Consumer protection by the ECJ in unit-linked group contracts : on transparency, liability and nullity under the UCPD

Consumer Protection by the ECJ in Unit-linked Group Contracts: on Transparency, Liability and Nullity under the UCPD

Jasper Vereecken[1]

Abstract

This case note addresses the ECJ's drafting of essential information to be given to a consumer in the event of a unit-linked group contract. This information enables consumers to make an informed decision. The ECJ subsequently qualifies the failure to transfer this information as a misleading omission under Article 7 UCPD, which in turn may result in a violation of the transparency requirement enshrined in the UCTD. Liability of the traders on whom the responsibility rests to furnish this information is also examined in this comment, as the ECJ makes a distinction between the responsibilities of traders and intermediaries. The Polish action for annulment when the traders infringe the UCPD was lastly deemed compliant with the UCPD and proportionate by the ECJ, thereby using a cross-reference to its case law in the field of consumer credits on the requirement that national sanctions have to be effective, proportionate and dissuasive. The possible consequences of this cross-reference method are discussed afterwards.

1. Introduction

1. The case decided by the ECJ between the Polish consumer K.D. and the assurance undertaking Towarzystwo Ubezpieczeń Ż S.A. (TUŻ) is interesting to receive a commentary for several reasons (hereafter: case TUŻ).[2] The ECJ drafted new and precisely defined information obligations, thereby elaborating, firstly, what essential information should entail in the event of so-called 'unit-linked group contracts' to which the consumer K.D. acceded. Secondly, the judgment provides in a legal connection between violations on these information obligations that flow from European insurance law directives and violations of the Unfair Contract Terms Directive[3] (hereafter: UCTD) and the Unfair Commercial Practices Directive[4] (hereafter: UCPD). This comment mainly places the present case in the context of the case law of the ECJ on these two consumer protection directives and some recent observations by legal scholars. Thirdly, the ECJ addressed who is responsible for providing the information to the consumer. The question of liability was of importance since more than two professional traders were involved, an assurance undertaking and an intermediary. Fourthly, the consumer K.D. could rely on a Polish action for annulment of the contract in the event of unfair commercial practices due to failure to give the required information. The judgment scrutinises the referring judge's question whether nullity of the contract because of an infringement of the UCPD was

[1] Teaching assistant and PhD researcher at the University of Antwerp, Law faculty, research group Business & Law. Also member of the Consumer Law Institute (University of Antwerp — Ghent University) and Financial Law Institute (Ghent University).

[2] ECJ 2 February 2023, Case C-208/21, ECLI:EU:C:2023:64, K.D. v Towarzystwo Ubezpieczeń Ż S.A. (hereafter: ECJ 2 February 2023, TUŻ).

[3] Dir. 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, http://data.europa.eu/eli/dir/1993/13/oj (hereafter: UCTD).

[4] Dir. 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, http://data.europa.eu/eli/dir/2005/29/oj (hereafter: UCPD).

disproportionate. The ensuing answers produced by the ECJ give the opportunity in this comment to clarify the complex legal context of European requirements imposed on the national enforcement of consumer law, particularly the precise scope of the well-known conditions that national sanctions have to be effective, proportionate and dissuasive. The commented case TUŻ fits within a larger bundle of case law on the enforcement of consumer law and needs this contextual framing in order to fully appreciate its impact. The comment ends with some final thoughts in a short conclusion.

2. Facts: a Polish action for annulment of a 'unit-linked' group life assurance contract

2. The conflict underlying the present case of the ECJ concerned a so-called 'unit-linked group contract' concluded between TUŻ, an assurance undertaking, and Y, a bank acting as the policyholder. Such contracts contain several characteristics that require an explanation to understand the commented case. A unit-linked insurance plan is typically a hybrid contract, providing in essence a combination of insurance and investment: part of the premium paid by the policyholder provides insurance coverage, while the remainder of the premium is invested in either equity (e.g. shares) or debt instruments (e.g. bonds), or a mix of both. These contracts are called 'unit-linked' because the assurance contract is linked to an underlying investment fund where the premiums are pooled.[5]

In the commented case, the unit-linked insurance contract was additionally marketed to consumers and managed by the policyholder, the bank Y, who received a commission from TUŻ for its intervention.[6] The purpose of that contract between TUŻ and Y was the collection by the policyholder of the assurance premiums from consumers, who qualify as the assured persons.[7] Hence, the unit-linked insurance was a group contract, being 'open' and 'collective' in nature, in the sense that it was agreed upon by an assurance undertaking and a policyholder with the objective of offering consumers the possibility of acceding to the contract while their identity is still undefined at the initial moment of agreement.[8] The consumers paid the premiums monthly, which were invested through an investment fund whose capital was established on the basis of those premiums. The collected capital was converted into units of the investment fund and the amount corresponding to those premiums was invested in certificates issued by an investment company ('the assets underlying the unit-linked group contract'), the value of which was calculated on the basis of an index.[9]

A Polish consumer K.D. acceded in 2012 as an assured person to the group contract for a period of 15 years.[10] In return, TUŻ undertook to provide benefits in the event of the death or survival of the assured person, at the end of the assurance period. The amount of those benefits was not to be less than the nominal value of the premiums paid by the assured person, together with any positive variation in the value of the investment fund units. By contrast, in the event of termination of the assurance contract before the expiry of its validity period, TUŻ undertook

[5] See ECJ 24 February 2022, Case C-143/20 and C-213/20, A ('Unit-linked' assurance contracts), ECLI:EU:C:2022:118, para 64, for a detailed definition by the ECJ.
[6] ECJ 2 February 2023, TUŻ, para 19.
[7] ECJ 2 February 2023, TUŻ, para 16.
[8] ECJ 24 February 2022, A ('Unit-linked' assurance contracts), para 64.
[9] ECJ 2 February 2023, TUŻ, para 16.
[10] ECJ 2 February 2023, TUŻ, para 15.

to reimburse the assured person an amount equal to the present value of his or her units in the investment fund, after deduction of a termination fee.[11]

3. The contract concluded between the Polish consumer K.D. and the bank Y was governed by standard contract clauses drafted by the assurance undertaking TUŻ. Those documents did not specify the rules governing the conversion of monthly premiums into units of the investment fund and the valuation of those units, the valuation of the net assets of that fund in its entirety and the valuation of the certificates in which the fund assets were invested, or the method for calculating the value of the index on which the payment of those certificates was based. The assurance product was entirely designed by TUŻ, but Y trained its employees to offer that product to consumers and prepared training materials for that purpose, validated by TUŻ. In the present case, the Polish consumer's accession to the unit-linked group contract was processed by an employee of Y who presented the assurance product as an investment product offering guaranteed capital at the end of the validity period of that contract.

