Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

3 October 2019*

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Regulation (EU) No 1215/2012 — Article 17(1) — Jurisdiction over consumer contracts — Notion of 'consumer' — Natural person carrying out transactions on the international exchange market through the intermediary of a brokerage company — Regulation (EC) No 593/2008 (Rome I) — Directive 2004/39/EC — Notion of 'retail client')

In Case C-208/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší soud (Supreme Court, Czech Republic), made by decision of 13 March 2018, received at the Court on 23 March 2018, in the proceedings

Jana Petruchová

v

FIBO Group Holdings Limited,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader, A. Rosas, L. Bay Larsen and M. Safjan (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 31 January 2019,

after considering the observations submitted on behalf of

– Ms Petruchová, by M. Hostinský, advokát,

– FIBO Group Holdings Limited, by J. Komárek, advokát,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by M. Šimerdová and M. Heller, acting as Agents,

* Language of the case: Czech.

after hearing the Opinion of the Advocate General at the sitting on 11 April 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 17(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

2 The request was made in the context of a dispute between Ms Jana Petruchová and FIBO Group Holdings Limited ('FIBO') concerning a request for payment of the difference between Ms Petruchová's profit and the profit she would have obtained if the order to purchase a currency, given by her, had been executed by FIBO without delay.

Legal context

Regulation No 1215/2012,

3 Under recitals 15, 16 and 18 of Regulation No 1215/2012:

'(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. …

(16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. …

…

(18) In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.'

4 Section 4 of Chapter II of that regulation, entitled 'Jurisdiction over consumer contracts', includes Articles 17 to 19 of that regulation. Article 17(1) and (3) of the regulation states:

'1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this section, without prejudice to Article 6 and point 5 of Article 7, if:

(a) it is a contract for the sale of goods on instalment credit terms;

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

…

3. This section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.'

5 Article 18(1) of that regulation provides:

'A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.'

6 Article 19 of Regulation No 1215/2012 is worded as follows:

'The provisions of this section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen;

(2) which allows the consumer to bring proceedings in courts other than those indicated in this section; or

(3) which 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.'

7 Article 25(4) of that regulation provides:

'Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.'

The Rome I Regulation

8 Recitals 7, 28 and 30 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6; 'the Rome I Regulation'):

'(7) The substantive scope and the provisions of this regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [(OJ 2001 L 12, p. 1)] and Regulation (EC) No 864/2007 of the [European] Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II") [(OJ 2007 L 199, p. 40)].

…

(28) It is important to ensure that rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to different laws being applicable to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. …

(30) For the purposes of this regulation, financial instruments and securities are the instruments referred to in Article 4 of Directive 2004/39/EC [of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1)].'

9 Article 1 of the Rome I Regulation, entitled 'Material scope', states, in the first subparagraph of paragraph 1 thereof:

'This regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.'

10 Article 6 of that regulation, entitled 'Consumer contracts', provides:

'1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

…

4. Paragraphs 1 and 2 shall not apply to:

…

(d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;

…'

Directive 2004/39

11 Article 4 of Directive 2004/39, which is entitled 'Definitions', provides in paragraph 1:

'For the purposes of this directive:

…

(10) "client" means any natural or legal person to whom an investment firm provides investment or ancillary services;

(11) "Professional client" means a client meeting the criteria laid down in Annex II;

(12) "Retail client" means a client who is not a professional client;

…

(17) "Financial instruments" means those instruments specified in Section C of Annex I;

…’

12 Under the heading ‘Financial instruments’, Section C of Annex I to Directive 2004/39 set out the list of financial instruments covered by that directive, including, in point 9 of that section, ‘financial contracts for differences’.

13 Under the heading ‘Categories of clients considered as professionals’, Section I of Annex II to Directive 2004/39 stated:

‘The following should all be regarded as professionals in all investment services and activities and financial instruments for the purposes of the directive:

1. Entities which are required to be authorised or regulated to operate in the financial markets. The list below should be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned …:
   (a) Credit institutions
   (b) Investment firms
   (c) Other authorised or regulated financial institutions

   …

2. Large undertakings meeting two of the following size requirements on a company basis:

   – balance sheet total: EUR 20 million;

   – net turnover: EUR 40 million;

   – own funds: EUR 2 million.

