

## European Union, CJEU, *Biuro podróży* & Partner, judgement of 21 December 2016

### Deciding bodies and decisions

Warsaw Appeal Court  
Supreme Court  
Court of Justice of European Union

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### Area of law

Consumer protection

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### Subject matter

collective remedies - effect  
right to be heard

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### Summary Facts Of The Case

On 26 April 2012, the CJEU decided the *Invitel* case. The decision was the following  
“It is for the national court, ruling on an action for an injunction, brought in the public interest and on behalf of consumers by a body appointed by national law, to assess, with regard to Article 3(1) and (3) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the unfair nature of a term included in the general business conditions of consumer contracts by which a seller or supplier provides for a unilateral amendment of fees connected with the service to be provided, without setting out clearly the method of fixing those fees or specifying a valid reason for that amendment. As part of this assessment, the national court must determine, inter alia, whether, in light of all the terms appearing in the general business conditions of consumer contracts which include the contested term, and in the light of the national legislation setting out rights and obligations which could supplement those provided by the general business conditions at issue, the reasons for, or the method of, the amendment of the fees connected with the service to be provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract.

Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) and (2) thereof, must be interpreted as meaning that:

– it does not preclude the declaration of invalidity of an unfair term included in the standard terms of consumer contracts in an action for an injunction, provided for in Article 7 of that directive, brought against a seller or supplier in the public interest, and on behalf of consumers, by a body appointed by national legislation from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same general business conditions apply, including with regard to those consumers who were not party to the injunction proceedings;

– where the unfair nature of a term in the general business conditions has been acknowledged in such proceedings, national courts are required, of their own motion, and also with regard to the future, to take such action thereon as is provided for by national law in order to ensure that consumers who have concluded a contract with the seller or supplier to which those general business conditions apply will not be bound by that term.”

A couple of years later, the Polish Supreme court was addressed by a tightly linked issue, and used the CJEU decision in *Invitel* as a point of reference and extended the analysis as regards the effects of in abstracto judgements.

Under art. 479(43) of the Polish Code of Civil Procedure a judgment declaring (abstract) abusiveness of a clause is “effective towards third persons”, from the day of listing this clause in the public register administered by the President of the Office of Protection of Competition and Consumers. The Court of Protection of Competition and Consumers may review (on demand of the specified set of persons and entities) the fairness of standard contract terms used on the market through an in abstracto evaluation – i.e. regardless of integrating them into any actually concluded contract. A final judgement granting the action has an effect for third parties when a provision of the model agreement considered to be prohibited is included in the public register. Article 24.2.1 of the Polish Act on the Protection of Competition and Consumers of 16 February 2007 prohibits application of any practice infringing consumers' collective interests, consisting of an application of the provisions of a model agreement to be entered into the register of the provisions of model agreements considered to be prohibited.

The jurisprudence regarding the objective limits of extended validity of an in abstracto judgements is not settled, as the Supreme Court has interpreted the limits in some cases in a narrow way, whereas in other cases a broad interpretation has been adopted. Similarly, subjective limits of extended validity have also been interpreted in a narrow and broad way.

In a motion of 16 February 2015, BSA I-4110-1/15, the First President of the Supreme Court made the following preliminary reference to the Supreme Court issue:

“Does an entry of a provision of a model agreement, which provision is considered to be prohibited into the register referred to in Article 479.24 of the Code of Civil Procedure lead to such result that extended efficiency of the final judgement provided for in Article 479.43 of the Code of Civil Procedure being the basis for such entry comes into conflict with the proceedings into the subject of the control of the provision of the same content, contained in a different model agreement used by the entrepreneur against whom such judgement has been issued or any other entrepreneur? On 20 November 2015 (case file No. III CZP 17/18), the Supreme Court, consisting of seven justices, made the following judgment:

“1. Substantive validity of the judgement considering a provision of the model agreement to be prohibited excludes an action for considering the provisions of the same normative content to be prohibited, used by the entrepreneur who is a defendant in the case in which this judgement was issued (Article 365 and 366 of the Code of Civil Procedure).

2. Substantive validity of the judgement considering a provision of the model agreement to be prohibited - also after entering such provision into the register (Article 479.2 of the Code of Civil Procedure) does not exclude an action for considering the provisions of the same normative content to be prohibited, used by the entrepreneur who is not a defendant in the case in which the judgement was issued (Article 365 and 366 in conjunction with Article 479.43 of the Code of Civil Procedure)”.

In the reasoning of the judgment, the Supreme Court balanced the effectiveness of consumer protection from abusive clauses and the right to fair trial, in order to determine the scope of *res iudicata* in the “abstract” review of contract clauses. As regards the first aspect, the Supreme Court based its reasoning on Directive 93/13/EU, as well as the *Invitel* case. As regards the right to fair trial, the Supreme Court based its reasoning on art. 45 of the Constitution of the Republic of

Poland, art. 6 section 1 of the ECHR and the art. 47(2) of the CFREU.

