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THE COURT AND SLEEPING BEAUTY: THE REVIVAL OF THE UNFAIR CONTRACT TERMS DIRECTIVE (UCTD)

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Abstract

The paper gives an overview of the increased litigation leading to innovative case law of the ECJ concerning the scope and effects of the Unfair Contract Terms Directive (Directive 93/13/EEC) on consumer contracts, in particular financial services and services in the general economic interest. The originally limited impact of the Directive on Member State contract law and procedure has been substantially extended – as a metaphor, one may even say that a "Sleeping Beauty has been kissed awake" by the Court! The authors follow the recent case law both in its legal and economic consequences on consumer protection in the EU internal market. The paper ends with an outlook on the state of "Social Contract Law in the EU" – hoping to provoke a broader discussion on the concept and limits of a "Europeanization" of contract law already under way.

1. Some introductory remarks

References from national courts to the Court of Justice concerning the interpretation of the Unfair Contract Terms Directive (hereafter: Directive 93/13 or UCTD) have recently shown a remarkable surge.[1] Since 2008, a total of 21 cases have been referred by national courts and decided by the ECJ – compared with only six in the 13 year period between the date of implementation (31 Dec. 1994) and 2007; eight cases are still pending at the time of writing and await their final decision. They originated mostly from new Member States, but there are also a surprising number from Spain concerning financial services on the one hand, and services in the general economic interest, such as telecommunications and energy, on the other. The

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1. Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts ,O.J. 1993, L 95/29.

references relate to sensitive areas of particular consumer concern, where the traditional regulatory remedies did not seem adequate to cope with real life problems of ordinary citizens; they have a broad impact on market regulation going further than the specific litigation. It is still an open question whether this surge is the result of a deeper societal battle with economic problems in the Member States concerned, or whether it is merely an attempt to revive an instrument of legal protection of consumers which in its initial stage had not looked too promising in this area, and in which legal thinking and action remained the *domaine reservée* of national law, particularly in Germany where the control of unfair terms had a long tradition.

This paper will not go deeper into an analysis of the sudden increase in preliminary references from national courts, as compared with the previous, somewhat "gentler", contacting of the ECJ by those courts. We are more interested in the renewed role of the ECJ in reacting to these references. The hypotheses developed in this paper will propose an increased, perhaps even activist role of the ECJ, insofar as the ECJ extends the use of the UCTD in coping with unfair contractual practices in consumer markets. To use an image from the fairy tales of the brothers Grimm, a "sleeping beauty" (*Dornröschen* in the original) has been "kissed awake" by the ECJ. The ECJ was greatly supported in this legal activism by thorough and learned Opinions of its Advocate General Trstenjak who – up to the end of her term in 2012 – wrote eight lengthy Opinions which were more or less followed by the ECJ mainly on the substantive effects. The differing positions, in particular when it comes to procedural aspects, will also be mentioned below. In six cases, the ECJ decided without an Opinion, probably to speed up proceedings; and in one, perhaps the most dramatic one, namely Mohamed Aziz,[2] it relied on a very committed Opinion by Advocate General Kokott. More generally, Advocate General Wahl has now taken over the field of European private law.

The paper will proceed as follows: section 2 reminds the reader of an inherent contradiction in the original case law of the ECJ vacillating between "under-" and "over-enforcement". Section 3 concerns a certain consolidation of the impact of the UCTD on Member State procedural law, by the paradigm of *ex officio* application by domestic courts and the limits to this. Section 4 emphasizes the emergence of more sophisticated substantive criteria of

2. Case C-415/11, *Aziz* v. *Catalunyacaixa*, judgment of 14 March 2013, nyr; see Micklitz, "Unfair contract terms – Public interest litigation before European courts Case C-415/11 Mohamed Aziz", in Terryn and Colaert (Eds.), *Landmark Cases of EU Consumer Law – in Honour of Jules Stuyck* (Intersentia, 2013), pp. 615–634. As a follow-up see the Opinion of A.G. Wahl of 21 Nov. 2012 in Case C-482/12, *P. & E. Macinský* v. *Getfin et al*., denying jurisdiction even though discussing *Aziz* in detail as a sort of supplementary argument. Its importance for the EU principle of "effectiveness" has been emphasized by Reich, *General Principles of EU Civil Law* (Intersentia, 2013), paras. 4.5, 4.15.

unfairness in relation to pre-formulated consumer contract terms. Section 5 devotes attention to an area only partially within the scope of ECJ case law, but certainly becoming more important in the future, namely the civil law consequences of unfair terms. Sections 6 and 7 look "beyond" existing ECJ practice in its theoretical and practical impact on an emerging EU civil law. Section 7 draws a tentative conclusion in the form of leading questions and hypotheses.

2. The starting point: *Océano* v. *Freiburger Kommunalbauten*

2.1. *The inherent contradictions of the UCTD*

When the UCTD was finally adopted after protracted negotiations in the Council – the role of the European Parliament was at that time rather limited – everybody seemed happy with its mostly symbolic character, which seemed to make effective application nearly impossible.[3] The different ways of understanding how to review unfair terms (whatever they might be) in consumer contracts in the Member States seemed to be merged in a conundrum of different concepts, which could not easily be coordinated:

- review was limited to "terms not individually negotiated" (pre-formulated terms), a narrower notion than the French concept, but wider than the German concept of *Allgemeine Geschäftsbedingungen* (standard contract terms) (Art. 3(2));[4]
- the yardstick for review was a cumulation of the concepts of "significant imbalance" taken from English law and "good faith" known in German law (Art. 3(1));
- the personal scope of application was limited to business-to-consumer (B2C) contracts in the definitions in Article 2, not to general contract terms whoever they were used against;[5]
- an originally proposed "black" and "grey list" of incriminated terms was reduced to an "indicative list" in the Annex, whose legal relevance remained deliberately unclear despite its rather detailed provisions (Art. 3(3) and Annexes 1 and 2);

3. Details in Micklitz, Reich, Rott and Tonner, *European Consumer Law*, 2nd ed. (Intersentia, 2014), ch. 3.

4. For a discussion see Micklitz, "Reforming European unfair terms legislation in consumer contracts, European review of contract law", (2010) *European Review of Contract Law*, 347, 359 et seq.

5. The ECJ confirmed in Case C-541/99, *Cape* v. *Idealservice MN RE Sas/OMAI Srl*, [2001] ECR I-9049 that the Directive solely applies to B2C contracts and that the term "consumer" in Art. 2(b) refers solely to natural persons.

