. Moreover, the principles of **proportionality** and the **dissuasiveness**, as well as fundamental rights involved in the case, also play a role.

With regard to **effectiveness**, in the *Aziż* case (C-415/11) the CJEU considers the effectiveness of consumer protection as impaired by the lack of availability of interim measures within the declaratory proceedings in respect of the enforcement proceedings. The Court also deals with the issues of whether alternative remedies could provide effective protection for the consumer, namely the damages that the consumer could claim once his/her home is 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.

These arguments may be compared with those adopted in the *Kušionová* case (C-34/13), where, just by contrast, the CJEU finds the Slovak legislation as not precluded by EU law interpreted in accordance with the principles of **effectiveness** and **dissuasiveness**. The consistency with these principles is found with regard to the power of the judge in charge of the declaratory procedure to stay the enforcement procedure and to declare the nullity of the sale concluded on the basis of such a procedure if based on contract terms that are found unfair. Restitution in-kind is not literally mentioned, but it is implicitly connected with the invalidity of the auction sale. Moreover, in the specific case, the nature of the consumer right, as also linked **with another fundamental right (the right to the family home)**, is specifically addressed by the Court under the lens of the principle of proportionality. The Court acknowledges that interim measures and nullity coupled with restitution, as “strong” remedies, are totally proportional in respect to the affected right. The CJEU also refers to the ECHR jurisprudence and puts it in relation with Article 7 of the CFREU.

Non-binding nature of unfair terms and restitutionary remedies

In the perspective of the effectiveness and dissuasiveness of consumer protection, the availability of **restitution** is particularly important. In this respect, in the *Naranjo* case (C-154/15), **the CJEU stated that national case law cannot 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 the delivery of the decision in which a finding of unfairness is made.** In this respect, the CJEU notes 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 as an intrinsic aspect of effective consumer protection: only if nullity, and therefore restitution, extends to the whole time-span of the contractual relation since the time of limitation is such protection effective and dissuasive.

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 terms' non-binding nature, bearing in mind that:

- the principle of effectiveness should require 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 should be considered.

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

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

The principles of effectiveness and dissuasiveness are important in order to identify the consequences of declaring a contractual term as unfair: according to these principles, **the CJEU has limited the possibility for a national court to remedy the invalidity of the unfair term by substituting a default provision of national law.**

In the *Banco Español* case (C-618/10), the CJEU stated that, according to Directive 93/13, the national courts are 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. 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, in accordance with the rules of domestic law, such a continuity of the contract is legally possible. The reasoning of the Court is based on Article 7 of Directive 93/13, which requires MSs to provide for adequate and effective means, and on the principle of dissuasiveness: if it were open to the national court to revise the content of unfair terms included in such contracts, this 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 as 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.

Only in a situation in which a consumer contract **cannot continue its existence** after an unfair term has been deleted, national law can enable the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law (*Kásler* case, C-26/13), concerning a consumer loan agreement). In this respect, the CJEU argues that, if it was not permissible to replace an unfair term with a default provision, 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 jeopardised. The same approach may be applied when national legislation provides for term invalidity as a consequence of a breach of information duties; then the dissuasive effect of term invalidity without term replacement should be assessed through the lens of proportionality (*Credit Lyonnaise* case, C-388/11); indeed, not all infringements are severe enough to deserve such a measure (*Home Credit* case, C-42/15)

To sum up, generally speaking, according to the joint use of the principles of effectiveness, dissuasiveness and proportionality made by the CJEU:

- a national court must declare unfair a contractual term, without revising its content;
- only in a situation in which a consumer contract cannot continue its existence after an unfair term has been deleted, can a domestic court substitute or revise the unfair term;
- refraining from replacing invalid contract terms may also extend to cases of a breach of information duties (if the term invalidity is then provided by national law), provided that this measure is proportionate to the gravity of the infringement.

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

With regard to unfair practices, the question arises whether the EU principles of effectiveness, proportionality and dissuasiveness can influence the identification of civil remedies against unfair commercial practices (see Articles 11 and 13 of Directive 2005/29/CE). More particularly, it might be asked whether these principles can influence the possibility to set aside the contract stipulated in relation with or as a result of an unfair practice.

In this respect, according to the *Pereničová* case (C-453/10), the occurrence of an unfair practice may constitute the basis for assessing unfair terms of the related contract, but **no automatic inference** may be drawn from the former on the latter. Moreover, remaining within the scope of application of EU directives, an impact of a single term's non-binding nature 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. Therefore the national judge should first of all assess the existence of an unfair term, then assess, on the basis of the aforementioned criteria, whether the contract can continue without the unfair term, rather than invalidate the whole contract. When carrying out its reasoning, the national judge must rely on national law, as derived from Article 6 of Directive 93/13.

