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Affirming Free Movement of Services and the Scope of International Jurisdiction of a Cross-Border Consumer Credit Agreement: Case C-630/17 Milivojevic v Raiffeisenbank St Stefan-Jagerberg-Wolfsberg eGen

I. Introduction

At the heart of CJEU case C-630/17 *Milivojevic v Raiffeisenbank St Stefan-Jagerberg-Wolfsberg eGen* was the principle of free movement of services (Article 56 TFEU) and shared competence in consumer protection law between the EU and Member States (Article 169 TFEU). In this case, the Croatian court referred a question concerned with Member States' restrictions on free movement of services[1] and whether the contract was a consumer contract for the purpose of establishing international jurisdiction under the EU 1215/2012 the Brussels I Regulation (Recast).[2] The value of this case is in how far the CJEU affirms the relationship between the principle of free movement of services and Member States' laws in such cases where the latter seeks to "invalidate"[3] consumer credit agreements with non-authorised lenders. It also reiterated the interpretation of the consumer

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[1] Case C-630/17 *Milivojevic* [2019] ECLI:EU:C:2019:123, Opinion of AG Tanchev, at paragraph 71.

[2] Hereafter Brussels I Recast Regulation.

[3] Case Comment "Croatian law invalidating certain credit agreements contrary to EU law," EU Law Focus 2019 21-22.

concept for special international jurisdiction under the Brussels I Recast Regulation and the scope of exclusive, *in rem*-jurisdiction under the same instrument.

II. Key Facts

The case turned on the following facts. Ms Miliovojevic, a Croatian national, entered into a credit agreement and mortgage with Raiffeisenbank, the defendant, a bank incorporated in Austria. A crucial aspect of the parties' agreement was that it was entered into in Croatia with the assistance of an intermediary. However, the defendant was not an authorised lender in Croatia. Ms Miliovojevic sought a declaration of invalidity of both the credit agreement and notarised deed relating to the creation of a mortgage to guarantee the debt. She also sought removal of the mortgage from the Croatian Land Register. In support of her claim, Mrs Miliovojevic sought to rely on Article 322(1) of the Croatian Law of Obligations which rendered null and void credit agreements featuring international elements entered into with a non-authorised lender from another jurisdiction. Croatian law also applied to consequential or ancillary agreements to the credit agreement. Whilst the Croatian legislation came into effect after the agreement was entered into, it did have retrospective effect. However, the agreement was entered into before Croatia acceded to the EU as a Member State. The central issue of the case was whether Croatian law was subject to the overarching principle of free movement and whether EU law applied over national law for the purposes of establishing international jurisdiction of the courts.

III. The Four Legal Questions Arising

Four interesting legal questions arose from the circumstances of this case. The focus of the first question was the applicability of Croatian law and its complementarity with the principle of free movement of services. Specifically, the first question was whether the free movement of services (Article 56 TFEU) and the free movement of capital (Article 73 TFEU) pre-

vented Croatian law from applying in circumstances where the agreement between the parties pre-dated the entering into force of the Croatian Law of Obligations. The Croatian court also asked whether all sums were to be returned if the contract was held to be null and void. The Advocate General's Opinion was focussed on the first question (see below).

The second question dealt with the issue of international jurisdiction. The focus was whether the Brussels I Recast Regulation precluded national law in determining where proceedings may be brought by a consumer against a non-authorised lender.

The third question was whether the contract was a consumer contract within the scope of the Brussels I Recast Regulation. Article 17(1)(a) of that Regulation applies to matters relating to contracts between a private consumer and a business where the contract is, *inter alia*, for a loan repayable by instalments. Article 18 enables proceedings to be brought by the consumer against the other party to a contract either in the Member State where the EU defendant is domiciled defendant or the court of the consumer's domicile.

The fourth question was whether the scope of exclusive jurisdiction under Article 24(1) of the Brussels I Recast Regulation applied to proceedings in Croatia in such cases where the mortgage secured over immoveable property was situated in Croatia.

Linking all of these questions was the first question, whether the retrospective application of Croatian law rendered the credit agreement null and void and, if so, whether Croatian law was contrary to free movement of services under Article 56 TFEU.

Opinion of Advocate General

The CJEU requested Advocate General Tanchev to consider the first question only. The key issue was whether EU law applied to Member States in the situation where the date of the parties' agreement pre-dated the accession of the new Member State. If EU law applied, the second key issue was whether free movement of services under Article 56 TFEU was unduly restricted by Croatian law.