4. When the Polish consumer learned that the value of her units in the investment fund was significantly lower than the amount of the assurance premiums which she had paid, she terminated her assurance contract and requested TUŻ to refund all of those assurance premiums. TUŻ refused that request. The consumer brought an action for compensation relying on the plea that her declaration of accession to the unit-linked group contract was null and void and that TUŻ had engaged in an unfair commercial practice consisting of the sale of goods not adapted to consumer needs and the provision of misleading information to the consumer at the time of entering into that contract. She alleged that the standard contractual terms of the contract contain unclear, imprecise and therefore misleading provisions which do not enable the consumer to determine the nature and structure of the assurance product offered and the related risks. It is in that context that the referring court raised questions concerning the interpretation of the UCPD and the UCTD.

5. With its first and second questions the referring court asked the ECJ whether, in the event that the allegations of an unfair commercial practice by the suing consumer correspond with the ECJ's assessment, the assurance undertaking, the policyholder undertaking or both traders together must be held liable for that unfair commercial practice?[12] With its third question the referring court asked whether the Polish law which confers on the consumer the right to seek the annulment of a contract concluded as a result of an unfair commercial practice is in violation of the UCPD?[13]

3. Transparency requirements and information obligations as levers for elevated consumer protection

3.1 New information obligations

6. First and foremost, before answering the question of liability, the ECJ had to assess whether the assurance practices by the assurance undertaking TUŻ and the policyholder, the bank Y, could be considered unfair commercial practices. The Luxembourg court reminded that the UCPD has a very broad scope due to the definition of 'commercial practices' in Article 2(d) UCPD: practices have to be firstly, of a *commercial nature* and secondly, *directly* connected

[11] ECJ 2 February 2023, TUŻ, para 17.
[12] ECJ 2 February 2023, TUŻ, para 51.
[13] ECJ 2 February 2023, TUŻ, para 73.

with the promotion, sale or supply of a product to consumers. 'Directly connected with the sale of a product' covers, inter alia, any measure taken in relation to the conclusion of a contract.[14] Of course, the follow-up question arises whether the drafting of the standard contract by TUŻ pertains a commercial practice with a 'direct' connection to the contract between the bank Y and the suing Polish consumer. In this respect, the ECJ had already ruled in earlier case law that the accession of a consumer to a group contract between an assurance undertaking (here TUŻ) and a policyholder (here bank Y) gives rise to an individual assurance contract between that assurance undertaking and that consumer. The policyholder should be considered to be carrying out an assurance mediation activity.[15]

6. That also meant that a few European directives on insurance activities apply. The information listed in Annex III, A of Directive 2002/83/EC concerning life assurances contained some limited information obligations that apply in the event of unit-linked assurance contracts (e.g. means of terminating the contract, means and duration of payment of premiums, indication of the nature of the underlying assets for unit-linked policies, etc.). This information is subsequently subject to transparency requirements: it has to be communicated to the policyholder before the contract is concluded (formal transparency) and "must be provided in a clear and accurate manner, in writing" (substantive transparency).[16] Moreover, Directive 2002/92/EC on insurance mediation requires that "all information provided to customers [by insurance intermediaries] shall be communicated in a clear and accurate manner, comprehensible to the customer".[17] It follows from the joint reading of these obligations that the furnishing of the information in Annex III, A rests on both the assurance undertaking and the policyholder, the latter being required because of his function as an insurance intermediary to transfer this information directly to the consumer.[18]

7. Earlier case law of the ECJ already stipulated some specific information obligations using these two European directives on insurance activities.[19] The ECJ now made a precise distinction between essential information, which applies because of the investment nature of the unit-linked group contract, and non-essential information. The essential information obligations must include "a clear, accurate and intelligible description of the economic and legal nature of [the] underlying assets [of the unit-linked group contract], including the general principles governing their yield, as well as clear, accurate and intelligible information on the structural risks associated with those underlying assets, namely the risks inherent in their nature and that may directly affect the rights and obligations arising from the insurance relationship, such as the risks linked to the depreciation of units in the investment fund to which that contract is linked or the credit risk of the issuer of the financial instruments which make up those underlying assets."[20] In addition to the information obligations already enshrined in legislation

[14] ECJ 2 February 2023, TUŻ, para 53.
[15] ECJ 24 February 2022, A ('Unit-linked' assurance contracts), paras 81, 87 and 88, with reference to ECJ 31 May 2018, Case C-542/16, Länsförsäkringar Sak Försäkringsaktiebolag, ECLI: EU:C:2018:369, paras 47-54.
[16] Article 36 *juncto* Annex III, point A, Dir. 2002/83/EC of 5 November 2002 concerning life assurance, http://data.europa.eu/eli/dir/2002/83/oj. Although this directive is no longer in force, it was at the time of accession by the consumer in the present case.
[17] Article 12 Dir. 2002/92/EC of 9 December 2002 on insurance mediation, http://data.europa.eu/eli/dir/2002/92/oj.
[18] ECJ 24 February 2022, A ('Unit-linked' assurance contracts), paras 63-92.
[19] ECJ 24 February 2022, A ('Unit-linked' assurance contracts), paras 93-108.
[20] ECJ 2 February 2023, TUŻ, para 56.

(the aforementioned Annex III, A), the ECJ here especially draws the attention to communication of the risks associated with these unit-linked group contracts.

