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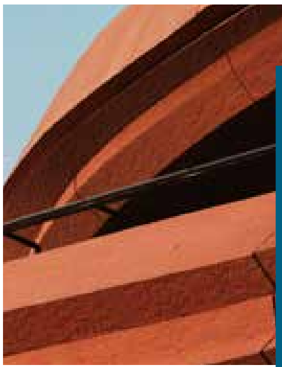

Litigation and Arbitration

On the exclusion of "financial instruments" from consumer protection provisions for the purposes of applicable law

(CJEU Judgment of 18 June 2026, C-346/25)

For the purposes of Article 6 of Rome I, the provisions of a contract defining the terms on which a professional receives or executes a CFD-related order are not covered by the exception provided for in Article 6(4)(d).

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July 2026

When asked whether contracts for difference (CFDs) entered into between a professional and a consumer are excluded from the general rule determining the law applicable to contracts concluded between consumers, as set out in Article 6 of Regulation (EC) No 593/2008 (Rome I), the Court of Justice of the European Union (CJEU) distinguishes between *a*) the rights and obligations relating to the financial terms on which the consumer's order is to be executed, and *b*) the provisions of the framework contract concluded between a consumer and a professional that allow the latter not to execute an order or to execute it under conditions different from those initially defined by the consumer. The former are excluded from consumer provisions, while the latter are not.

Article 6(1) of Rome I provides that a contract concluded by a natural person (the consumer) for a purpose that can be regarded as falling outside his trade or profession with another person (the professional) acting in the course of his or her trade or profession shall be governed by the law of the country where the consumer has his or her habitual residence, provided that professional pursues his or her commercial or professional activities in the country where the consumer has his or her habitual residence, or directs such activities to that country or to several countries, including that country. According to paragraph 2, the parties to a consumer contract may choose the law applicable to the contract; such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1. As an exception, paragraph 4 lists the cases in which the foregoing does not apply and includes among them (subparagraph (d)) "rights and obligations which constitute a financial instrument".

The question the CJEU answers was referred by the Supreme Court of the Czech Republic in the context of a dispute between J. P., a natural person domiciled in the Czech Republic, and FIBO, a Cypriot company which operates as a broker of transferable securities and offers its services via the internet to, inter alia, clients residing in the Czech Republic. J. P. remotely concluded a framework contract with FIBO titled 'Terms of Business', the purpose of which was to enable her to make transactions on the foreign exchange market by placing orders to buy and sell base currency, which FIBO would execute by means of its online trading platform. Clause 8.10 of the framework contract provided that FIBO reserved the right, in the event of a technical failure on that platform, not to execute the transaction as instructed by J.P, that is to say, not to conclude the corresponding CFD or, as the case may be, to execute it on different terms, in particular at a price other than that indicated in J.P.'s order.

The framework contract provided for the conclusion, between J.P. and FIBO, of individual trades classified as CFDs, the purpose of which is to make profit on the difference between the exchange rates applicable to the buying and selling, respectively, of the base currency vis-à-vis the quote currency. Additionally, J.P. leveraged her trading by selecting the option of trading via 'lots', a lot being worth 100 000 USD. That mechanism enabled her to trade on the market using amounts greater than the funds that she actually had available to her.

In October 2014, J. P. concluded a CFD with FIBO under which she placed a buy order in respect of 35 lots at a fixed exchange rate for Japanese yen, accepting that, in the event of

FIBO's counter-offer, FIBO was not required to execute the buy order beyond a specified rate. J. P. accepted it by confirming the buy order. Due to a significant backlog of orders in its trading system, FIBO executed the order placed by J. P. with a 16-second delay, during which time the market exchange rate fluctuated. Consequently, FIBO's of the amount of US dollars approved by J.P. was made at a different exchange rate from that which J.P. had accepted when confirming her buy order, which, according to J. P., resulted in the loss of an additional profit of nearly 9 000 USD.