3. National and regional governments, public bodies that manage public debt, Central Banks, international and supranational institutions such as the World Bank, the International Monetary Fund (IMF), the European Central Bank (ECB), the European Investment Bank (EIB) and other similar international organisations.

4. Other institutional investors …

The entities referred to above are considered to be professionals. They must however be allowed to request non-professional treatment and investment firms may agree to provide a higher level of protection. Where the client of an investment firm is an undertaking referred to above, the investment firm must inform it prior to any provision of services that, on the basis of the information available to the investment firm, the client is deemed to be a professional client, and will be treated as such unless the investment firm and the client agree otherwise. …

…’

14 Under the heading ‘Clients who may be treated as professionals on request’, Section II of Annex II to that directive included point II.1, entitled ‘Identification criteria’. That point provided:

‘…

Investment firms should … be allowed to treat any of the above clients as professionals provided the relevant criteria and procedure mentioned below are fulfilled. These clients should not, however, be presumed to possess market knowledge and experience comparable to that of the categories listed in section I.

This reduction in protection … shall be deemed valid only if an adequate assessment is made …

…

In the course of that assessment, as a minimum, two of the following criteria shall be satisfied:

— the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters,

— the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments exceeds EUR 500 000,

— the client works or has worked in the financial sector for at least 1 year in a professional position, which requires knowledge of the transactions or services envisaged.'

The dispute in the main proceedings and the question referred for a preliminary ruling

15 Ms Petruchová is resident in the territory of the Czech Republic. FIBO is a brokerage company incorporated under Cypriot law, which operates as a 'professional' in the field of securities.

16 On 2 October 2014, Ms Petruchová remotely concluded a framework contract with FIBO ('the framework contract'), the purpose of which was to enable her to make transactions on the international FOREX (foreign exchange) market ('the FOREX market'), by placing orders to buy and sell the base currency, which FIBO would carry out by means of its online trading platform.

17 To that end, the framework contract provided for the conclusion, between Ms Petruchová and FIBO, of individual contracts, classified as financial contracts for differences ('CFDs'), which are financial instruments the objective of which is to make profit on the difference between the exchange rates applicable to the purchase and sale respectively of the base currency in relation to the quote currency.

18 Although it is possible to trade on the FOREX market with own funds, Ms Petruchová took advantage of the possibility of trading in 'lots', a lot being worth 100 000 United States dollars (USD) (approximately EUR 88 000), using the leverage effect. That mechanism allowed her to trade with more funds than she had at her disposal. Thus, when she opened her position by buying the base currency, she took a loan from FIBO, which she repaid by closing her position by selling the base currency.

19 Clause 30 of the framework contract provided for an agreement conferring jurisdiction on the Cypriot courts.

20 On 3 October 2014, Ms Petruchová concluded a CfD with FIBO, under which she placed an order to purchase 35 lots at a fixed rate of exchange against Japanese yen (JPY).

21 Due to the processing of a long series of orders in the FIBO trading system, the order placed by Ms Petruchová was executed by that company with a delay of 16 seconds, during which a fluctuation in the USD/JPY exchange rate occurred on the FOREX market. As a result, the purchase by FIBO of the amount of United States dollars ordered by Ms Petruchová was made at a USD/JPY exchange rate different from that which Ms Petruchová had accepted when confirming her purchase order.

22 According to Ms Petruchová, if her purchase order for the base currency had been executed on time, and not with a delay, she would have made three times the profit.

23 In those circumstances, on 12 October 2015, Ms Petruchová brought an action before the Krajský soud v Ostravě (Regional Court, Ostrava, Czech Republic), claiming the unjust enrichment of FIBO.

24 As can be seen from the order for reference, Ms Petruchová, considering herself a 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012, brought the action before the court of her place of residence. Similarly, she was of the view that, in accordance with Articles 19(1) and 25(4) of that regulation, an agreement conferring jurisdiction concluded with a consumer before the dispute arose was without effect.