By contrast, the information that does not need to be included, because it is non-essential, concerns "a detailed and comprehensive description of the nature and scope of all the investment risks associated with the underlying assets of the unit-linked group contract, such as those arising from the specific features of the various financial instruments of which they are composed, or from the technical methods for calculating the value of the index on which the payment of those financial instruments is based, or the same information as that which the issuer of those financial instruments is required, as a provider of investment services, to communicate to its clients."[21] The distinction between essential and non-essential information obligations seems based on the objective of enabling consumers to make an informed choice as to the insurance product best suited to their needs.[22]

8. The emphasis by the ECJ in the present case TUŻ on the risks associated with the unit-linked group contract is reminiscent of another branch of case law of the ECJ. In the case law on foreign currency loans,[23] the Luxembourg Court attached great importance to whether the seller or supplier expressly draws the attention of the consumer on the existence of specific risks associated with these loan agreements denominated in a foreign currency.[24] Both the present case as well as this case law on foreign currency loans view the possible variation of the financial rights and obligations of the consumer due to an underlying asset, whose value may fluctuate, as these 'risks'. Also common to both kinds of cases is the formulation of specific information obligations relating to these risks of complex financial products using a transparency requirement.[25] Lastly, the information obligations that were drafted by the ECJ underline not the quantity of the information given, but the quality of the information by, on the one hand, putting emphasis on the risks and, on the other, because only essential information needs to be given.[26] The present case addressed in this comment confirms the opinion expressed by scholars that the findings relating to quality of information and transparency are not limited to the case law on foreign currency loans, but have a general bearing.[27]

3.2 The information's connection with transparency under the UCPD and UCTD

[21] ECJ 2 February 2023, TUŻ, para 56.
[22] ECJ 24 February 2022, A ('Unit-linked' assurance contracts), para 101.
[23] ECJ 30 April 2014, C-26/13, Árpád Kásler, ECLI:EU:C:2014:282; ECJ 20 September 2017, C-186/16, Banca Românească SA, ECLI:EU:C:2017:703.
[24] G. STRAETMANS and J. WERBROUCK, 'Recent developments in the case law of the Court of Justice of the European Union on unfair contract terms: the ins and outs of transparency', in European Commission, *Consumer protection in the European Union: challenges and opportunities* (Brussels: Publications Office of the European Union, 2023), p (232) at 237.
[25] ECJ 20 September 2017, Banca Românească, paras 44-50.
[26] ECJ 24 February 2022, A ('Unit-linked' assurance contracts), para 133.
[27] G. STRAETMANS and J. WERBROUCK, 'Recent developments in the case law', p (232) at 237.

9. The case law on foreign currency loans used the transparency requirement[28] of the UCTD: "[contract] terms must always be drafted in plain, intelligible language"[29]. Article 4(2) UCTD gives this transparency requirement a broad range of application since core terms normally fall outside of the scope of the UCTD except for the transparency requirement imposing on traders that these are also drafted in plain, intelligible language.[30] It is settled case law of the ECJ that this transparency requirement of the UCTD cannot be reduced merely to their being formally and grammatically intelligible.[31] The consumer must also be in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him/her which derive from the contract.[32] The ECJ has steered this information for consumers on economic consequences to essential information.[33] Moreover, although this transparency requirement relates to contract terms under the UCTD, it follows from the ECJ's case law that the transparency of a contract term must be examined in light of all the relevant information, including the promotional material and information provided in the negotiation of the contract, not only by the seller itself, but also by any other person who, on behalf of that professional, participated in the marketing of the contracts concerned.[34] Based on these features the UCTD's transparency requirement has a very broad scope of application.[35]

Another open norm that in a sense requires transparency of information is incorporated in Article 7 UCPD since traders violate this provision's prohibition on misleading omissions if they omit, hide or provide in an unclear, unintelligible, ambiguous or untimely manner material information. The emphasis on essential information in the UCTD's transparency requirement is congruent with Article 7 UCPD's emphasis on 'material' information.[36] Importantly, the question rises to what extent the failure to give the specific information relating to the unit-linked group contract defined by the ECJ, and thus failing the transparency requirement under the aforementioned directives on insurance activities, could lead to penalties under the UCPD and the UCTD.

Firstly, the ECJ ruled that the furnishing of the information obligations related to the unit-linked group contracts forms a commercial practice in the sense of the UCPD.[37] Moreover, these information obligations are to be deemed essential (or 'material') information obligations

---

[28] See for more details: C. GARDINER, 'The transparency principle of the UCTD', in C. GARDINER, *Unfair Contract Terms in the Digital Age* (Edgar Elgar Publishing, 2022), pp 77-99; M. LOOS, 'Transparency Under the UCTD: Could You Please Explain what these terms are Supposed to Mean?', *EuCML (Journal of European Consumer and Market Law)* 2020(1), pp 25-26; G. HOWELLS and G. STRAETMANS, 'The Interpretive Function of the ECJ and the Interrelationship of EU and National Levels of Consumer Protection', *Perspectives on Federalism* 2017(2), pp (180) at 189-194.

[29] Article 5 UCTD.

[30] Article 4(2) UCTD stipulates: "Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language."

[31] ECJ 30 April 2014, Árpád Kásler, para 71.

[32] ECJ 30 April 2014, Árpád Kásler, para 75; ECJ 20 September 2017, Banca Românească, para 45.

[33] ECJ 20 June 2021, Joined Cases C-776/19 to C-782/19, BNP Paribas Personal Finance, ECLI:EU:C:2021:470, 74; G. STRAETMANS and J. WERBROUCK, 'Recent developments in the case law', p (232) at 236.

[34] ECJ 20 June 2021, BNP Paribas Personal Finance, para 66.

[35] ECJ 30 April 2014, Árpád Kásler, para 72.

[36] G. STRAETMANS and V. BURKI, 'Transparantie van kernbedingen en het belang van precontractuele informatie bij kredietovereenkomsten', *D.A.O.R. (Le droit des affaires - Het ondernemingsrecht)* 2018(4), p (98) at 107.