Having outlined both Articles 56 and 63(1) TFEU, Advocate General Tanchev turned to setting out and reviewing Croatian law on the nullity of loan contracts with international features, concluded in Croatia with an unauthorised lender. Crucial to the issue of free movement of services were Articles 2 and 3 of the Croatian Law of Obligations. A non-authorised lender is defined as a party whose "statutory seat is situated outside the Republic of Croatia at the date of the contract featuring international elements and which propose or supply credit services in the Republic of Croatia." [4] Article 3 defined credit agreements with international elements concluded in Croatia between debtors and unauthorised lenders as null and void.[5]

The Advocate General focussed on three aspects: First, the admissibility of the case, second, determining the application of free movement of services and, third, its application to the facts of the dispute.

On the matter of admissibility, the Advocate General was brief and clear. Since the parties' contract subsisted at the date of Croatia's accession as a EU Member State (1 July 2013), EU law was applicable at the time of the commencement of legal proceedings ("*ratione temporis*"[6]). The logical consequence of EU law applying meant that "legal relationships […] 'must adapt to the new legal framework'."[7] The Advocate General relied on a number of cases in support, most recently C-256/15 *Nemek* and C-122/96 *Saldahna and MTS*.[8] The next aspect was whether the free movement of services (Article 56 TFEU) or free movement of capital (Article 63 TFEU) applied to the substance of the proceedings. The Advocate General's starting point was the principle from C-549/15 *E.ON*

[4] Case C-630/17 *Milivojevic* [2019] ECLI:EU:C:2019:123, para 19.

[5] Para 20 of Judgment (n 5).

[6] Para 43-43 of AG Opinion (n 2).

[7] Para 43 of AG Opinion. Words in quotes removed for syntax.

[8] Para 43, footnote 38 of AG Opinion.

Biofor Sverige AB that Croatian law was subject to the relevant EU law. In *E.ON Biofor*, Directive 2013/36 for the guarantee of cross-border credit services was seen as relevant. Recital 15 of that Directive explains that it aims to secure mutual recognition of authorisation and prudential supervision systems through the principle of the country of origin for such services.[9] Taking account of the purpose of the national legislation, Advocate General Tanchev took the view that granting credit was a service under Article 56 TFEU[10] rather than the provision of capital. He provided three reasons for his viewpoint. First, the purpose of the Croatian legislation was the provision of credit.[11] Second, he relied on the Opinion of Advocate General Kokott in C-646/15 *Trustees of the P Panayi Accumulation and Maintenance Settlements*. In that case, AG Kokott said that both services and capital are subject to the same principle of proportionality and that restrictions on capital are a consequence of restrictions on services.[12] Third, the Advocate General also dealt with the argument that the defendant was not providing cross-border credit services. He found that the defendant did not contest that the parties had used an intermediary based in Croatia to conclude the agreement.[13]

The third aspect of the Opinion focussed on whether Croatian law amounted to a restriction of free movement of services against unauthorised lenders situated outside Croatia.[14] The Advocate General considered the various reasons put forward as to why the Croatian law was introduced. At the hearing, the Croatian government sought to explain that the legislation was designed to protect Croatian consumers against

[9] Para 47 of AG Opinion.

[10] Para 50 of AG Opinion, citing C-602/10 *SC Volksbank Romania*, at para 52.

[11] Paras 51, 52 of AG Opinion.

[12] Para 53 of AG Opinion.

[13] Para 56 of AG Opinion.

[14] Para 58 of AG Opinion.

unscrupulous creditors who sought to exploit financial services in Croatia. However, the Advocate General did not accept that the restriction under Croatian law was justified on grounds of "public policy, public security, or public health."[15] Croatian law was held to "manifestly exceed the limits of what was required to achieve a legitimate goal…".[16] Referencing the evidential requirement of proportionality from C-390/12 *Pflegrand Others*, the Advocate General said that Croatia would have been required to clearly demonstrate that the legislation was proportionate by evidence of a "pressing problem [in Croatia, which required] extreme action."[17] In the absence of such evidence, the Advocate General reached the conclusion that the Croatian legislation was not deemed proportionate and did amount to a restriction of the principle of free movement of services.

IV. The CJEU's Judgment

The CJEU judgment addressed each of the four questions in turn. There is little controversy regarding the Court's response to each question. First, the CJEU agreed with the Advocate General and ruled that Article 56 TFEU precluded national legislation which rendered invalid credit agreements entered into before the national legislation was enacted. On the relationship between Article 56 TFEU and national law, the CJEU confirmed that the principle of free movement of services applied in the case[18] and took precedence over national law which sought to restrict free movement. The CJEU also held that Croatian law was not compatible with EU law[19] and persisted when the same leg-

[15] Para 65 of AG Opinion.

[16] Para 68 of AG Opinion.

[17] Para 69 of AG Opinion, words in brackets added and amended for syntax.