25 By judgment of 29 September 2016, the Krajský soud v Ostravě (Regional Court, Ostrava) dismissed Ms Petruchová's appeal. That court concluded that the agreement conferring jurisdiction in clause 30 of the framework contract was valid and that, consequently, it did not have international jurisdiction to rule on the dispute pending before it. In the view of that court, Ms Petruchová was not a 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012, since she had not concluded the CfD at issue in order to meet her private needs, had the knowledge and expertise essential for entering into CfDs, acted in the aim of obtaining profit and was warned of the relevant risks and the unsuitability of CfDs for 'retail clients', within the meaning of Article 4(1)(12) of Directive 2004/39. In the alternative, the Krajský soud v Ostravě (Regional Court, Ostrava) took the view that Article 17(1) of Regulation No 1215/2012 was to be interpreted in the same way as Article 6 of the Rome I Regulation, in order to maintain the uniformity of the legal systems concerning the rules governing conflict of laws and the determination of the international jurisdiction as regards consumer contracts. However, financial instruments are excluded from the scope of the latter provision.

26 By order of 17 January 2017, the Vrchní soud v Olomouci (Higher Court, Olomouc, Czech Republic) confirmed the order of the Krajský soud v Ostravě (Regional Court, Ostrava).

27 In those circumstances, Ms Petruchová brought an appeal in cassation against the first order before the referring court, the Nejvyšší soud (Supreme Court, Czech Republic).

28 The referring court notes that if Ms Petruchová were to be regarded as a consumer within the meaning of Article 17(1) of Regulation No 1215/2012, clause 30 of the framework contract recognising the exclusive jurisdiction of the Cypriot courts would be ineffective.

29 In that regard, the court recalls that, in accordance with Article 25(4) of that regulation, agreements conferring jurisdiction have no effect if they are contrary to the provisions of Article 19 of that regulation. Article 19 allows derogations from the provisions of Section 4 of Chapter II of that regulation, governing jurisdiction in respect of consumer contracts, only by agreements after the dispute arose, agreements which enable the consumer to bring proceedings in courts other than those indicated in Section 4, or agreements which, having been concluded between the consumer and his contracting partner who have, at the time the contract is concluded, their domicile or their habitual residence in the same Member State, confer jurisdiction on the courts of that Member State.

30 However, according to the national court, clause 30 of the framework contract does not fulfil any of those conditions since, first, the framework contract was concluded before the dispute arose, second, the agreement conferring jurisdiction deprives Ms Petruchová of the right provided for in Article 18(1) of Regulation No 1215/2012 to bring proceedings before the courts of the Member State in which she is domiciled and, third, at the time the framework contract was concluded, the parties to the proceedings had their domicile and registered office respectively in different Member States.

31 It is in that context that the referring court entertains doubts as to the interpretation of the concept of 'consumer', within the meaning of Article 17(1) of Regulation No 1215/2012 and as to whether a person in Ms Petruchová's situation may be classified as such. In that regard, that court considers that the lower Czech courts have misinterpreted that concept.

32 First, in the view of the referring court, a 'retail customer' within the meaning of Article 4(1)(12) of Directive 2004/39 is not necessarily a 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012, in that those two acts of secondary legislation differ in scope and that a 'retail customer' within the meaning of the first of those acts may be a professional within the meaning of the second.

33 Second, the referring court points out that, even if it is necessary to ensure that the uniformity of legal regimes relating to rules governing conflict of laws and the determination of international jurisdiction in matters relating to consumer contracts is maintained, Article 17(1) of Regulation No 1215/2012 should not be interpreted in the same way as Article 6(1) of the Rome I Regulation, since those regulations do not have the same purpose, the former governing procedural matters and the latter dealing with the problem of conflict of laws in order to determine the applicable substantive law. Thus, the provisions of Section 4 of Chapter II of Regulation No 1215/2012 apply to contracts relating to financial and investment instruments, since only certain transport contracts are excluded from the scope of that section.

34 In that regard, it also follows from the Court's judgment of 28 January 2015, *Kolassa*, (C-375/13, EU:C:2015:37), that Article 17(1) of Regulation No 1215/2012 does not restrict consumer protection in respect of financial and investment instruments.

35 Lastly, third, the referring court considers that it is irrelevant, for the purposes of classifying a person as a 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012, whether the transactions carried out involve a substantial amount, whether the person concerned has special knowledge and expertise, or whether the contract in question is complex, atypical or gives rise to risks for that person of which he has been informed.