[37] ECJ 24 February 2022, A ('Unit-linked' assurance contracts), para 130.

in the sense of Article 7 UCPD.[38] By consequence, failure to provide that information, concealment of that information or providing it in an unclear, incomprehensible, ambiguous or late manner may cause the consumer to take a transactional decision that he would not have taken otherwise and are therefore a misleading omission in the sense of Article 7 UCPD.[39] The disregard of transparency requirements under one set of legislation (insurance law directives), will lead to the violation of the transparency requirement that flow from Article 7 UCPD. Secondly, the Polish judge asked the ECJ in the commented case TUŻ whether Article 5 UCTD on the transparency requirement also constitutes an appropriate legal basis for seeking annulment in the event of faulty information on the unit-linked group contracts.[40]

10. The ECJ did not elaborate on this point of law in relation to the UCTD raised by the Polish judge. Nonetheless, as has been mentioned above, like in the case law on the foreign currency loans the information obligations on unit-linked group contracts drawn up by the ECJ put emphasis on financial risks for the consumer and have been deemed essential. They are in other words probably part of the economic consequences of a contract that the consumer should receive information on. It therefore seems likely that the violation of the specific information obligations set forth by the ECJ in the present case could also be seen as the violation of the transparency requirements in Articles 4(2) and 5 UCTD.

In this respect, it is also settled case law of the ECJ that a national court's 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 based on Article 4(1) UCTD[41].[42] Although that element is not such as to establish, automatically and on its own, that the contested terms are unfair,[43] it would seem reasonable for a national judge to almost immediately conclude that the finding of an unfair commercial practice should lead to the assessment that the contract agreed upon based on these same unfair commercial practices is also characterised by unfair contract terms.[44]

11. It follows from the above that the Polish judge in the commented case TUŻ had the full competence to determine that certain contract terms in the agreement between the consumer K.D. and the bank Y can be deemed unfair when the traders violated the ECJ's information obligations on unit-linked group contracts.[45] Surely, the violation of the requirements flowing

[38] ECJ 24 February 2022, A ('Unit-linked' assurance contracts), para 133.
[39] ECJ 24 February 2022, A ('Unit-linked' assurance contracts), paras 134-135.
[40] ECJ 2 February 2023, TUŻ, 33.
[41] "The unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to *all the circumstances* attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent (own emphasis added)."
[42] ECJ 15 March 2012, C-453/10, Pereničová, ECLI:EU:C:2012:144, para 43.
[43] ECJ 15 March 2012, Pereničová, para 44.
[44] See also on this point G. STRAETMANS, 'De invloed van een oneerlijke handelspraktijk op de consumentenbescherming van de Richtlijn oneerlijke bedingen', *DCCR (Droit de la consommation - Consumentenrecht)* 2014(2), p (21) at 30.
[45] See G. STRAETMANS and J. WERBROUCK, 'Recent developments in the case law', p (232) at: "[Transparency] under the UCTD can be seen as quality standards which, if not met, do not make contract terms necessarily unfair, nor lead automatically to their non-bindingness. Rather, non-transparent terms […] must be interpreted in favour of the consumer […] and be subject to an unfairness assessment. Yet, there is a neat correlation between transparency and unfairness. Following Article 4(1) UCTD, (lack of) transparency is an important aspect that must be taken into account when assessing whether or not a contractual term is unfair. Nevertheless, it is perfectly

from Article 7(1) UCPD which prohibit the failure to provide the aforementioned information, concealment of that information or providing it in an unclear, incomprehensible, ambiguous or late manner will most likely at the same time also be a violation of the transparency requirement which obligates contracts to be drafted in plain, intelligible language, including both grammatical clarity and information on economic consequences. In other words, Article 7 UCPD equals a first transparency requirement whose violation should almost instantly lead to the violation of the very similar transparency requirement in Articles 4(2) and 5 UCTD, provided that the furnished information has led to the conclusion of a contract.

4. Liability of traders under the UCPD in a three party unit-linked group contract

4.1 Qualification of intermediaries as traders under the UCPD and beyond

12. The Polish consumer K.D. had sought compensation through the reimbursement of the paid premiums. The next point of law that the ECJ therefore had to ascertain was whether the assurance undertaking, the policyholder undertaking or both of those traders could be liable in the event of an unfair commercial practice. To that end, the Luxembourg Court first confirmed that both the assurance undertaking and the policyholder fall within the definition of 'trader' of the UCPD.[46] The Court thereby applied on the present facts its ruling of the RLvS judgment where it determined that the UCPD may apply in a situation where an operator's commercial practices are put to use by another undertaking, acting in the name or on behalf of that operator, with the result that the provisions of that directive could, in certain situations, be relied on as against both that operator and the undertaking, if they satisfy the definition of 'trader'.[47]

Nonetheless, the ECJ in the present case did not explain in detail why *in this certain situation* the policyholder, acting as an intermediary, can also be qualified as a trader. In my opinion, it seems of importance that the policy holder received a commission for his activities as an intermediary from the assurance undertaking in order to qualify as a trader. It seems unlikely that the policyholder could be a trader by itself without a remunerative relationship with the assurance undertaking; although it remains an open question whether other elements apart from a commission can suffice to qualify the intermediary as a trader. Remuneration should in any event be understood broadly as a 'gainful activity' by the intermediary,[48] received from its principal, encompassing also any other economic advantage added to the intermediary's assets apart from payment in the form of a sum of money.[49]

In any event, their legal qualification as a trader in the commented case TUŻ leads to the result that both traders are individually responsible for the proper performance of the pre-contractual information obligations mentioned above for the benefit of the consumer who accedes to the unit-linked group contract, for the part of that obligation which they are required to fulfil.[50]

---

possible that a non-transparent contractual term does not bring along a significant imbalance, and conversely a perfectly transparent term may still lead entail a significant imbalance, and thus qualify as unfair."

[46] ECJ 2 February 2023, TUŻ, para 68.

[47] ECJ 17 October 2013, Case C-391/12, RLvS, ECLI:EU:C:2013:669, para 38.

[48] ECJ 3 October 2013, Case C-59/12, BKK Mobil Oil, ECLI:EU:C:2013:634, para 32; ECJ 4 October 2018, C-105/17, Kamenova, ECLI:EU:C:2018:808, para 30; ECJ 24 February 2022, A ('Unit-linked' assurance contracts), para 129.

[49] ECJ 2 September 2021, Case C-371/20, Peek & Cloppenburg, ECLI:EU:C:2021:674, para 41.

[50] ECJ 2 February 2023, TUŻ, para 69.

This confirms the approach the ECJ had already taken in other case law. It is firstly in line with the ECJ's ruling in the Tiketa judgment on the Consumer Rights Directive[51] (CRD) that a natural or legal person who is acting as an intermediary is also a 'trader', without there being any need to establish the existence of a twofold provision of services.[52] Secondly, both of those traders are required to ensure compliance with the requirements laid down by the CRD.[53] This most likely includes the obligation to provide the legally required information. However, while information obligations are identical for both the principal and the intermediary, the ECJ seems to approach the liability of the two traders differently.