The conclusion reached by the CJEU is compatible with the possibility that national legislation provides for **validity rules** applicable to contracts concluded as a result of unfair practices. In the absence of a specific remedial framework, national judges could rely on general rules regarding the vices of consent as well as voidness, voidability and unwinding. Indeed, in some MSs, the consumer has been enabled to set aside a contract concluded on the basis of unfair commercial practices through the aforementioned means. With regard to the vices of consent, Italian national courts have, for instance, applied such provisions. This notwithstanding, these rules will normally require proof (to be provided by the consumer) of a specific link between the factual circumstances causing the vice of consent and the formation of the contractual consent as materially affected by those circumstances and unfair practices. It could be argued that this restriction may fail to provide an effective remedy to the consumer. It should also be noted that the European Commission in the *New Deal for consumers* (COM(2018) 183 final) argued that EU law does not currently provide for sufficient means to eliminate the negative effects of an unfair practice, and affirmed that in the future “*consumers should have the right to individual remedies (e.g. financial compensation) when they are harmed by unfair commercial practices.*” Moreover, pursuant to the current proposal of reform of Unfair Commercial Practice Directive, among contractual remedies, at least contract termination should be available.

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

1.6.4.1 Replacement and reimbursement

The principles of effectiveness and proportionality strongly affect the choice of remedies against non-conforming goods set out in Article 3 section 3 of Directive 1999/44/EC. In light of these principles, the seller's possibility to deny replacement due to unreasonably high costs is excluded when the consumer – due to the specific nature of the case – cannot claim reimbursement and replacement is the only available remedy in kind. Indeed, the principle of proportionality will be applied comparing repair and replacement, taking into account the priority of remedies in kind over other remedies (*Weber and Putz*, joined cases C-65/09 and C-87/09). If a national provision on remedies in the case of the non-compliance of a good with a contract does not allow goods to be replaced in those circumstances, the national court is obliged to **interpret it in a directive-conforming way or not to apply it.**

1.6.4.2 The allocation of replacement costs

All the costs of replacement should be borne, in principle, by the seller. The list of the respective costs provided in the 1999/44/EC directive is not exhaustive. Therefore, it is the role of the

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

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

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

If the costs of replacement are excessively high from the perspective of a seller, for reasons related with instalments already occurred upon consumer's request in good faith, the national court is entitled to **share the costs** between the parties.

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 the full reimbursement of the price.

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

In particular, **the principle of effectiveness** requires the array of factual statements, as well as corresponding evidence, to be limited to **the circumstances 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.

1.7 ACCESS TO JUSTICE AND EFFECTIVE AND PROPORTIONATE A.D.R. MECHANISMS.

Looking at the impact of the effectiveness and of Article 47 of the CFR on A.D.R. mechanisms, the question arises whether a pre-judicial mandatory out-of-court settlement procedure is compatible with the principles of effective judicial protection (Article 47 of the CFR) and of the effectiveness of EU Law. Therefore, it might be asked whether there are general requirements for such mandatory out-of-court settlement attempts to be considered proportionate and compatible with the principle of effective judicial protection and the right to access to justice.

With regard to the compatibility of a pre-judicial mandatory out-of-court settlement procedure with the principle of effectiveness the Court recalls that, in accordance with the general principle

of procedural autonomy, MSs are free to lay down the detailed procedural rules governing actions for safeguarding rights that individuals derive from EU law, provided that both the principle of equivalence and the principle of effectiveness are respected. Regarding the latter, the Court admits that making the admissibility of legal proceedings conditional upon the prior implementation of an out-of-court settlement procedure affects the exercise of rights conferred on individuals. The CJEU asserts that such limitations can be considered valid under EU law, on the condition that they do not make it impossible or excessively difficult in practice to exercise the individuals' rights. In order to test whether this is the case, the Court (in the *Allassini* case, C-317-320/08) further sets out six specific criteria:

- (a) the procedure must not result in a decision that is binding on the parties;
- (b) the procedure must not cause a substantial delay for the purposes of bringing legal proceedings;
- (c) the procedure must suspend the period for the time-barring of claims;
- (d) the procedure must not give rise to significant costs for the parties;
- (e) the procedure must not be accessible only by electronic means; and
- (f) the mandatory requirement must not prevent the grant of interim measures, in exceptional cases where the urgency of the situation so requires.

With respect to the compliance with the right enshrined in Article 47 of the CFREU, the CJEU recalls the long-standing assumption that fundamental rights must not be construed as unfettered prerogatives and may be restricted, provided that such restrictions pursue objectives of general interests, are proportional to such aims and do not excessively impair the substance of the rights guaranteed.