36 In those circumstances, the Nejvyšší soud (Supreme Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 17(1) of Regulation [No 1215/2012] to be interpreted as meaning that a person, such as the applicant in the main proceedings, who engages in trade on the [FOREX market] on the basis of actively placing his own orders, although through a third party who is professionally engaged in that trade, must be regarded as a consumer under that provision?'

Consideration of the question referred

37 By its question, the referring court asks, in essence, whether Article 17(1) of Regulation No 1215/2012 must be interpreted as meaning that a natural person who, under a contract, such as a CfD, concluded with a brokerage company, carries out transactions on the FOREX market through that intermediary, can be qualified as a 'consumer' within the meaning of that provision, and whether factors such as the value of transactions carried out under such contracts, the extent of the risks of financial loss associated with their conclusion, the person's possible knowledge or expertise in the field of financial instruments or his or her active behaviour in such transactions and the fact that financial instruments are not covered by Article 6 of the Rome I Regulation or that the person is a 'retail customer' within the meaning of Article 4(1)(12) of Directive 2004/39 are relevant for the purposes of that classification.

38 As a preliminary point, it must be borne in mind that, in so far as Regulation No 1215/2012 repeals and replaces Council Regulation (EC) No 44/2001, the Court's interpretation of the provisions of the latter regulation also applies to Regulation No 1215/2012, whenever the provisions of the two instruments of EU law may be regarded as equivalent (judgment of 15 November 2018, *Kuhn*, C-308/17, EU:C:2018:911, paragraph 31 and the case-law cited). That is the case, in particular, of Articles 15 to 17 of Regulation No 44/2001 and Articles 17 to 19 of Regulation No 1215/2012.

39 In accordance with the case-law of the Court, Article 17(1) of Regulation No 1215/2012 applies if three conditions are met: first, a party to a contract is a consumer who is acting in a context which can be regarded as being outside his trade or profession; second, the contract between such a consumer and a professional has actually been concluded; and, third, such a contract falls within one of the categories referred to in Article 17(1)(a) to (c). Those conditions must all be fulfilled, so that if one of the three conditions is not met, jurisdiction cannot be determined under the rules relating to consumer contracts (see, to that effect, judgment of 23 December 2015, *Hobohm*, C-297/14, EU:C:2015:844, paragraph 24 and the case-law cited).

40 As is apparent from the order for reference, the question referred to the Court in this case concerns the first of those three conditions, namely the status of a party to a contract as a 'consumer'.

41 In that regard, the Court has specified that the concept of 'consumer', within the meaning of Articles 17 and 18 of Regulation No 1215/2012, must be interpreted restrictively, by referring to the position of that person in a given contract, in relation to the nature and purpose of the contract, and not to the subjective situation of that person, a single person who can be regarded as a consumer in the context of some transactions and as an economic operator in the context of other transactions (see, to this end, judgment of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37, paragraph 29 and the case-law cited).

42 The Court deduced therefrom that only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules laid down by the regulation to protect the consumer as the party deemed to be the weaker party (judgment of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37, paragraph 30 and case-law cited).

43 That specific protection is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is planned only for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character (judgment of 14 February 2019, *Milivojević*, C-630/17, EU:C:2019:123, paragraph 89 and the case-law cited).

44 It follows that the special rules of jurisdiction in Articles 17 to 19 of Regulation No 1215/2012 apply, in principle, only where the contract is concluded between the parties for the purpose of a use other than a trade or professional use of the relevant goods or services (see, to that effect, judgment of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37, paragraph 31 and case-law cited).

45 It is in the light of those observations that it is appropriate to examine whether a person who, under a contract such as a CfD concluded with a brokerage company, trades on the FOREX market through that company, can be classified as a 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012.

46 In that regard, it should be noted that there is nothing in the order for reference or in the file before the Court to indicate that the conclusion of the framework contract or CfD in question was part of Ms Petruchová's professional activity. Similarly, at the oral hearing, Ms Petruchová stated, without being contradicted, that, at the time of the conclusion of these contracts, she was a university student and worked part-time. According to her statements, she concluded those contracts outside her professional activity.