- in a last minute amendment, the "definition of the main subject matter" and the "adequacy of the price and remuneration" were eliminated from review, provided "these terms are in plain intelligible language" (Art. 4(2));[6]
- nothing was said about the consequences of an intransparent term, with the exception of the principle of interpretation *contra preferentem* (Art. 5);
- the consequences of an unfair term were regulated in a rather restricted way in Article 6(1) "as provided under national law, not be binding on the consumer", thus deliberately avoiding the terms being "void" or "without effect";
- the Directive said nothing about how pre-formulated terms could validly become parts of the B2C transaction; this was left to applicable Member State law;
- the principle of adequacy and effectiveness as yardstick for eliminating unfair terms with future effect was enshrined in Article 7(1) and supplemented by the duty to provide for an "abstract injunction" (without using the legal term of injunction) in Article 7(2) against the supplier and (3) against a majority of suppliers or trade associations, but without regulating any details;
- Article 8 confirmed the principle of minimum harmonization,[7] Article 8a – the only amendment in its 20-year history – transferred a reporting obligation from the Consumer Rights Directive 2011/83/EU.[8]

6. See for the history of Art. 4(2) Opinion of A.G. Trstenjak in Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid*, [2010] ECR I-4785, para 61. Common Position of the Council of 22 Sept. 1992 on the adoption of the Directive on unfair terms in consumer contracts, Doc. 8406/1/92, O.J. 1992, C 283/1; this seemed to go back to a critical article by Brandner and Ulmer, "The Community Directive on unfair terms in consumer contracts – Some critical remarks on the proposal submitted by the EC Commission", (1991) CML Rev., 647, 656., expressly and with approval cited in the speech of Lord Mance in *OFT* v. *Abbey Ntl*., [2009] UKSC 6, para 109. For a recent discussion see Weatherill, *EU Consumer Law and Policy*, 2nd ed. (Elgar, 2013), p. 153.

7. Its justification found its way to the ECJ, Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid*, [2010] ECR I-4785, paras. 28 and 29, not violating EU law, para 49; for a comment, see Tamas, (2011) *Revue européenne de droit de la consommation*, 403; Stuyck, (2010) *European Review of Contract Law*, 449; for a discussion in relation to the UK *Bank Charges* case, see Whittaker, "Unfair contract terms, unfair prices and bank charges", (2011) MJ, 106; Kenny, "Orchestrating consumer protection in retail banking: *Abbey National* in the context of europeanized private law", (2011) E.R.P.L., 43.

8. Tonner, ch. 9 in Micklitz et al., op. cit. *supra* note 3.

2.2. *Commission attempts to "enforce" the Unfair Contract Terms Directive*

The effects of the Unfair Contract Terms Directive on consumer contracting were felt only very late in Member State law; "implementation" took place slowly. Without giving a full overview, suffice it to say that the impression prevailed that the Directive was a "toothless tiger". Despite the intense academic discussion in the Member States, no real changes in substance and procedure seemed to be felt. The Commission brought several infringement actions against Member States:

- The Netherlands[9] and Spain[10] were brought before the Court for insufficient implementation of the transparency principle: consistent interpretation by national courts was said to be insufficient as a substitute for implementation.
- An action against Italy[11] concerned the (non-)implementation of Article 7(3).
- An action against Sweden[12] concerning the non-implementation of the "indicative list" was rejected because its reference to government documents without being formally taken up in legislation was, surprisingly, found to suffice; this seemed to rule out completely any importance of the list in consumer law proceedings on unfair terms.
- An action in the UK, referred by the High Court to the ECJ, concerned the original limitation of the injunctive relief under Article 7(2) to the OFT as a State body but excluding standing of consumer associations; it was withdrawn after the UK had "voluntarily" given "the Consumers Association" standing.[13]
- Germany was spared an action by the Commission, even though the transparency principle had originally not been implemented correctly.[14]
- In its negotiations with new Member States, in particular those admitted in 2004, the Commission always insisted on the adoption of the consumer *acquis* by the new Member States, without the ECJ having jurisdiction to monitor this process before accession.[15]

9. Case C-144/99, *Commission* v. *Netherlands*, [2001] ECR I-3541.
10. Case C-70/03, *Commission* v. *Spain*, [2004] ECR I-7999.
11. Case C-372/99, *Commission* v. *Italy*, [2002] ECR I-819.
12. Case C-478/99, *Commission* v. *Sweden,* [2002] ECR I-4147.
13. Case C-82/96, *R. and Secretary of Trade ex parte Consumers Association*, see Howells and Weatherill, *Consumer Protection Law*, 2nd ed. (Ashgate, 2005), para 5.8 (p. 294).
14. For details see Basedow, in *Müchner Kommentar zum BGB*, 7th ed. (Beck, 2012), para 305 BGB note 52.
15. See Case C-302/04, *Ynos Cf* v. *J Varga*, [2006] ECR I-371 concerning exclusion of jurisdiction for litigation having arisen before membership.

Ten years ago it seemed as if the European Commission was ready to push the Europeanization of regulation of unfair contract terms further. On 27 April 2000, the Commission presented its ideas on the further development of the Unfair Contract Terms Directive: the Green Paper on the Revision of the Consumer Acquis[16] led to the adoption of Directive 2011/83/EC on Consumer Rights, which despite its ambitious name is restricted to the full harmonization of direct and distant selling. Since then, political efforts to handle well-recognized and frequently discussed shortcomings of Directive 93/13, in scope, substance and procedure,[17] have more or less come to a halt. The inactivity of the Commission is compensated by a certain judicial activism. It seems as if the ECJ has now taken over the task not only of giving shape to the Directive, but also of developing it as an instrument of consumer policy making.

2.3. *The importance of the reference proceedings: A setback by Freiburger Kommunalbauten?*

After the rather limited success of centralized enforcement by the Commission, the decentralized enforcement through preliminary reference proceedings (under Art. 267 TFEU, ex 234(3) EC) in the framework of judicial cooperation between national courts and the ECJ – gave Directive 93/13 increased relevance. It is an interesting socio-legal question to study the interplay between centralized and decentralized enforcement of EU law, which unfortunately has not found sufficient attention by academic research. Anecdotal evidence seems to suggest that decentralized enforcement through the preliminary reference procedure has been much more efficient as well as more effective in EU consumer law than centralized enforcement by the Commission, despite its evidently slower pace.[18] However, there are severe shortcomings due to a lack of co-ordination between national consumer enforcement authorities.[19] The decentralization process started with

16. COM(2006)744 final 8 Feb. 2007.

17. Collins (Ed.), *Standard Contract Terms in Europe, A Basis for a Challenge to European Contract Law* (Kluwer, 2008).

18. See on the distinction between centralized and de-centralized enforcement, Cafaggi and Micklitz (Eds.), *New Frontiers of Consumer Protection The Interplay between Private and Public Enforcement* (Intersentia, 2009), in particular the introduction and the conclusion by the editors.