[18] Para 58 of Judgment.

[19] Para 3 of Judgment.

islation was extended to agreements with creditors established in Croatia.[20] The CJEU accepted that the Croatian Government had not provided "evidence of a genuine, sufficiently serious threat affecting one of the fundamental interests of society"[21] which may have merited the restriction contained in the Croatian Law of Obligations.

The second and third questions can be considered here together. The CJEU dealt with the preliminary issue of admissibility of these questions succinctly. Since the matter concerned EU law, the CJEU was "in principle bound to give a ruling."[22] The core issue with the second question was whether proceedings under national law for the invalidity of credit agreements featuring international elements"[23] could depart from the general rule in the Brussels I Recast Regulation by "extend[ing] the scope of more protective jurisdiction rules […] to all debtors."[24] By contrast, the protective jurisdiction under the Brussels I Recast Regulation applies as a "derogation" of the general rule in an "exhaustive list of cases."[25] Referring to its earlier judgment in C-498/16 *Schrems*, the CJEU confirmed that the general principle of the defendant's domicile under the Brussels I Recast Regulation could not be derogated by national legislation.[26] The CJEU confirmed that where the contract is a consumer contract, any jurisdiction agreement must comply with Article 25(4) and Article 19 of the Brussels I Recast

[20] Paras 62, 63 of Judgment; the relevant date was 30 September 2015.

[21] Para 69 of Judgment, para 72 on matter of evidence required for breach of freedom to provide capital.

[22] Para 47 of Judgment.

[23] Para 80 of Judgment.

[24] Para 80 of Judgment. Words in brackets modified for syntax.

[25] Para 81 of Judgment.

[26] Para 81 of Judgment.

Regulation.[27] The effect of this enables the debtor a choice to bring proceedings against creditors either where the debtor or creditor has its domicile, regarded as its statutory seat, central administration or principal place of business (Article 63, Brussels I Recast Regulation). The CJEU also held that creditors can only bring proceedings where the debtor is domiciled.

Linked to the second question, the third question focussed on the concept of the consumer. This concept of the consumer underpins the "philosophy"[28] of Article 17. The CJEU has consistently given a restricted interpretation to the concept. The traditional concept, or "status,"[29] of the consumer has and remains applicable only to those "private final consumers

[27] Para 82 of Judgment.

[28] Lorna Gillies, "Clarifying the 'Philosophy of Article 15': C-585/08 *Peter Pammer v Reederei Karl Schulter* and C-144/09 *Hotel Alpenhof v Heller*," [2011] 60(2) ICLQ 557.

[29] C-498/16 *Schrems v Facebook Ireland* [2018] ECLI:EU:C:2018:37, at paragraph 24.

contracting for their own private use or consumption." [30] There is a social justice, [31] equality [32] and economic [33] benefit to special jurisdiction since it enables the consumer – conceptualised as the contractually weaker party - to bring proceedings in the court where he or she is domiciled . This case continued the "objective" [34] means of ascertaining who is a consumer to a "particular contract." [35] To establish

[30] From C-89/91 *Shearson Lehmann Hutton In v TVB* [1993] ECR 1-139 to C-464/01 *Gruber v Bay Wa* [2005] ECR 1-00439 and most recently in C-498/16 *Schrems v Facebook Ireland* [2018] ECLI:EU:C:2018:37.

[31] Hans-W. Micklitz,'Introduction,' in H-W Micklitz (ed.), *The Many Concepts of Social Justice* (Edward Elgar, 2011), 5.

[32] In the contractual sense; Dorota Leczykiewicz, 'Horizontal application of the Charter of Fundamental Rights' [2013] European Law Review 479, 494 and Adrian Briggs, *The Conflict of Laws*, 3rd edn (Clarendon, 2013), 72; in the access to justice sense; Lorna Gillies, "Adapting International Private Law Rules for Electronic Consumer Contracts," in Charles E.F. Rickett and Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice* (CUP 2003) and from the perspective of fundamental rights protection; Olha O. Cherednychenko, "The EU Charter of Fundamental Rights and Consumer Credit: Towards Responsible Lending?" in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (CUP 2017) and Olha O. Cherednychenko, "The Impact of Fundamental Rights," in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law*, (Elgar 2016).

[33] In so far as the ability of consumers to sue in the courts of his or her domicile helps to streamline both the application of the law of the consumer's habitual residence (Article 6, Rome I Regulation EC593/2008) and the automatic enforcement of a judgment across EU Member States; Lorna Gillies, "Recent developments in the approximation of EU private international laws: towards mutual trust, mutual recognition and enhancing social justice in civil and commercial matters," in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Elgar 2016).