47 However, as can be seen from the order for reference, the Court is asked whether, in a situation such as that described in paragraphs 45 and 46 of this judgment, a natural person may be refused the status of 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012 on the ground of factors such as the risks associated with the conclusion of contracts such as CfDs, the value of transactions, any knowledge or expertise that that person has in the field of financial instruments or his active behaviour on the FOREX market.

48 In that regard, first, it should be noted that the Court has previously held that the scope of the provisions of Section 4 of Chapter II of Regulation No 1215/2012 governing jurisdiction in respect of consumer contracts extends to all types of contracts, except that specified in Article 17(3) of that regulation, namely contracts of transport other than those which, for a fixed price, combine travel and accommodation (see, to that effect, judgment of 2 May 2019, *Pillar Securitisation*, C-694/17, EU:C:2019:345, paragraph 42).

49 It follows that financial instruments such as CfDs fall within the scope of Articles 17 to 19 of Regulation No 1215/2012.

50 Second, the Court has also held that the scope of the provisions of Section 4 of Chapter II of Regulation No 1215/2012 is not limited to particular amounts (see, to that effect, judgment of 2 May 2019, *Pillar Securitisation*, C-694/17, EU:C:2019:345, paragraph 42).

51 Indeed, as the Advocate General noted in point 51 of his Opinion, should Articles 17, 18 and 19 of Regulation No 1215/2012 be interpreted as not applying when significant funds are invested, the investor would not be able, in the absence of an express threshold set in that regulation, above which the amount of a transaction is regarded as being significant, to know whether he will be afforded the protection of those provisions, which would be contrary to the intention of the EU legislature as expressed in recital 15 of that regulation, according to which the rules of jurisdiction should be highly predictable.

52 Regulation No 1215/2012 pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see, to that effect, judgment of 4 October 2018, *Feniks*, C-337/17, EU:C:2018:805, paragraph 34 and the case-law cited).

53 It follows, as a corollary to the foregoing and, in particular, to paragraph 51 of the present judgment, that the fact, set out in the order for reference, that the conclusion of CfDs is likely to involve, for an investor, significant risks in terms of financial losses is, as such, irrelevant to the question of the classification of the investor as a 'consumer' within the meaning of Article 17(1) of that regulation.

54 Third, as regards whether the knowledge and expertise of a person in the field covered by the contract which he has concluded, such as that which Ms Petruchová has in respect of the CfDs in the main proceedings, are likely to deprive her of the status of 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012, it should be noted that, for a person to be eligible for that status, it is sufficient for him to conclude a contract for use outside his professional activity. In that regard, that provision does not impose any additional conditions.

55 In so far as the concept of 'consumer', within the meaning of Article 17(1) of Regulation No 1215/2012, is defined by contrast to that of an 'economic operator', it is objective in nature and it is distinct from the knowledge and information that the person concerned actually possesses (see, to that effect, judgments of 3 September 2015, *Costea*, C-110/14, EU:C:2015:538, paragraph 21, and of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37, paragraph 39).

56 In that regard, the fact of considering that the status as a consumer of a contracting partner may depend on the knowledge and information he possesses in a given field, and not on whether or not the contract he has concluded is intended to satisfy his personal needs, would amount to referring to the subjective situation of that contracting partner. However, in accordance with the case-law cited in paragraph 41 of this judgment, the status of a person as a 'consumer' must be examined solely in the light of his position in a given contract, taking into account its nature and purpose.

57 Fourth, it is appropriate to point out that the active conduct, on the FOREX market, of a person who places orders through a brokerage company and thus remains responsible for the return on his investments is, as such, irrelevant to the classification of that person as a 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012.

58 Indeed, as noted by the Advocate General in paragraph 53 of his Opinion, Article 17(1) of Regulation No 1215/2012 does not require the consumer to behave in a particular way in the context of a contract concluded for use outside his professional activity.

59 Consequently, although it is for the national court to determine whether, in the context of her contractual relations with FIBO, Ms Petruchová did actually act outside and independently of any professional activity, and to draw the consequences as regards her status as a consumer, it must be noted that, for the purposes of that classification, factors such as the value of the transactions carried out under contracts such as CfDs, the extent of the risks of financial loss associated with the conclusion of such contracts, Ms Petruchová's possible knowledge or expertise in the field of financial instruments or her active conduct in connection with such transactions are, as such, in principle irrelevant.