19. See final report May 2013 of the Consumer Justice Enforcement Forum (COJEF), where the difficulties are documented, <cojef-project.eu/IMG/pdf/Conclusions_document_cases__FINAL_8_May.pdf>. One of the areas in which the national enforcement authorities tried to co-ordinate their national activities is the so-called Apple Case, Djurovic, "The Apple case, The commencement of pan-European battle against unfair commercial practices", (2013) *European Review of Contract Law*, 253.

Océano[20] and *Cofidis*[21] and suffered a setback in *Freiburger Kommunalbauten*.[22]

The Directive does not establish whether the consumer needs to refer to the unfairness of the term, or whether courts are required or allowed to review unfairness *ex officio*. This legal question was the focus of *Océano*. The ECJ confirmed the possibility of the national court to review *ex officio,* referring to the weaker position of the consumer who possesses less information and bargaining power. If the consumer was required to assert the unfairness of a term, then the legal knowledge of the consumer would be decisive. Although in *Océano* the ECJ did not articulate an *obligation* for the court to perform a review, the question still arose whether circumstances could be conceived under which he would be required to act *ex officio* and whether his margin of appreciation becomes nearly zero.

In *Cofidis* the ECJ had the opportunity to define the reach of Article 6 of Directive 93/13 in relation to national prescription provisions. In his Opinion, Advocate General Tizzano believed such a preclusive period to be incompatible with Article 6; legal certainty is to be interpreted in the consumer interest. This is said to be only possible if unfairness could be determined without time restrictions. The ECJ adopted the viewpoint of the Advocate General, but linked the possible legal consequences of Article 6 and 7 in total consistency with *Océano*, insisting that the protection of the Directive " … extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfair nature of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve" (para 34).

This "consumer-friendly" interpretation of the UCTD was however not upheld in the later *Freiburger Kommunalbauten* case, where the Court seemed to suggest that the concept of unfairness in Article 3 is to be determined exclusively by national law, based on a strong Opinion in this vein by Advocate General Geelhoed, who argued that "(t)he jurisdiction of the Court to interpret Community law does not, however, extend to the interpretation of contractual terms at issue in a specific case before a national court. After all, … this does not involve a question of Community law" (para 26). This statement was more

20. Joined Cases C-240-244/98, *Océano Grupo ed. al.* v. *Quintero et al*, [2000] ECR I-4941, comment Stuyck, (2001) CML Rev., 719; critique Borges, "AGB-Kontrolle durch den EuGH", (2001) NJW, 2061.

21. Case C-473/00, *Cofidis* v. *J.-L. Frédout*, [2002] ECR I-10875.

22. Case C-237/02, *Freiburger Kommunalbauten* v. *Hofstetter*, [2004] ECR I-3403; see the follow-up of the BGH, in (2005) NJW, 2032, insisting on the unfairness of the clause according to the German general contract term legislation AGB-G, now part of the BGB, paras. 305 et seq., in relation to its original order of reference.

or less repeated by the Court in its judgment, insisting on the requirement "that consideration be given to national law". The Court can only interpret "general criteria used by the Community legislature under Article 234 [now Art. 267 TFEU] in order to define the concept of unfair terms", but not rule on the application of these general criteria to a particular term (paras. 21–22).

The case concerned the unfairness of a prepayment clause in a construction contract entered into by a consumer and secured by a bank guarantee. The ECJ left it to the national court to determine its unfairness, a result which seems to be convincing insofar as the division of competences under the preliminary reference procedure is concerned. Referring to the indicative list in the Annex – whatever its legal importance – would have been of no help either, since the specific contractual constellation in *Freiburger Kommunalbauten* was not provided for in it; it would not be covered by lit. (o) on clauses "obliging the consumer to fulfil all his obligations where the seller of supplier does not perform his".

On the other hand, the Court could and should have given more detailed interpretation guidelines to the national court concerning the concept of unfairness itself in relation to the two criteria of "good faith" and "imbalance", in particular whether the EU legislature used an autonomous concept of unfairness independent of Member State law, as it seemed to suggest in *Océano*. The ECJ could have even made a suggestion – as it occasionally does in preliminary references – to the effect that the contested clause in *Freiburger Kommunalbauten* was not unfair because it secured the prepayment of the consumer against a possible non-performance by the construction company, but of course leaving the final decision to the national court.

2.4. *Reactions to Freiburger Kommunalbauten*

Freiburger Kommunalbauten seemed to confirm earlier voices by some German authors[23] (resulting from what was then a rather unique position of the German legal system, which had nearly 50 years of unfair terms control

23. Roth, "Generalklauseln im Europäischen Privatrecht – Zur Rollenverteilung zwischen Gerichtshof und Mitgliedstaaten bei ihrer Konkretisierung", in *Festschrift Drobnig* (Mohr, 1998), pp. 135, 141 referring to the limited legal effect of directives under Art. 249(3) EC (now Art. 288(3) TFEU). A somewhat different view had been developed by Remien, "Die Vorlagepflicht bei der Auslegung unbestimmter Rechtsbegriffe", (2002) RabelsZ, 503, 525 (importance of uniform control); Reich, "Die Vorlagepflicht auf teilharmonisierten Rechtsgebieten am Beispiel der Richtlinien zum Verbraucherschutz", (2002) RabelsZ, 530, 545 (reference to the indicative list); the discussion after *Freiburger Kommunalbauten* is documented in M. Schmidt, *Konkretisierung von Generalklauseln in europäischen Privatrecht* (de Gruyter, 2009), 226–231, criticizing the restrictive approach of the ECJ.

already) that the interpretation of "general clauses" like "good faith" or "significant imbalance" was not a matter of EU, but of national law. Therefore it was held that there is no duty to refer (at least for courts of last instance under Art. 267(3) TFEU) on their interpretation. However, it was never made clear how this exemption from interpretation could be justified. EU law uses general clauses also in other legislative acts, which however does not have any impact on the interpretative role of the ECJ – quite the contrary. The concept of "general clause" is much too vague to allow far-reaching conclusions as to the competence of the ECJ and the obligation to refer questions of interpretation. Quite the opposite: in order to allow for a common concept of good faith in the EU, the interpretative function of the ECJ is particularly important. In answering a reference of a national court, the ECJ is obviously precluded from deciding the specific case, but this is not particular to general clauses, but rather flows from the division of competences within preliminary reference proceedings. It should be recalled that the autonomy of EU civil law concepts like "contract" and "delict" was underlined by the Court in particular in interpreting the Brussels Convention of 1968.[24]

3. The beginning of a new substantive and procedural approach by the ECJ: *Freiburger Kommunalbauten* overruled, respectively qualified?