[34] Para 87 of Judgment and para 92, citing C-464/01 *Gruber v Bay Wa* [2005] ECR 1-00439.

[35] Para 87 of Judgment.

jurisdiction under Article 17, the "content, nature and purpose of the contract" [36] must be identified. Here, the court confirmed its recent decision in C-498/16 *Schrems* to the effect that a party could be both a consumer – and obtain the benefit of protective jurisdiction – and a professional entity.[37] In the present case, the parties' agreement had a "dual purpose"[38] to finance the renovation of a private home to enable future rentals to third parties. For the protective jurisdiction to be applicable, the "link between the contract and the trade or profession concerned [must be so] slight as to be marginal".[39] In other words, the "essential" function of the contract had to be for private purposes.[40] Subject to the Croatian court's final determination, the CJEU held that the debtor was not a consumer for the purposes of Article 17(1)(a) since the credit agreement was used to finance work on immoveable property intended for use as tourist accommodation and not entirely for the consumer's own private use or consumption.[41]

The fourth and final question focussed on the scope of exclusive, *in rem*-jurisdiction under Article 24(1) of Brussels I Recast Regulation. This enables proceedings *in rem* to be raised where immoveable property is situated. The CJEU clarified two points. First,that the interpretation of Article 24 must relate to its objectives. These proceedings must relate to the "extent, content, ownership or possession of immoveable property or the existence of other rights in rem".[42] Furthermore, support for this view is seen in the Official Report to the earlier

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[36] Para 92 of Judgment.

[37] Para 88 of Judgment.

[38] Para 91 of Judgment.

[39] Para 91, 93 of Judgment. Words in brackets modified for syntax.

[40] Para 93 of Judgment.

[41] Para 94 of Judgment.

[42] Para 99 of Judgment.

1968 Brussels Convention on Jurisdiction and Judgments (the Jenard Report). The Jenard Report states that exclusive jurisdiction applied "only if [it] constitutes the principal subject-matter of the proceedings of which the court is to be seised."[43] Since the action to remove security from a land registry was the principal subject-matter of the dispute between the parties, it was this action that formed the basis of proceedings under Article 24. The CJEU held that Article 24 did not apply to a claim seeking the invalidity of a credit agreement. Given the explanation in the Jenard Report, this response was to be expected. The CJEU shone a light to the claimant with its second point. Referring to C-417/15 *Schmidt*, the Court ruled that whilst proceedings for invalidity of a consumer credit agreement were classified as proceedings *in personam*,[44] jurisdiction over such proceedings could be deemed a related action under Article 8(4) of Brussels I Recast Regulation. [45]

V. Conclusions

The case serves as a useful reminder of competence shared between EU law and national law generally and in the field of cross-border consumer protection. The value of this case is twofold. The first development from this case is that EU law applies to disputes brought before Member States even when the state did not have EU Membership at the time of the parties' contract which formed the subject-matter of the dispute. The CJEU affirmed the relationship between the principle of free movement of services and Member States' laws in such cases where the latter seeks to "invalidate"[46] consumer credit agreements with non-authorised

[43] Council Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, by Mr P. Jenard, (the Jenard Report) OJ C-59/1 [1979] at p .34. Word in brackets added for syntax.

[44] Para 100 of Judgment, citing C-417/15 *Schmidt*.

[45] Para 104 of Judgment.

[46] Case Comment "Croatian law invalidating certain credit agreements contrary to EU law," EU Law Focus 2019 21-22.

lenders. Member States are not permitted to restrict free movement of services [47] through their national laws. This means that the principle of free movement of services retains its hierarchy over national measures. Where there is a clash between EU and national measures, compelling evidence must be presented to meet the requirement for proportionality of the national rules in such cases.

The second important development from this case is its affirmation of the scope of special jurisdiction for consumer contract for the purpose of establishing international jurisdiction under Brussels I Recast Regulation. Furthermore, the case confirms the strict scope of exclusive, *in rem*-jurisdiction under the same instrument. The case reiterates the restrictive interpretation of both in rem jurisdiction under Article 24 and special jurisdiction for consumer contracts under Article 17. In particular, this case confirms that the concept of consumer under Article 17 of Brussels I Recast Regulation remains restricted to those contracts within its scope, in essence where the consumer is acquiring goods or services for their own private use or consumption. In conclusion, lenders based in one Member States will be satisfied that national laws of target Member States cannot circumvent the principle of free movement. Consumer seeking services from foreign lenders can be assured that when their contract falls within the scope of Brussels I Recast Regulation, they remain protected by international jurisdiction rules in that Regulation by rules which enable proceedings to be brought in the courts of their domicile.

[47] AG Opinion at paragraph 71.