4.2 Separate regimes of liability

13. The ECJ defined precisely in the present case which duties rest upon each party in the unit-linked group contract in order for them to avoid liability for unfair commercial practices. On the one hand, the communication of contractual information to a consumer who intends to accede to a unit-linked group contract may be made by means of a standard contract drafted by the assurance undertaking and this falls within the concept of 'commercial practice' of the UCPD, while on the other hand the policyholder undertaking has to give that contractual information by means of a standard contract to the consumer prior to his or her accession, in sufficient time to enable him or her, in full knowledge of the facts, to make an informed choice as to the assurance product best suited to his or her needs.[54] Moreover, it is for the assurance undertaking to communicate the contractual information to the policyholder undertaking, formulating it in a clear, accurate and intelligible manner for consumers, with a view to its subsequent transmission to consumers during the procedure for accession to a unit-linked group contract. That policyholder undertaking, acting as an insurance intermediary, must, for its part, communicate that contractual information to any consumer before the consumer accedes to that contract, together with any other details which may prove necessary in the light of the consumer's requirements and needs. These details must be modulated according to the complexity of the contract and formulated clearly and accurately and in a manner intelligible to the consumer.[55]

According to this ruling the policyholder cannot satisfy his legal obligations by simply transferring the information provided by the assurance undertaking to the consumer, he must actively check the information he receives and add additional information if needed. The information obligations resting on the policyholder increase in accordance with the requirements and needs of the consumer. The complexity of the contract is one possible indication that more information is needed. This is in line with the consumer information model which seeks to combat the information asymmetry that exists between the weaker party (the consumer) vis-à-vis the trader.[56] It can be submitted that the commented case TUŻ provides in

[51] Dir. 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, http://data.europa.eu/eli/dir/2011/83/oj; See also ECJ 4 October 2018, C-105/17, Kamenova, ECLI:EU:C:2018:808, para 29, where the ECJ ruled that the concept of trader in the UCPD and CRD must be interpreted uniformly.
[52] ECJ 24 February 2022, Case C-536/20, Tiketa, ECLI:EU:C:2022:112, para 36.
[53] ECJ 24 February 2022, Case C-536/20, Tiketa, ECLI:EU:C:2022:112, para 35.
[54] ECJ 2 February 2023, TUŻ, paras 58 and 60.
[55] ECJ 2 February 2023, TUŻ, para 57.
[56] More extensively described by G. STRAETMANS, "Information Obligations and Disinformation of Consumers", in G. Straetmans (ed.), *Information Obligations and Disinformation of Consumers* (Springer, 2019), pp 3-96.

an indication that the consumer's weaker position increases in correlation with the complexity of the financial product and that additional information obligations should cure this increased weakness.

However, this raises a few questions. Firstly, how can a trader (the policyholder) determine the degree of complexity of a financial product from which the additional information obligations for their consumers have to be derived? According to the ECJ in the Citroën Belux case, it follows from recital 9 of the UCPD that all financial products are in nature complex.[57] Moreover, without going into detail, the MiFID legislation and its interpretation by the European Securities Market Authority offer some guiding benchmarks elaborating which products define as complex financial products in the remit of European financial law, although these benchmarks are also complex by themselves and not very straightforward, nor do they offer a clear hierarchy of which financial products are more complex than others.[58] The lack of straightforwardness of a definition determining the degree of complexity here creates a tense relationship between the ECJ's requirement of increased information correlated to a financial product's complexity and the European principle of legal certainty.

Secondly, to what extent can these specific requirements in the commented case TUŻ be applied to other situations, for instance to other types of commercial relationships without an intermediary's participation or to other complex financial products? An extension of the ECJ's propagated information obligations remains to be seen, but the idea of additional precontractual obligations when the complexity of a financial product increases is not new in European law. For instance, the increased complexity of a financial product triggers precontractual (information) obligations under the MiFID-legislation and have also been the reason for the additional information obligations in the aforementioned case law on foreign currency loans.

14. The ECJ then divides liability in respect of the consumer between the principal and the intermediary. If the standard contract is given to the consumer on time but was still misleading, then only the assurance undertaking is liable.[59] The policyholder acting as an intermediary cannot at the same time be liable for failing to check whether the standard contract met the aforementioned information obligations. Liability on the policyholder is limited to giving the

---

[57] ECJ 18 July 2013, C-265/12, Citroën Belux, ECLI:EU:C:2013:498, paras 22 and 39.

[58] See Article 25(4) Dir. 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, http://data.europa.eu/eli/dir/2014/65/oj; Article 57 Commission Delegated Regulation 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, http://data.europa.eu/eli/reg_del/2017/565/oj; Committee Of European Securities Regulators, *Questions and Answers - MiFID complex and non complex financial instruments for the purposes of the Directive's appropriateness requirements*, 3 November 2009, https://www.esma.europa.eu/document/questions-and-answers-mifid-complex-and-non-complex-financial-instruments-purposes, 22 p; Iosco, *Suitability Requirements With Respect To the Distribution of Complex Financial Products*, January 2013, https://www.iosco.org/library/pubdocs/pdf/IOSCOPD400.pdf, pp 4-5, where some definitions of complex financial products are mentioned. Unit-linked group life assurance contracts, for instance, fall within the conceptual scope of complex financial products as their terms, features and risks are not reasonably likely to be understood by a retail customer (i.e. consumers) because of their complex structure and which are difficult to value. Instruments whose potential pay-off is linked to market parameters, as in the present commented case, can be considered complex financial products.

[59] ECJ 2 February 2023, TUŻ, para 70: "Where the unfair commercial practice consists of the fact that the assurance undertaking drafted the standard unit-linked group contract in a misleading manner, and which was transmitted to the consumer in in a timely manner before he or she acceded to that group contract, that undertaking must, in principle, be held liable for such a practice."

information on time (before accession by the consumer) and adding the additional information if needed. Additional information concerns, inter alia, the financial aspects of the investment in the assurance product, the associated risks or the fact that the policyholder failed to transmit the standard unit-linked group contract to the consumer.[60] By consequence, if a standard contract fails to meet the aforementioned information obligations that the ECJ elaborated, the 'additional information' to be provided by the policyholder does not have to include the information the assurance undertaking should have given.