60 That having being said, it remains necessary to examine, for the purposes of classifying a person as a 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012, on the one hand, the relevance of the exclusion of financial instruments from the scope of Article 6 of the Rome I Regulation and, on the other, the relevance of that person's status of 'retail client' within the meaning of Article 4(1)(12) of Directive 2004/39.

61 Indeed, to ensure compliance with the objectives pursued by the EU legislator in the field of consumer contracts and the consistency of EU law, the concept of 'consumer' in other rules of EU law may prove relevant (see, to that effect, judgment of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37, paragraph 28).

62 Thus, it should be noted, first, that, although the concept of 'consumer' is defined in Article 6(1) of the Rome I Regulation in terms almost identical to those of Article 17(1) of Regulation No 1215/2012, in that that first provision provides that it applies to 'a contract concluded by a natural person …, for use which can be regarded as being outside his trade or profession', Article 6(4)(d) of the Rome I Regulation, read in the light of recitals 28 and 30 thereof, excludes from the rules applicable to consumer contracts laid down in Article 6(1) and (2) of that regulation 'the rights and obligations which constitute a financial instrument'. However, as is apparent from recital 30 of that regulation, financial instruments, for the purposes of the Rome I Regulation, are those referred to in Article 4 of Directive 2004/39, which include CfDs, as provided for in point 9 of Section C of Annex I to that directive.

63 While it is apparent from recital 7 of the Rome I Regulation that the material scope and provisions of that regulation should be consistent with Regulation No 44/2001, which was succeeded by Regulation No 1215/2012, it does not, however, follow therefrom that the provisions of Regulation No 1215/2012 should be interpreted in the light of those of the Rome I Regulation. Under no circumstances can the coherence sought by the EU legislature lead to an interpretation of the provisions of Regulation No 1215/2012 that is alien to its system and objectives (see, to that effect, judgment of 16 January 2014, *Kainz*, C-45/13, EU:C:2014:7, paragraph 20).

64 However, it must be noted that the Rome I Regulation and Regulation No 1215/2012 pursue different objectives. While the Rome I Regulation applies, in accordance with the first subparagraph of Article 1(1) thereof, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters in order to determine the applicable substantive law, Regulation No 1215/2012 is intended to lay down the rules for determining the court competent to rule on a dispute in civil and commercial matters relating, in particular, to a contract concluded between a professional and a

person acting for a purpose unrelated to his professional activity, so as to protect the latter in such a situation (see, to that effect, judgment of 2 May 2019, *Pillar Securitisation*, C-694/17, EU:C:2019:345, paragraph 42).

65 In that regard, in so far as, as found in paragraphs 48 and 49 of this judgment, financial instruments such as CfDs fall within the scope of Articles 17 to 19 of Regulation No 1215/2012, to refuse the consumer procedural protection on the sole ground that such protection is not provided to him in respect of a situation of conflict of laws would be contrary to the objectives of that regulation.

66 It follows that the exclusion of financial instruments from the scope of Article 6 of the Rome I Regulation is irrelevant to the classification of a person as a 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012.

67 Second, with regard to the relevance, for the purposes of that classification, of the fact that that person is a 'retail customer' within the meaning of Article 4(1)(12) of Directive 2004/39, it is appropriate to bear in mind that that provision defines a 'retail customer' as 'a customer who is not a professional customer'. Under Article 4(1)(11), a professional client is 'any client who meets the criteria set out in Annex II' to that directive.

68 In accordance with Section I of Annex II to Directive 2004/39, for the purposes of that directive, for all investment services and activities and financial instruments, first, entities that are required to be authorised or regulated to operate in financial markets, such as credit institutions or investment firms; second, large companies meeting two of the three criteria, namely a balance sheet total of EUR 20 million, a net turnover of EUR 40 million and own funds of up to EUR 2 million; third, public entities or institutions such as national governments, central banks or the World Bank, and, fourth, other institutional investors are regarded as professionals. However, entities falling into one of those four categories may request to be treated as non-professionals.