3.1. *A new wave of references – and a new orientation by the ECJ in Pénzügyi Lizing*

There is a saying in legal literature: hard cases make bad law. But in the EU context, this saying can be turned upside down: hard cases provoke innovative case law. This has been exactly the development after *Freiburger Kommunalbauten*. Instead of quietening down the unfair terms litigation, it led to an increasing influx of references asking for a clarification of the scope of unfair terms review in response to social and legal problems.

The beginning and most outspoken example of this re-orientation of ECJ practice was marked by *Pénzügij Lizing,*[25] a Grand Chamber judgment based on thorough arguments by Advocate General Trstenjak. She made clear that

24. See e.g. Case C-167/00, *Verein für Konsumenteninformation* v. *Karl Heinz Henkel*, [2002] ECR I-8111, para 35; more recently, Case C-508/11, *Walter Vapenik* v. *Josef Thurner*, judgment of 5 Dec. 2013, nyr. Whether this is a mere assumption or whether the ECJ is re-conceptualizing contract and tort is a matter of research which goes beyond the present article.

25. Case C-137/08, *VB Pénzügyi Lízing Zrt.* v. *Ferenc Schneider*, [2010] ECR I-10847; for a comment, see Roth, (2011) *European Review of Contract Law*, 425.

the case does not concern the assessment of the unfairness of a term, but with "jurisdictional and institutional aspects of the complex cooperative relationship between the Court of Justice and the national courts" (Opinion, para 59). She also discussed the relevance of the Opinion and the Decision in *Freiburger Kommunalbauten*. Without expressly suggesting an overruling of *Freiburger Kommunalbauten*, she supported a more activist role of the Court in interpreting the general clauses of the UCTD. The ECJ has "gradually to give specific expression to the abstract criteria for reviewing whether a term may be classified as unfair and, with increasing experience, to establish a profile for reviewing the unfairness of terms at the level of Community law" (Opinion, para 99). This statement is certainly different from the original restrictive approach in *Freiburger Kommunalbauten*.

The Court in *Pénzügij Lizing* reiterates the division of competences in reference proceedings. The later parts of the judgment put a two-stage examination burden on the national court concerning the scope of the Directive and its unfairness concept. Clauses which confer jurisdiction on the court at the seller's place of business should usually be regarded as unfair, thus expressly confirming *Océano*. The Court uses rather strong words in condemning such clauses by referring to the indicative list of the Annex 1(q) and without leaving much room for manoeuvre to the national court, without even citing *Freiburger Kommunalbauten*.

By Order of 16 November 2010 in *Pohotovost'*,[26] the ECJ made clear that its new approach will not be restricted to jurisdictional clauses, but will affect also substantive issues. It clarified *Freiburger Kommunalbauten* by insisting that "the Court may interpret general criteria used by the European Union legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question … " (para 60).

3.2. *A new orientation for "procedural autonomy" in the case law on Directive 93/13*

Relying on its rulings in *Cofidis* and *Mostaza Claro* (see below), the ECJ established in *Pannon*[27] the duty (!) of the national court to examine *ex officio* the unfairness of a term in a B2C contract. The ECJ thereby went further than its ruling in *Océano*, in which it merely confirmed the possibility of the

26. Case C-76/10, *Pohotovost' s.r.o.* v. *Iveta Korčkovská*, [2010] ECR I-11557.

27. Case C-243/08, *Pannon* v. *E. S.G.*, [2009] ECR I-4713, para 32; comment Stuyck, (2010) CML Rev., 879; Cheneviere, (2010) *Revue européenne de droit de la consommation*, 351; Ancery and Wissink, (2010) E.R.P.L., 307 .

national court to determine the unfairness of a term *ex officio*. A number of subsequent references posed questions on the extent and the limits of this obligation, which also seemed to contradict the ECJ's earlier pronouncements in *Van Schijndel*.[28] However, in that case – usually cited as the clearest recognition of the principle of procedural autonomy in civil proceedings depending on the initiative of the parties – a reservation had been made. It is often overlooked that the Court in *Van Schijndel* already expressed an exception for a court intervention of its own motion based on a public interest test.[29] One might also argue that there is a difference between the role and importance of the *ex officio* doctrine in primary and secondary EU law, in particular if the secondary law, as in the UCTD case law, has a strong protective outlook.

This balancing between party autonomy on the one hand and *ex officio* protection on the other re-emerges in a number of later judgments, whose results can only be summarized here. There is a strong paternalistic element in these judgments, though some flexibility is allowed according to the legal provisions of national procedures on the one hand, and a realistic appreciation of the usually passive role of the consumer in such proceedings, where the concept of autonomy is more related to ideology than to reality. So far it remains difficult to come to clear conclusions as to the limits of the *ex officio* doctrine. The relevant elements can arguably be set out as follows.

According to *Pannon t*he consumer cannot be protected against his will;[30] the national court has to give the consumer a chance to make his opinion heard, but need not wait for an initiative of the consumer. There must be some sort of minimal "contradictory proceedings" to be arranged by the national court[31] allowing the consumer to oppose the non-application of the clause.[32] *Banco de credito espanol* went even further;[33] here the ECJ insisted that the *ex officio* doctrine applies also in a simplified procedure for the recovery of debts "even

28. Joined Cases C-430 & 431/93, *Van Schijndel and Van Veen* v. *Stichting Pensionenfonds*, [1995] ECR I-4705, paras. 19–21, where the ECJ developed the distinction between a context-related approach and balancing; for a detailed discussion of later case law, narrowing the *Van Schijndel* formula, see Hartkamp, *EU Law and National Private Law* (Kluwer, 2012), paras. 124–130. In his seminal paper, "Of rights, remedies, and procedures", (2000) CML Rev., 502, the former A.G. van Gerven defines this as a problem of competence between the EU and Member States.

29. See, now, the annotation of *Duarte* by Jansen, "Price reduction as a consumer sales remedy and the powers of the national courts", in this *Review*, 975–992, relating consumer policy to "context" in the meaning of *Van Schijndel*, cited *supra* note 28.

30. *Pannon*, cited *supra* note 27.

31. C-472/11, *Banif Plus Bank*, judgment of 21 Feb. 2013, nyr, paras. 28 and 36.

32. *Pannon*, cited *supra* note 27, para 35.

33. Case C-618/10, *Banco espanol de Credito* v. *Camino*, judgment of 14 June 2012, nyr, para 69, A.G. Trstenjak, in line with the other parties to the litigation, took a more reluctant

though it already has all the legal and factual elements necessary for that task available to it" (para 53). The Court also pointed to the specific risks of the order for payment procedure, which may deter the consumer from lodging objections in the (usually) short time limits provided for by national law.