Yet, some open questions still remain: 1) what if the task of the policyholder in the present case is exercised by the assurance undertaking without an intermediary's participation? It seems probable that this trader would have to fulfil all of the requirements set forth by the ECJ in the commented case; 2) can an intermediary correct the failure of the assurance undertaking to draft up a standard contract for the consumer that is not misleading by means of the 'additional information' (even though the intermediary is not obligated to)? While this may have the consequence of a consumer now being able to make an informed decision under the UCPD, it still remains possible that the flawed standard contract is in violation with the UCTD.

5. Is the Polish action for annulment effective, proportionate and dissuasive in terms of the UCPD?

5.1 Compliance of the annulment action with Article 11a UCPD

15. As concerns the last part of the commented case, the Polish judge was uncertain whether Article 3(2) UCPD, which states that the UCPD is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract, precludes the Polish law provision Article 12(1)(4) of the Law on combating unfair commercial practices that grants a right to a consumer to seek the annulment of a contract concluded as a result of an unfair commercial practice. Since the UCPD cannot serve as a basis for declaring a contract invalid according to Article 3(2) UCPD, the Polish judge furthermore thought that national law transposing the obligation of Article 13 UCPD which states that sanctions should effective, proportionate and dissuasive into an annulment measure results in a disproportionate penalty. Lastly, the question arises how the new Article 11a on proportionate and effective remedies inserted into the UCPD by the Omnibus Directive[61] should be interpreted in light of the Polish annulment sanction and Article 3(2) UCPD.

16. The uncertainties voiced by the Polish judge illustrate the unclarities that may remain among national judges after the ECJ's Bankia judgment and due to the new Article 11a UCPD subsequently inserted by the Omnibus Directive. Firstly, in the Bankia judgment the ECJ ruled that the effectiveness of the UCPD did not require from the Spanish national judges to apply the UCPD of their own motion to a mortgage credit agreement between a trader and a

[60] ECJ 2 February 2023, TUŻ, para 71.
[61] Dir. 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, http://data.europa.eu/eli/dir/2019/2161/oj (hereafter: Omnibus Directive).

consumer.[62] While some scholars were critical of this judgment by the ECJ,[63] it follows from Article 3(2)'s exclusion of contractual effects such as remedies that the UCPD *merely* prohibits unfair commercial practices,[64] whereas other consumer protection directives go further and require that infringements on consumer protection provisions have a bearing on the validity of the contract.[65] Secondly, Article 11a UCPD since then states that "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, […] the termination of the contract." Moreover, these remedies are, according to Article 11a(2) UCPD, "without prejudice to the application of other remedies available to consumers under […] national law".[66] Could Article 11a UCPD have the effect of leaving the Bankia judgment invalid and leading to *ex officio* application of the UCPD, as some have suggested?[67]

17. The present case TUŻ might provide a first answer to this question. First, some clarifications are needed for national judges who apply national remedies in transposition of Article 13 UCPD to contracts concluded between traders and consumers. In this respect, Union law has always been subject to the paradigm where the EU can create provisions of substantive law in the domains where it received competence from the Member States, whereas the Member States were responsible for the enforcement of these EU directives and regulations.[68] However, Member States had to ensure the effectiveness of Union law provisions according to Article 4(3) TEU that enshrines the principle of sincere cooperation. It then follows from the principle of since cooperation according to the ECJ in the Greek Maize judgment that Member States shall take all measures necessary to guarantee the application and effectiveness of Union law.[69] Moreover, the ECJ determined that national penalties have to be effective, proportionate and dissuasive.[70]

Article 13 UCPD repeats this 'triad'[71] of requirements that the Greek Maize judgment set out and is nothing more than a codification of the landmark case. Despite the codification efforts by the EU legislator, the 'triad' that sanctions have to be effective, proportionate and dissuasive

---

[62] ECJ 19 September 2018, C-109/17, Bankia, ECLI:EU:C:2018:735, para 34.
[63] M. DUROVIC, 'Private Law Consequences of Unfair Commercial Practices' in L. DE ALMEIDA, M. CANTERO GAMITO, M. DUROVIC and K. P. PURNHAGEN (eds), *The Transformation of Economic Law: Essays in Honour of H-W. Micklitz* (Oxford: Hart Publishing, 2019), p (29) at 34.
[64] ECJ 19 September 2018, Bankia, paras 32 and 41.
[65] E.g. Article 6 UCTD: "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."
[66] ECJ 2 February 2023, TUŻ, para 83.
[67] M. LOOS, 'The Modernization of European Consumer Law (Continued): More Meat on the Bone After All', *ERPL (European Review of Private Law)* 2020(2), 411, who submitted that Article 11a might lead the ECJ to determine that Member State courts should also apply the UCPD of their own motion.
[68] This follows from the principle of conferral in Article 5 TEU, according to which the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives **set** out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. Enforcement is not part of the conferred powers, the only exception being competition law where the European Commission received enforcement competences (see Article 105 TFEU).
[69] See ECJ 21 September 1989, C-68/88, Commission v Greece (Greek Maize), ECLI:EU:C:1989:339, para 23, for the original phrasing.
[70] ECJ 21 September 1989, Greek Maize, para 24.
[71] F. CAFAGGI and P. IAMICELI, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions', *ERPL* 2017(3), pp 575-618.

applies on a much broader scale since its origin lies in the EU's primary law (current Article 4(3) TEU). Thus also in relation to EU directives and regulations that do not contain an expressive codification of the triad it should be expected that Member States take all necessary measures to guarantee their application and effectiveness and that national sanctions should be effective, proportionate and dissuasive.