As determined by the Supreme Court, the “effectiveness of the judgment in question in favour of anyone, but with respect to the particular entrepreneur, being a defendant in the proceedings, is proportionate, as it maintains a balance between the need to guarantee the effectiveness of an abstract control [of contract clauses] and the need to respect the right to be heard, as a fundamental element of the right to fair trial, arising from the right to due process.”

In its judgment, the Supreme Court interpreted the notion of “effectiveness towards third persons” (art. 47943 of the Code of Civil Proceedings) as referring only to the particular entrepreneur (who took part in the abstract review proceedings) – at the same time, however, it may be invoked by every consumer (including a consumer who did not participate in the trial). Moreover, the Supreme Court found this outcome proportionate and therefore compliant therefore with the requirement of proportionality of remedies set forth in Directive 93/13/EU.

It is important to note that on 19 November 2014, before the preliminary reference of the First President, the Court of Appeal in Warsaw made the following preliminary reference:

“In the light of Articles 6(1) and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (1), in conjunction with Articles 1 and 2 of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests (2), can the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in the register of unlawful standard contract terms be regarded, in relation to another undertaking which was not a party to the proceedings culminating in the entry in the register of unlawful standard contract terms, as an unlawful act which, under national law, constitutes a practice which harms the collective interests of consumers and for that reason forms the basis for imposing a fine in national administrative proceedings?

In the light of the third paragraph of Article 267 of the Treaty on the Functioning of the European Union, is a court of second instance, against the judgment of which on appeal it is possible to bring an appeal on a point of law, as provided for in the Polish Code of Civil Procedure, a court or tribunal against whose decisions there is no judicial remedy under national law, or is the Sąd Najwyższy (Polish Supreme Court), which has jurisdiction to hear appeals on a point of law, such a court?”

The case was decided by the CJEU as *Biuro Podróży Partner* (C-119/15). In the judgment of 21.12.2016 the Court concluded that:

“Article 6(1) and Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with Articles 1 and 2 of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests and in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in a national register of unlawful standard contract terms from being regarded, in relation to another seller or supplier which was not a party to the proceedings culminating in the entry in that register, as an unlawful act, provided, which it is for the referring court to verify, that that seller or supplier has an effective judicial remedy against the decision declaring the terms compared to be equivalent in terms of the question whether, in the light of all relevant circumstances particular to each case, those terms are materially identical, having regard in particular to their harmful effects for consumers, and against the decision fixing the amount of the fine imposed, where applicable.”

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## Relation to the scope of the Charter

The Supreme Court explicitly addressed the balancing exercise that involved effectiveness of consumer protection (declared explicitly in the *Invitel* decision) and the fundamental right to a fair trial, underpinning the issues of the binding nature and *res iudicata* of judicial decisions in civil matters. The Supreme Court derived this right from fundamental rights located at various levels of the legal system – the Constitution of the Republic of Poland (art. 45), the ECHR (art. 6 section 1) and the CFREU (art. 47 section 2).

The judgment therefore referred to the Charter as one of the (parallel) sources of the right to a fair trial. The Court expanded upon this right in order to clarify the meaning of the domestic provision implementing the Directive 93/13/EU. The Court thereby supplemented the conclusions made by the ECJ in the *Invitel* case. The fundamental right to a fair trial was used by the Court as a key element of its reasoning.

The case did not involve any direct constitutionality review. The Supreme Court applied, however, the “pro-constitutional” interpretation of the domestic provision, thereby its compliance with the Polish Constitution. This effect was achieved by applying the reasoning related to fundamental rights – based upon the constitutional right to fair trial.

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## Notes on the remedies dimension

The Court referred to the *Invitel* case as one of the main points of reference in the resolution, concluding that the CJEU explicitly found that a judgment declaring a clause abusive should be effective “in favour” of every consumer. At the same time, however, as has been pointed out in the judgment, the effects of this judgment “against” the entrepreneurs needed to be addressed. As has been pointed out in the *Invitel* case, a judicial declaration of abusiveness may be effective *erga omnes* with respect to consumers (allowing every consumer to benefit from a finding of abusiveness even if they did not participate in the original proceedings). It remains to be addressed whether the same *erga omnes* effect is also applicable to entrepreneurs – i.e. whether all entrepreneurs, regardless of whether they took part in the original court proceedings, should be legally prohibited from using the same term (or a term with a similar meaning). In light of this background, the Supreme Court supplemented the findings made in *Invitel*, defining the effects of an “abstract” declaration of abusiveness with respect to entrepreneurs – basing its conclusions upon a fundamental right (guaranteed simultaneously by the national Constitution, the ECHR and the CFREU).

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Sources - EU and national law

Directive 93/13

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Sources - CJEU Case Law

C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, ECLI:EU:C:2012:242

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