In *Jöros,* the Court set some boundaries and linked the scope of the *ex officio* obligation to the condition that the national court must have "available to it the legal and factual elements necessary for that ask".[34] This does not seem to be in line with *Penzügyi*[35] and *Banif Plus Bank*[36] where the *ex officio* obligation to investigate the legal and factual elements reaches further. The ECJ wants to prevent the judge being forced by law to close his eyes to an obviously unfair clause, but does not put rapid enforcement proceedings into danger where under normal circumstances the judge need not go into the factual and legal details of a claim, for instance in summary proceedings.

In *Mostaza Claro,* the ECJ again went quite far as the degree to which the national court is obliged to engage in investigations of its own motion. Even if the consumer agreed to an arbitration clause – the unfairness of which must be determined by national law, as can be seen from clause 1(q) of the Annex – he still cannot be drawn into arbitration against his will if this clause may be regarded as unfair; against traditional principles of the law of arbitration, it is the national court which has jurisdiction to determine the unfairness, not the arbitrator.[37]

In appeal proceedings where the availability of new defences is limited, *Asbeek*,[38] and in re-opening proceedings of a final arbitration award, *Asturcom*,[39] the ECJ quite adroitly used the principle of "equivalence" to guarantee a sort of "last resort" protection of the consumer: if national law allows the widening or re-opening of these proceedings under public policy aspects, this must include defences available under EU consumer protection provisions which thus take the place of "public policy" in order to be

approach. The A.G. took an even more outspoken position against the *ex officio* doctrine in *Pénzügyi*, cited *supra* note 25, paras. 109 et seq.; see comment by Rott, (2012) *European Review of Contract Law*, 475.

34. Case C-397/11, *E. Jörös* v. *Aegon*, judgment of 30 May 2013, nyr, para 28.

35. *Pénzügyi*, cited *supra* note 25, para 56.

36. *Banif Plus Bank,* cited *supra* note 31, para 24.

37. Case C-168/05, *E.M. Mostaza Claro* v. *Centro Movil Milenium*, [2006] ECR I-10421; comment Reich, (2007) *European Review of Contract Law*, 41; more critical Liebscher, comment on *Mostaza Claro*, (2008) CML Rev., 545.

38. Case C-488/11, *D.F. Asbeek Brusse et al* v. *Jahani*, judgment of 30 May 2013, nyr, para 52.

39. Case C-40/08, *Asturcom Telecommunicaciones*, [2009] ECR I-9579, paras. 54–55; see for a comment Stuyck, (2010) CML Rev., 879; Schebasta, "Does the national court know European law", in Micklitz and Reich (Eds.), "The impact of the internal market on the private law of member countries", 22 EUI Working Papers (2009), 47; (2010) E.R.P.L., 847; Mak, (2010) *European Review of Contract Law*, 437; Ebers, (2010) E.R.P.L., 823.

mandatorily considered by the national court. Advocate General Trstenjak in line with the Hungarian and the Spanish governments as well as the Commission, went even further in *Asturcom,* arguing that effective consumer protection requires the removal of *res judicata* in execution proceedings.[40]

In *Aziz*[41] the Court was confronted with the issue of the protection of debtors defaulting on an outstanding mortgage who, under existing Spanish law, cannot oppose the claim of the creditor against execution even if clauses in the contract on acceleration, default interests and unilateral determination of the amount of unpaid debt may be found to be unfair (discussed in section 6 below). In her Opinion, Advocate General Kokott referred to the principle of effective legal protection of the debtor which must give the judge in the declaratory proceedings the possibility to stay execution proceedings in order to find out whether the disputed clause is abusive or not (see para 57 of the Opinion). The Court followed suit, stating that the principle of effectiveness must be assessed "by reference to the role of that provision in the procedure, its progress and its features, viewed as a whole, before the various national bodies" (para 53). However neither the Advocate General nor the Court mention the *ex officio* doctrine explicitly. Exactly this question is involved in a whole series of new references by Spanish courts.[42]

In *Invitel*[43] the ECJ extended the *ex officio* doctrine to collective proceedings. The case concerned the effects of "abstract injunctive proceedings" on individual consumer contracts concluded with the same supplier, where the unfair nature of an identical term has been recognized in an action for an injunction. " … the national courts are required, of their own motion, and also as regards the future, to draw *all the consequences* [our italics] provided for by national law in order to ensure that consumers who have concluded a contract to which those GBC [i.e. the general business conditions of the defendant] apply will not be bound by that term" (para 43). The ECJ did not go into the further question raised in the Opinion of Advocate General Trstenjak whether this extension would also cover identical terms used by different suppliers – an extension *erga omnes* expressly rejected by the Advocate General for reasons of procedural fairness.

40. A.G. Trstenjak in *Asturcom*, cited previous note, paras. 58 et seq. It is somewhat surprising that both A.G. Trstenjak and the ECJ take a fundamentally different position in *Asturcom* as compared to *Banco Espanol*.

41. Cited *supra* note 2, para 59, referring to Case C-432/05, *Unibet* v. *Justiekanslern*, [2007] ECR I-2271, para 77; detailed comment Micklitz, op. cit. *supra* note 2.

42. Requests for a preliminary ruling from the Juzgado de Primera Instancia e Instrucción no 2 de Marchena (Spain), lodged on 10 Sept. 2013 (Cases C-482-487/13).

43. Case C-472/10, *Nemzeti F.H.* v. *Invitel*, judgment of 27 Apr. 2012, nyr; comment Reich and Micklitz, "AGB-Recht und UWG – (Endlich) eine Ende des Kästchendenkens?", (2012) *Europäisches Wirtschafts- und Steuerrecht* (EWS), 257; Cafaggi and Law, "Unfair contract terms – Effect of collective proceedings", in Terryn and Colaert, op. cit. *supra* note 2, p. 653.

In his Opinion in *Macinský,*[44] Advocate General Wahl sums up the case law of the ECJ on the *ex officio* doctrine, insisting that the consumer has to make the first move.[45] In the case at issue the creditor intended to enforce a security interest by extra-judicial means, thereby paving the way for a "public auction" of the consumer's home which was given as security for a loan. Under Slovakian law there is no compulsory prior judicial review required. The Advocate General regards the four-months period to contest the public auction as sufficient for the consumer to take the first step and defend her rights before the courts. It remains to be seen whether the Court will follow the Advocate General, or even decline jurisdiction which seems to be suggested as the first option of the Advocate General.