69 By application of Section II of Annex II to Directive 2004/39, clients other than those referred to in Section I of that directive may be treated as professionals at their request. In order to be treated as a professional, the client, who cannot be presumed to have knowledge and experience comparable to that of professional clients, must be adequately assessed in advance. The attribution of professional client status thus presupposes that it has been ascertained that the client meets at least two of the three criteria, which include, first, that he has carried out on average 10 transactions of a significant size per quarter during the previous four quarters; second, that the value of his portfolio of financial instruments exceeds EUR 500 000 or, third, that he has held a professional position in the financial sector for at least 1 year.

70 That having being said, it must be noted that the 'client', within the meaning of Article 4(1)(10) of Directive 2004/39, regardless of his status as a 'professional client' or 'retail' client, is understood as being 'any natural or legal person to whom an investment firm provides investment services and/or ancillary services'.

71 Accordingly, unlike a 'consumer', who, as set out in Article 17(1) of Regulation No 1215/2012, is a natural person, a 'retail client', within the meaning of Article 4(1)(12) of Directive 2004/39, may also be a legal person.

72 In particular, as noted, in essence, by the Advocate General in paragraph 85 of his Opinion, retail clients may be legal entities that failed to meet two of the three criteria to be regarded as and treated as professionals by application of the provisions of Section II of Annex II to Directive 2004/39 or legal entities which, although regarded as professional clients, have requested non-professional treatment pursuant to Section I of Annex II to Directive 2004/39.

73 It also follows therefrom that the classification of 'retail customer' within the meaning of Article 4(1)(10) and (12) of Directive 2004/39 is not subject to the lack of commercial activity of the person concerned, unlike the classification of 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012.

74 In addition, the classification of 'consumer' and that of 'retail client', provided for in those provisions, pursue different objectives.

75 The first of those classifications, as follows from paragraph 64 of this judgment, affords protection when the court competent to rule on a dispute in civil and commercial matters is determined, while the second, as is apparent from the provisions of Section I of Annex II to Directive 2004/39, seeks to protect an investor, in particular as regards the scope of the information that the investment firm is required to provide to him.

76 Consequently, although it cannot be excluded that a 'retail client' within the meaning of Article 4(1)(12) of Directive 2004/39 may be classified as a 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012 if it is a natural person acting outside any commercial activity, those two concepts, having regard to the differences in their scope and in the objectives pursued by the provisions providing for them, do not fully overlap.

77 It follows that a person's status as a 'retail client' within the meaning of Article 4(1)(12) of Directive 2004/39 is, as such, in principle irrelevant for the purpose of classifying him as a 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012.

78 In the light of all the above considerations, the answer to the question referred is that Article 17(1) of Regulation No 1215/2012 must be interpreted as meaning that a natural person who, under a contract such as a CfD concluded with a brokerage company, carries out transactions on the FOREX market through that company, must be classified as a 'consumer' within the meaning of that provision if the conclusion of that contract does not fall within the scope of that person's professional activity, which it is for the national court to ascertain. For the purpose of that classification, on the one hand, factors such as the value of transactions carried out under contracts such as CfDs, the extent of the risks of financial loss associated with the conclusion of such contracts, any knowledge or expertise that person has in the field of financial instruments or his or her active conduct in the context of such transactions are, as such, in principle irrelevant, and, on the other, the fact that the financial instruments do not fall within the scope of Article 6 of the Rome I Regulation or that that person is a 'retail client' within the meaning of Article 4(1)(12) of Directive 2004/39 is, as such, in principle irrelevant.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 17(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a natural person who, under a contract such as a CfD concluded with a brokerage company, carries out transactions on the international FOREX (foreign exchange) market through that company, must be classified as a 'consumer' within the meaning of that provision if the conclusion of that contract does not fall within the scope of that person's professional activity, which it is for the national court to ascertain. For the purpose of that classification, on the one hand, factors such as the value of transactions

carried out under contracts such as financial contracts for differences, the extent of the risks of financial loss associated with the conclusion of such contracts, any knowledge or expertise that person has in the field of financial instruments or his or her active conduct in the context of such transactions are, as such, in principle irrelevant, and, on the other, the fact that the financial instruments do not fall within the scope of Article 6 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) or that that person is a 'retail client' within the meaning of Article 4(1)(12) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC is, as such, in principle irrelevant.

[Signatures]