In this context the ECJ explained as part of the answer to the referring judge that Article 13 UCPD leaves a large margin of discretion as to the choice of national measures intended to combat unfair commercial practices.[72] Member States can consequently choose public law sanctions, such as administrative fines or criminal penalties, but also private law remedies, such as actions for annulment or compensation.[73] Article 3(2) does not preclude Member States from determining private law sanctions such as the Polish action for annulment to give effectiveness to the UCPD. The UCPD simply leaves general aspects of contract law and the validity of contracts out of the area of harmonisation by the UCPD and within the Member States' autonomy.[74]

Since there is a large margin of discretion left to the Member States on *how* the requirements of effectiveness, proportionality and dissuasiveness are met, Member States should also consider the combined effect of public and private law sanctions on the same violation of the UCPD.[75] Private and public law sanctions may lead to disproportionate sanctions when they are applied independently from each other and cumulate financial detriment for the trader, for example when a public authority imposes an administrative fine and a civil judge awards a remedial claim. After all, some Member States have designed special private law sanctions for violations of the national laws transposing the UCPD. In the Netherlands a contract concluded in consequence of an unfair commercial practice can be declared null and void according to Article 6:193j of the Civil Code. In one judgment a Dutch judge even applied this annulment sanction *ex officio* since sanctions have to be effective, proportionate and dissuasive according to Article 13 UCPD.[76] While it is debateable whether the requirements of effectiveness, proportionality and dissuasiveness could lead to an *ex officio* obligation of the application of a private remedy at the national level, Article 13 UCPD's large margin of discretion most likely allows national legislators and/or judges to annul consumer contracts *ex officio* in court proceedings when they were concluded as a result of an unfair commercial practice.

18. This autonomy of Member States to define private law sanctions has not been altered by the introduction of the new Article 11a into the UCPD, according to the ECJ in the commented case TUŻ. Its inclusion in the UCPD confirms that it was and remains open to Member States to provide for other remedies in favour of consumers harmed by unfair commercial practices, including those providing for the consumer's right to seek the annulment of a contract

[72] ECJ 2 February 2023, TUŻ, para 79.
[73] Compare with: ECJ 19 September 2018, Bankia, para 42: "Article 11 of Directive 2005/29 merely requires Member States to ensure that adequate and effective means exist to combat unfair commercial practices, means which may consist in *legal action against such practices* or *administrative proceedings* with the possibility of legal review, the purpose of such actions and proceedings being to put an end to such practices (own emphasis added)."
[74] Recital 9 UPCD; ECJ 2 February 2023, TUŻ, paras 77 and 78.
[75] See also on this point F. CAFAGGI and P. IAMICELI, 'The Principles of Effectiveness, Proportionality and Dissuasiveness', pp (575) at 610-615.
[76] Rechtbank Amsterdam 5 september 2017, ECLI:NL:RBAMS:2017:6552, para 8; C.M.D.S. PAVILLON and L.B.A. TIGELAAR, 'Vernietiging van de overeenkomst bij een oneerlijke handelspraktijk; een hanteerbare sanctie?', *Contracteren* 2018(3), pp 73-74.

concluded as a result of such a practice.[77] However, in the present case the ECJ did not explain how Articles 3(2) and 11a UCPD could be reconciled with one another, especially in relation to the suggestion that the UCPD could now be applied *ex officio* since the amendment by the Omnibus Directive.

This suggestion seems plausible due to the required "access to effective remedies" for consumers included in Article 11a UCPD, hereby seemingly granting some procedural rights to the consumer. Yet, at the same time the amending directive remains silent on the fate of Article 3(2) and recital 9 of the UCPD, which state that the UCPD is without prejudice to contract law. In my opinion, the new remedies in Article 11a UCPD need a restrictive interpretation since they should be regarded as exceptions to the aforementioned paradigm of autonomy of the Member States regarding enforcement, in a sense expressed in Article 3(2) UCPD concerning contractual remedies. This point of view receives confirmation in Article 11a UCPD since it states that Member States may still determine the conditions for the application and effects of those remedies. This implies a fairly limitless discretion for the Member States concerning the new remedies, capped only by the principles of effectiveness and proportionality.[78] It follows that *ex officio* enforcement of contractual remedies when a contract is subject to unfair commercial practices is the condition of a remedy that should remain within the discretion of the Member States to decide upon. *Ex officio* control by national judges of contracts affected by unfair commercial practices does not flow as a requirement from the UCPD based on Article 11a.

5.2 Compliance of the annulment action with Article 13 UCPD

19. After the affirmative answer to the question of conformity of the Polish action for annulment with Article 3(2), the ECJ had to determine whether annulment of the contract may be regarded as an effective, proportionate and dissuasive penalty within the meaning of Article 13 UCPD.[79] The requirement of effective, proportionate and dissuasive penalties or sanctions is a well-known phrase enshrined in most consumer protection directives, commonly referred to as 'the triad'.[80] The ECJ first underlined in the present case that it is for the national courts alone to assess, taking into consideration all the circumstances of the cases before them, whether the system of penalties applicable to traders using unfair commercial practices complies with the requirements of that directive and, in particular, the principle of proportionality.[81] The ECJ can of course give guidelines to the national judges so that they can determine whether their national sanctions meet the European requirements of effectiveness, proportionality and dissuasiveness, although this case law on the normative scope and content

[77] ECJ 2 February 2023, TUŻ, para 84. It even strengthens the possibility of annulment at the national level.
[78] See also B. DUIVENVOORDE, 'The Upcoming Changes in the Unfair Commercial Practices Directive: A Better Deal for Consumers?' *EuCML* 2019(6), p (219) at 228 and footnote 95.
[79] ECJ 2 February 2023, TUŻ, para 75.
[80] Scholars have made several attempts as regards the interpretation of this 'triad', see: F. CAFAGGI and P. IAMICELI, 'The Principles of Effectiveness, Proportionality and Dissuasiveness', pp 575-618; M.G. FAURE, 'Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Shipsource Pollution Directives: Questions and Challenges', *European Energy and Environmental Law Review* 2010, pp (256) at 259-265; J. WERBROUCK, *De impact van de rechtspraak van het Hof van Justitie inzake de handhaving van consumentenrecht op het nationale recht: een analyse van termijnen, ambtshalve toepassing en de werking van rechterlijke beslissingen* (Antwerpen: Intersentia, 2023), pp 160-178.
[81] ECJ 2 February 2023, TUŻ, para 85.

of the separate principles of effectiveness, proportionality and dissuasiveness is currently mostly limited to the Consumer Credit Directive[82] (CCD).[83]

20. In the present case the ECJ builds further on its previous case law in the field of the CCD by using a cross-reference to the OPR-Finance case where the Czech penalty of nullity of the contract containing a consumer credit was already deemed compliant with the principles of effectiveness, proportionality and dissuasiveness.[84] According to the ECJ, it then follows that the Polish action for annulment of a contract concluded as a result of an unfair commercial practice may also be regarded as an effective, proportionate and dissuasive sanction.[85] This obviously raises the question to what extent also other case law of the ECJ as regards the triad within the scope of the CCD could be extrapolated to other consumer protection directives, such as the UCPD, but for example also the CRD.