3.3. *The impact of the case law of the ECJ on national procedural law*

When looking at the cases cited, not much procedural autonomy seems to be left to Member States concerning consumer protection against unfair terms – and perhaps also in relationship to other mandatory EU provisions.[46] This is in line with the analysis by Trstenjak and Beysen[47] who observe "[a] less stringent application of the concept of procedural autonomy . . . in the enforcement of consumer rights under the different consumer protection directives". The ECJ case law allows courts to set aside (or at least limit) the scope of traditional concepts of procedural autonomy in civil proceedings as expressly recognized in *Van Schijndel*, to overcome their limited powers to hear new defences in appeal and arbitration proceedings by referring to "public policy" considerations, to limit the priority of fast-track order-for-payment or execution proceedings over substantive justice, and to ensure third party effects of abstract injunction proceedings for individual consumer contracts. It seems that, taking all these consequences together, the procedural autonomy of Member States is severely curtailed, at least in this area of litigation – to the point that some authors contest the very idea of procedural autonomy.[48] On the other hand, an erosion of Member States'

44. *Macinský* v. *Getfin et al*., cited *supra* note 2.

45. Ibid., Opinion of 21 Nov. 2013, paras. 62 and 65.

46. E.g. recently, Case C-32/12, *Duarte* v. *Autociba*, judgment of 3 Oct. 2013, nyr, concerning Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees, O.J. 1999, L 171/12.

47. Trstenjak and Beysen, "European consumer protection law: *Curia semper dabit remedium*?", (2011) CML Rev., 119.

48. See the contribution by Adinolfi, "The 'procedural autonomy' of Member States and the constraints stemming from ECJ's case law: Is judicial activism still necessary", in Micklitz and De Witte (Eds.), *The ECJ and the Autonomy of Member States* (Intersentia, 2012), p. 281; Bobek, "Why there is no principle of 'procedural autonomy' of the Member States", ibid., p. 305.

powers is feared by those who are sceptical about any extension of EU powers, even in the guise of consumer protection.[49] How is this conflict to be balanced? This point is taken up in section 7 below.

4. Substantive criteria of unfairness in the new case law of the ECJ

4.1. *An autonomous and substantive interpretation of the good faith clause*

One of the most important and at the same time most controversial elements of Directive 93/13 has always been the concept of "good faith" itself. Teubner has called it a "legal irritant" for English law;[50] in fact the the UK House of Lords (which at the time exercised the functions now performed by the Supreme Court) twice refused to make a reference to the ECJ for clarification of this concept.[51] The cumulative use of "good faith" and "substantial imbalance" as criteria for determining the unfairness of a pre-formulated clause is said to result from a compromise between a French/German coalition arguing in favour of good faith and the English plea for significant imbalance.[52] The combination of the two, which raised much concern in academic writing, then allows each State to choose the concept which fits into the national private legal order. The originally proposed list of unfair terms seemed to be, after its degradation to an indicative rather than a binding list, of little help because it referred exclusively to the discretion of national law without allowing an autonomous EU interpretation. The ECJ held in *Commission* v. *Sweden* that the list did not even need to be included in the transposition of the directive.[53]

The original restrictive approach of Directive 93/13 – or rather the relevant case law of the ECJ – to the concept of "good faith" as a yardstick for determining the unfairness of a clause has changed quite radically in the last

49. See the critique of the former Justice at the German Constitutional Court, Di Fabio, "Grenzen der Rechtsfortbildung in Europa" (meaning: Limits of legal activism in Europe), No. 199 Papers of the Zentrum für Europäisches Wirtschaftsrecht Bonn, 2012.

50. Teubner, "Legal irritants: Good faith in British law or how unifying law ends up in new divergencies", (1998) MLR, 1.

51. Judgment of 25 Nov. 2009, *Office of Fair Trading (Respondents)* v. *Abbey National plc & Others (Appellants)*, Michaelmas Term (2009) UKSC 6 on appeal from (2009) EWCA Civ 116; judgment of the House of Lords of 25 Oct. 2001, *Director General of Fair Trading* v. *First National Bank plc*, (2001) UKHL 52; for a detailed analysis see Micklitz, *The Politics of Judicial Cooperation in the EU* (Cambridge University Press, 2005), pp. 418–423; the later *bank charges* case is referred to *supra* note 7.

52. This story has been reported to the authors by a former public official of the European Commission, Dr. Dieter Hoffmann, at that time head of the unit within the former DG 24.

53. Cited *supra* note 12.

years; an autonomous EU concept is emerging,[54] which will be shown below by reference to recent ECJ judgments. The development has certainly not come to an end yet. A number of elements have by now been clearly established, including: non-transparency of a term; transposition of value judgments on unfairness from other EU directives; understanding of the indicative list as an "essential element"[55] (benchmark) in determining (non-) fairness of a specific term; interpretation of good faith by using the balancing methodology, well known in ECJ case law on internal market regulation; reference to national law by applying an assessment deriving from "clarified" *Freiburger Kommunalbauten*. These elements are discussed in the following sections.

4.2. *Transparency as positive information obligation*

The transparency argument was written into Articles 4(2) and 5 of Directive 93/13, referring to the requirement that terms are drafted in "plain intelligible language". The recitals do not help very much in understanding the meaning of this term: is it limited to the presentation of terms in a format which can be read and understood by the consumer? or does it also include the duty of the provider to inform the consumer about certain *essentialia negotio,* like criteria for price increases, modification of content of the contract?[56]

In its early case law, the transparency requirement did not play a substantial role, even though indirectly referred to in several clauses contained in the indicative list.[57] Later case law developed a positive information obligation *vis-à-vis* the consumer to be included in the transparency requirement – a legal argument promoted in particular by the Opinions of Advocate General Trstenjak. This puts unilateral price increases into doubt, as the Court held in *Invitel,* stating that "in the assessment of the 'unfair' nature of a term, within the meaning of Article 3 of the Directive, the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the amendments, by a seller or supplier, of the GBC [general business terms of the supplier] with regard to the fees connected to the service to be provided is of fundamental importance" (para 28).

The recent *RWE* case[58] concerned unilateral price increase clauses for household gas supplies. A regional consumer advice centre

54. Details Reich, op. cit. *supra* note 2, ch. 7.

55. *Invitel*, cited *supra* note 43, para 26; *Asbeek*, cited *supra* note 37, para 55.

56. From the legal literature see the references in Micklitz and Reich, "Von der Klausel zur Missbrauchskontrolle", (2013) EuZW, 457.

57. See e.g. Annexe, No. 1(i), (j), (l), and No. 2(a), (b).

58. Case C-92/11, *RWE Vertrieb* v. *Verbraucherzentrale NRW*, judgment of 21 March 2013, nyr; comment Terryn, "Unfair contract terms – Statutory provisions, price increase and the role

(Verbraucherzentrale Nordrhein-Westfalen) brought a representative action for 25 consumers against one of the biggest German gas supply companies, which in their general conditions for special contracts referred to mandatory provisions in order to vary gas prices unilaterally without stating the grounds; these mandatory provisions referred to in Article 1(2) UCTD only applied to standard tariff contracts and – according to the ECJ – could not be applied to special contracts. The ECJ, in a reference from the BGH, examined the price variation clause both under the transparency requirement of Articles 4(2) and 5 UCTD and similar provisions of the second Gas Directive 2003/55.[59] The Court stated that "A standard term which allows such a unilateral adjustment must … meet the requirements of good faith, balance and transparency" (para 47).