In the *Menini* case (C-75/16), the CJEU confirms the criteria set out in the *Allassini* judgement, and states that, with regard to Directive 2013/11, **the parties' right of access to the judicial system precludes a provision of national law to the effect that consumers may withdraw from a mediation procedure only in the event that they demonstrate the existence of a valid reason in support of that decision, or face penalties in the context of subsequent legal proceedings.** In the perspective of the principle of effective judicial protection, any withdrawal from a mandatory ADR procedure by a consumer must not have unfavourable consequences for that consumer in the context of proceedings before the courts relating to a dispute that formed, or ought to have formed, the subject matter of that procedure.

1.8 EFFECTIVE CONSUMER PROTECTION IN CROSS-BORDER CASES

1.8.1 Effective consumer protection and courts having jurisdiction over cross-border consumer cases.

The **scope of application** of the rules on jurisdiction of the Brussels I Regulation protecting consumers should be defined broadly, based on the principle of effectiveness of consumer protection, mitigated by the principle of proportionality [the need to ensure a fair balance between the rights of the applicant/professional (access to justice) and those of the defendant/consumer (right of the defence)]. The same EU principles should offer guidance in **the interpretation of the rules on jurisdiction** set by the Brussels I Regulation for cases involving consumers.

In particular, even if the **notion of “consumer”** is to be strictly construed for the purpose of applying Articles 15 and 16 of Regulation No 44/2001 (Articles 17 & 18, Reg. No 1215/2012), judges should interpret it in light of the principle of effectiveness, taking into account the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract. This weakness must be distinct from the knowledge and information that the person concerned actually possesses. The consequence is that activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of a private Facebook account user’s status as a ‘consumer’ within the meaning of that regulation (Schrems case, C-498/16). However, jurisdiction cannot be established through the concentration of several claims concerning consumers domiciled in several MSs, in the person of a single applicant, since the consumer is protected only in so far as he is, in his personal capacity, the claimant or defendant in proceedings (Schrems case, C-498/16). Possible future developments in EU consumer law may bring further clarification about the role of collective redress mechanisms in securing access to justice (See, in the framework of the New Deal for Consumers, Article 16 of the proposal for a directive on representative actions for the protection of the collective interests of consumers, repealing Directive 2009/22, COM(2018) 184 final).

In light of the principle of effectiveness of consumer protection, judges should verify, *ex officio*, whether a **choice-of-court provision** included in a transnational consumer contract meets the conditions set by Article 17 of Regulation 44/2001 (corresponding to Article 19 of Regulation 1215/2012).¹ If it does not, they should verify whether the consumer knowingly accepts the jurisdiction of the tribunal designated by the clause.²

A national court before which a consumer brings an individual claim based on an allegedly unfair term, should not **stay its proceedings** because of the existence of parallel proceedings ongoing before the courts of another MS on the basis of an action brought by a consumer association seeking an injunction against the same unfair term.

1.8.2 *Ex officio* powers to declare the unfairness of a choice-of-law clause.

The principle of effectiveness implies that, **when dealing with a conflict-of-law clause in a consumer contract, judges should verify, *ex officio*, whether the clause is unfair** by applying the criteria established by the CJEU on the basis of the provisions of Directive 93/13. A pre-formulated choice-of-law clause is unfair when it misleads the consumer on the scope of the protection he is entitled to under Article 6(2) of the Regulation Rome I, securing the protection afforded to the consumer by provisions that cannot be derogated from by agreement

¹ According to Art. 17 Reg. no. 44/2001 and Art. 19 Reg. no 1215/2012 the condition are that the agreement: a) is entered into after the dispute has arisen; or b) allows the consumer to bring proceedings in courts other than those indicated in this Section; or c) is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

² According to Art. 24 Reg. No 44/2001 and Art. 26 Reg. No 1215/2012, when a defendant enters an appearance before a court without challenging its jurisdiction, the jurisdiction of such a court is prorogated. The rule applies even if the defendant is a consumer.

by virtue of the law that, in the absence of choice, would have been applicable on the basis of default criteria set by the regulation.

Moreover, if the conflict-of-law clause is an unfair term, the judge should apply, *ex officio*, the law of the country of residence of the consumer, instead of the chosen law (*Amazon* case C- 191/15, para. 70). This conclusion may not change in cases in which an injunction is sought as regard the future use of such contract terms: indeed, whereas the fairness assessment is subject to Rome I Regulation, being a matter of contractual obligations, only the use of terms and their prohibition have an extra-contractual nature, therefore falling under Rome II Regulation (*Amazon* case C- 191/15).