It can be submitted that the cross-reference by the ECJ in the commented case TUŻ offers a first indication in favour of a uniform interpretation across the consumer protection directives of the triple requirement that national sanctions have to be effective, proportionate and dissuasive. For instance, the concepts of effectiveness and dissuasiveness as principles requiring national penalties to deprive infringing traders of the economic benefits derived from their infringement as expressed by the ECJ in the Ultimo Portfolio Investment judgment on the CCD could apply on a broader scale to all consumer protection directives.[86] This statement seems likely as it would also match the overarching economic viewpoint on dissuasive sanctions.[87] In a similar vein, the ECJ has ruled in the Home Credit Slovakia judgment that harsher penalties (more dissuasive) are justified when the essential information obligations enshrined in the CCD are violated.[88] The aforementioned information obligations concerning the risks associated with unit-linked group contracts and foreign currency loans were also considered 'essential' by the ECJ in light of the UCPD. It follows that national legislators could most likely adopt harsher penalties when enforcing these essential information obligations.

21. While these extensions of the triad's interpretation seem probable, it nevertheless needs to be emphasized that each extension requires a precise examination in light of the new legal context of the applicable directive. Moreover, the final confirmation whether case law on the CCD can be used to interpret the triad in other consumer protection directives rests in the hands

---

[82] Dir. 2008/48/EG of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, http://data.europa.eu/eli/dir/2008/48/oj.

[83] ECJ 27 March 2014, C-565/12, Le Crédit Lyonnais, ECLI:EU:C:2014:190; ECJ 9 November 2016, C-42/15, Home Credit Slovakia, ECLI:EU:C:2016:842; ECJ 5 March 2020, C-679/18, OPR-Finance, ECLI:EU:C:2020:167; ECJ 10 June 2021, C-303/20, Ultimo Portfolio Investment, ECLI:EU:C:2021:479. See, however, ECJ 16 April 2015, C-388/13, UPC Magyarország, ECLI:EU:C:2015:225, para 58, where the triad received an interpretation in the context of the UCPD.

[84] ECJ 2 February 2023, TUŻ, para 86; ECJ 5 March 2020, OPR-Finance, paras 25, 26, 29 and 30.

[85] ECJ 2 February 2023, TUŻ, para 87.

[86] ECJ 10 June 2021, Ultimo Portfolio Investment, para 32.

[87] Economic analysis of the law has postulated that deterrence (or dissuasiveness) through sanctions requires that infringers are deprived of their economic benefits flowing from the infringement. See more extensively: M. FAURE, A. OGUS and N. PHILIPSEN, 'Curbing Consumer Financial Losses: The Economics of Regulatory Enforcement', *Law and Policy* 2009(2), pp (161) at 165-170.

[88] ECJ 9 November 2016, Home Credit Slovakia, paras 70-72. The information pertaining to the annual percentage rate of charge, the number and frequency of payments and a statement that notarial fees will be payable and the sureties and insurance required, were all considered vitally important (see Article 10(2)(g),(h),(n) and (o) CCD). By contrast, mentioning the name and address of the competent supervisory authority was not (see Article 10(2)(v) CCD).

of the ECJ. It nonetheless seems desirable that the ECJ would aspire a congruent approach to the interpretation of the triad mentioned in each of the consumer protection directives. Indeed, a singular commercial relation between a consumer and a trader can lead to the cumulated determination of multiple infringements under several consumer protection directives at the same time. It follows that the enforcement of these same infringements apply the enforcement principles of effectiveness, proportionality and dissuasiveness according to an identical scope and meaning so that uniformity is achieved.

6. Concluding thoughts

22. In this comment some questions relating to consumer protection were highlighted in relation to a complex financial product, namely unit-linked group contracts. These contracts are difficult to understand and, upon first glance, the underlying legal and economic structure is not immediately visible. The ECJ has defined some tailor-made information obligations that should benefit the consumer in this respect, thereby using transparency requirements present in European legislation. Simply put, these information obligations are aimed at enabling consumers to make an informed decision. However, only the information that is pertinent for consumers to reach this decision should be given and thus the ECJ limits the mentioned information obligations only to 'essential' information obligations. The case note further explained that when the information is not given to the consumer in a manner that is compliant with the ECJ's requirements, a simultaneous determination of an infringement under both the UCPD and UCTD will arise. It follows that the violation of a transparency requirement in the UCPD will most likely lead to the violation of the transparency requirement enshrined in the UCTD.

While the ECJ considered both the principal (assurance undertaking) and the intermediary (the policyholder) as 'traders' in the sense of the UCPD, thereby confirming other case law where the same conclusion was reached in relation to the CRD, the failure to give the aforementioned essential information to the consumer will only lead to the liability of the assurance undertaking. The policyholder will then be liable for the failure to pass on the essential information to the consumer, by means of a standard contract, and to give additional information to the consumer, although the ECJ did not specify which information this could be. Nonetheless, the ECJ clearly opted again for a tailor-made approach to the provision of information since that amount of additional information should increase in relation to the complexity of the financial product. The content of the additional information can thus vary according to the precise situation at hand and the risk of liability increases for intermediaries when financial products increase in complexity.

Lastly, the ECJ confirmed that the Polish action for annulment of the contract agreed upon in consequence of an unfair commercial practice was compliant with Articles 3(2) and 13 UCPD. Interestingly, the ECJ used a cross-reference to case law of the CCD to make this conclusion. This is a first indication that the triad of effective, proportionate and dissuasive sanctions can have a uniform interpretation within the field of consumer law as concerns the scope and meaning of each of the three components. This would for practical reasons also be a desirable approach because multiple consumer protection directives often govern the contract or commercial practice between traders and consumers.