The supplier had to give the consumer notice and information about the right to terminate the contract in good time before the price increase. The mere right to cancel the contract and to invoke judicial proceedings was considered not be sufficient. The Court insisted on the effectiveness of this information and the right to termination. The interests of the two parties must be fairly balanced, namely the "supplier's interest in guarding against a change of circumstances" which corresponds to "the consumer's equally legitimate interest, first, in knowing and thus being able to foresee the consequences which such a change might in future have for him and, secondly, in having the data available in such a case to allow him to react most appropriately to his new situation" (*RWE*, para 53).

The Court takes the information rhetoric seriously in that only clear and transparent information allows the consumer to make use of his rights. The Court, however, seems to put great confidence in the individual capacity of the consumer to check the legitimacy of the price increase and to shop for better offers.[60] Such optimism reaffirms the ECJ's individualistic concept of protection of weaker parties. On the other hand, such information is also necessary to protect the collective interests of consumers, for example through the actions of consumer or user associations – as taken in the *RWE* case by the Verbraucherzentrale NRW.[61] Seen in this broader context, the "balancing element"[62] seems to become central in the control of pre-formulated clauses and allows a more far-reaching interference of EU law into standard B2C

of the ECJ", in Terryn and Colaert, op. cit. *supra* note 2, p. 677; on the practice of the German courts, see Rott, (2013) E.R.P.L., 717; the follow-up judgment of the Bundesgerichtshof (BGH) VIII ZR 162/09 of 31 July 2013 has been published in (2013) *Zeitschrift für Wirtschaftsrecht* (ZIP), 1964.

59. O.J. 2003, L 176/57.
60. In the same direction Terryn, op. cit. *supra* note 58, p. 693.
61. For an evaluation, see Micklitz and Reich, op. cit. *supra* note 56.
62. This is line with Jansen, op. cit. *supra* note 29.

contracts, thus implementing the principles of "good faith" and transparency.[63]

4.3. *Reference to other secondary EU law instruments*

Recent case law of the ECJ has deliberately also referred to other consumer law directives in order to determine the abusive character of a clause. Two cases stand out: the Order in *Pohotovost'*[64] is concerned with the effects of false information about the annual percentage charge in a consumer credit contract under old Directive 87/102/EEC in relation to the assessment of the fairness of a contract term. The ECJ said that, given that mentioning the APR (annual percentage rate of charge) is essential information in the context of Directive 87/102, "the failure to mention the APR … may be a decisive factor in the assessment by a national court of whether a term of a credit agreement concerning the cost of that credit in which no such mention is made is written in plain, intelligible language within the meaning of Article 4 of Directive 93/13" (para 71).

A similar situation came before the Court in *Pereničova*.[65] This time, the bank had misled the consumer about the effective interest rate, thus violating the Unfair Commercial Practices Directive 2005/29/EC;[66] Article 3(2) of that Directive precludes any effects on the validity of the contract, however. The ECJ went beyond that narrow limitation of the effects of an unfair commercial practice and, referring expressly to the Opinion of Advocate General Trstenjak, said "that an (unfair) commercial practice … is one element among others on which the competent court may base its assessment of the unfairness of contractual terms under Article 4(1) of Directive 93/13" (para 43). The Opinion highlighted the "need of a coherent interpretation of consumer protection law" (paras. 87 et seq.) and "the convergence in the direction taken by the two directives in affording protection … " (para 125). The two Directives should not be seen as separate legal instruments following their own logic, but as mutually dependent and supportive in improving the situation of the consumer as the weaker party to a transaction.[67]

63. The concept of balancing as a "general methodological principle of EU civil law" has been discussed in Reich, op. cit. *supra* note 2, para 5.8.

64. *Pohotovost'*, cited *supra* note 26.

65. C-453/10, *Pereničova and Perenič*, judgment of 15 March 2012, nyr; comment Micklitz in Micklitz et al., op. cit. *supra* note 3, para 3.6; Jacquemin, (2012) *Revue européenne de droit de la consommation*, 575; Keirsblick, (2013) CML Rev., 247.

66. O.J. 2005, L 149/22.

67. Micklitz and Reich, op. cit. *supra* note 43, 259.

4.4. *The indicative list: An "essential element" in determining fairness*

The recent case law of the ECJ is characterized by frequent references to the indicative list in the Annex to the Directive, despite its non-binding character. The formula used is that the list is "an essential element"[68] – a flexible formulation which gives the national court an orientation on how to determine the unfairness. This will also help to set up an EU-wide black or grey list of unfair terms, similar to Directive 2005/29, but without the rigid full harmonization effects which have led the ECJ to forbid any extension of that Directive's Annex I.[69] One could easily talk now of a judge-made "grey list" of pre-formulated unfair terms. The following examples may be given:

– excessive penalty clauses may be void[70] under point 1(e) of the Annex, and cannot be reduced to an acceptable level;[71]
– unilateral price increase clauses must inform the consumer about the method used for such increases and allow the consumer to oppose them;[72]
– jurisdiction clauses have been incriminated by reference to point 1(q) of the Annex in *Océano* and confirmed by *Pénzügyj Lizing*. This consumer-friendly verdict, however, does not apply to the benefit of consumer organizations;[73]
– pre-formulated arbitration clauses have not yet been examined under the indicative list, but their validity depends on applicable national law; the ECJ has extended control of arbitration proceedings and even awards under its *ex officio* doctrine, once the national court holds them to be unfair;[74]
– in consumer credit, default interest rates come under point 1(e) and unilateral determination of the amount due under point 1(q).[75]

68. *Invitel*, cited *supra* note 43, para 26, *Asbeek*, cited *supra* note 38, para 55.
69. Micklitz in Micklitz et al., op. cit. *supra* note 3, 3.26.
70. *Pohotovost'*, cited *supra* note 26.
71. *Asbeek*, cited *supra* note 38, paras. 57–58.
72. *Invitel*, cited *supra* note 43, *RWE*, cited *supra* note 58.
73. See now Case C-413/12, *Asociación de Consumidores Independientes de Castilla y León* v. *Anuntis Segunda Mano SL*, which deals with the Spanish legislation obliging consumer organizations to file the action for injunction at the domicile of the addressee of the action for injunction. A.G. Mengozzi, in his Opinion delivered on 5 Sept. 2013, draws a clear distinction between individual cases, where the consumer is the weaker party and deserves protection, and collective actions, where no such need exists. The Court followed suit in its judgment of 5 Dec. 2013.
74. *Mostaza Claro*, cited *supra* note 37, *Asturcom*, cited *supra* note 39.
75. *Aziz*, cited *supra* note 2, paras. 85–87 and 74.