Under those circumstances, J. P. sued FIBO in the Czech Republic, seeking the restitution of the unjust enrichment allegedly obtained by FIBO. After the claim was upheld in the first and second instances, an appeal was lodged, and the Czech Supreme Court referred a question for preliminary ruling to the CJEU. In its referral, the Czech Supreme Court asked whether Article 6(4)(d) of Rome I must be interpreted as meaning that, in the case of a CFD concluded between a professional and a consumer, the rights and obligations relating to the financial terms on which the consumer's order is to be executed are included in the expression "rights and obligations constituting a financial instrument" and, consequently, excluded from consumer provisions and subject, in this case, to Cypriot law. It asked, in particular, whether that expression covers the terms of the framework contract concluded between the consumer and the professional which allow the latter not to execute such an order or to execute it on terms different from those initially agreed to by the consumer.

The CJEU notes, first, that there is a divergence between the various language versions of Article 6(4)(d) of Rome I, in that most of them use the verb *to constitute*, which does not cover all rights and obligations connected to a financial instrument, but rather those that form that instrument as such, whereas the German version appears to give the exception a broader scope by using the expression "in relation to a financial instrument".

In the event of a discrepancy between the language versions of a provision of Union law, the provision in question must be interpreted in light of the general structure and purpose of the regulation in which it is contained. In the case of a CFD, its specific structure relates in particular to the mechanism by which the parties are exposed to fluctuations in the value of an underlying asset and how they determine the difference payable between them once the term of the contract expires. By contrast, terms which stipulate how the professional is to receive, process, execute or modify the order placed by the consumer do not come within the scope of the rights and obligations constituting the financial instrument itself.

This literal interpretation is borne out by a contextual reading of the provision. Recital 30 of Rome I refers, for the purpose of understanding the concept of *financial instruments*, to the instruments referred to in Article 4 of Directive 2004/39. Annex I to that Directive distinguishes investment services and activities, listed in Section A of that annex, from financial instruments, listed in Section C of that annex, the latter of which include CFDs. Section A covers, inter alia, the reception and transmission of orders in relation to one or more financial instruments, the execution of orders on behalf of clients, dealing on own account and portfolio management —services that are related to financial instruments but are not to be confused with the rights and obligations constituting such instruments.

It follows that the terms of a framework contract which lay down the circumstances in which a professional is to receive or execute an order relating to a CFD, including those which allow him or her, in the event of technical difficulty, not to execute that order or to execute it at a price different from the price initially accepted by the consumer, comes within the context of the provision of a financial service and not within the context of the definition of the financial instrument itself.

This interpretation is also consistent with the objective pursued by Article 6(4)(d) of Rome I, which, by excluding rights and obligations constituting a financial instrument from the scope of application of the protective rules provided for, aims to prevent — with respect to contracts entered into by consumers — that the application of laws other than those governing the instruments themselves changes their nature and prevents their fungible trading and offering. That objective does not justify expanding that exclusion to cover the terms of a framework contract which, in a relationship negotiated between a professional and a consumer, lay down the conditions for the receipt, processing or execution of an order relating to a CFD. A less strict interpretation would be difficult to reconcile with the with the fact that Article 6(4)(d) of Rome I constitutes a derogation.

Furthermore, CFDs are complex, highly speculative and non-standardised instruments which expose the consumer to significant risks. A broad interpretation of the expression ‘rights and obligations which constitute a financial instrument’, which would include the terms of a framework contract giving the professional the right to amend unilaterally the terms of execution of the order or the conclusion of the CFD, would have the effect of depriving the consumer of the protection afforded to him or her by the law of the Member State in which he or she has his or her habitual residence, or even, if it were to lead to the application of the law of a third State, of the protection afforded by EU law. Therefore, limiting that expression to the rights and obligations that define the CFD strictly speaking is consistent with the objective of consumer protection pursued by Article 6(4) of Rome I.