4.5. *Autonomous definition of the fairness concept under "good faith" imperatives*

As has been mentioned, the use of the general clause on "good faith" in Article 3(2) of Directive 93/13 has been particularly controversial, and in its early case law it seemed the ECJ did not want to embark on its clarification through interpretation. This was to some extent unfortunate because recital 16 already seemed to indicate quite a specific concept of "good faith".[76] Indeed, good faith requires a balancing between the interests of the supplier and those of the consumer. This has been confirmed in the recent *Aziz* judgment[77] in referring to recital 16, even though in somewhat different wording:

> "With regard to the question of the circumstances in which such an imbalance arises 'contrary to the requirement of good faith', having regard to the sixteenth recital in the preamble to the directive…the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations" (para 69).

This confirms the development of an emerging autonomous EU concept of "good faith", depending on a case-by-case assessment – carried out by the national court according to a "reasonable supplier standard" – as to whether the consumer would have agreed to the term. That means that the supplier, in a contract situation where there has been no "individual negotiation" in the sense of Article 3(2) UCTD, must take reasonable account of the consumer's ability to bargain. He cannot simply pursue his own business interests of contractual efficiency against the legitimate expectations of the consumer. In this sense, and against the critique of Teubner,[78] "good faith" is about to make its way into EU private law. A new series of references from Spanish courts[79] (not from English courts) demonstrate that the judicial activism of the ECJ has not yet been merged with national concepts of unfair contract terms control. Teubner's "irritant" has become an integral principle of EU civil law; whether

76. " … in making an assessment of good faith, particular regard shall be had to the strength of the bargaining position of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitable with the other party *whose legitimate interest he has to take into account*" (our emphasis).

77. *Aziz*, cited *supra* note 2.

78. Teubner, op. cit. *supra* note 50.

79. Preliminary references from the Juzgado de Primera Instancia e Instrucción no 2 de Marchena (Spain), cited *supra* note 42.

and to what extent the autonomous concept of good faith can be brought, and is brought, into line with current court practice remains to be seen (see section 6 below).

4.6. *Reference to national law in the light of "clarified Freiburger Kommunalbauten" criteria*

In the light of pronouncements in the cases mentioned above, the reference to national law in *Freiburger Kommunalbauten* takes on a different relevance, as the ECJ seems to indicate itself in *Pohotovost'* and continued in *Aziz* and *Álvarez*.[80] If the clause does not conform to applicable national law – always provided of course that this is in conformity with EU law – , this may well be an element to determine the unfair character of a clause, including default provisions. What is new is that the assessment of unfairness is not limited to national law, as *Freiburger Kommunalbauten* seemed to suggest at first sight, but is merely one element which the national court must take into account. Since the criteria of "good faith" and "significant imbalance" are rather abstract, they must be specified in the context of the contract before the (national) court; an impairment of the rights of the consumer will have to be assessed "by reason of the national provisions", as the Court said recently in *Álvarez* (para 23).

A broader approach has been taken by Riesenhuber,[81] insisting on primarily ("vor allem") comparing the term with default provisions of national law, while Schmidt[82] prefers an autonomous concept of unfairness which can only exceptionally be modified by reference to national law. In our opinion, the national court is required to take an overall balancing approach to the interests of the parties as described in the recent case law of the ECJ. National law is one element of this balancing – certainly important, but not the only or decisive one.

80. *Pohotovost'*, cited *supra* note 26, para 29; *Aziz*, cited *supra* note 2, para 68; Case C-226/12, *Constructora Principado SA* v. *José Ignacio Menéndez Álvárez*, judgment of 16 Jan. 2014, nyr, para 21.

81. Riesenhuber, *EU-Vertragsrecht* (Mohr, 2013), para 10, 23.

82. Schmidt, op. cit. *supra* note 23, 248; similarly, Röthel, "Die Konkretisierung von Generalklauseln", para 12, in Riesenhuber, *Europäische Methodenlehre*, 2nd ed. (Beck, 2010), p. 368.

5. Civil law consequences of unfair terms

5.1. *Unfair terms are void ex lege, not only voidable*

Article 6(1) of Directive 93/13 merely states that "unfair terms… 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". The wording is deliberately unclear so as to avoid conflicts with national laws. Advocate General Trstenjak, in her *Invitel* Opinion (para 74), surprisingly denied any effect of the UCTD on questions like restitution or compensation to consumers injured by unfair terms. This statement must be qualified. The ECJ must be understood more strictly as interpreting "not binding" as "void", to be assessed *ex officio* by the competent national court. Otherwise the broad obligations of the national court under EU law would be difficult to maintain. This consequence is strictly limited to the offending term. The effects on the contract as a whole must be determined by the criteria set out in Article 6(1) itself, namely whether the contract "is capable of continuing in existence without the unfair terms".

In *Pereničova* the ECJ made clear that the consumer does not have an option to choose between the elimination of those terms only which are void and no longer being bound by the entire contract. The ECJ insisted on objective criteria concerning the continuation of the contract and at the same time pointed to certain limitations of consumer protection. National law, under the minimum harmonization principle, may however provide for total nullity upon choice of the consumer.

5.2. *No "revision" of unfair terms*

In the opinion of the ECJ, the consequences of unfair terms are completely harmonized in Article 6, which means that courts may not revise a term so that it fits the fairness and good faith criteria, even if this could be possible under the minimum harmonization concept.[83] This means, for instance, that a penalty clause which is excessive, cannot be reduced to an acceptable level, but is simply void and cannot be enforced any more against the consumer.[84] The ECJ wishes to avoid writing an unfair term being "risk free" for the supplier, if revision were allowed by "contributing to eliminating the

83. *Banco Espanol* v. *Camino*, cited *supra* note 33; comment by Hondius, in Terryn and Colaert, op. cit. *supra* note 2, p. 625; minimal harmonization was defended by the ECJ in Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid*, [2010] ECR I-4785, paras. 28 and 29.

84. *Asbeek*, cited *supra* note 38, para 58.

dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms.…"[85]

For German unfair contract term law the question arises whether the practice of the Federal Court (BGH) to modify contested clauses by the method of "ergänzende Vertragsauslegung" (supplementary interpretation of the contract) according to a hypothetical will of the parties is compatible with the strict verdict of the ECJ, which precludes revision of clauses by courts.[86] The BGH uses this method when, in its opinion, the nullity of the clause would lead to "unacceptable economic consequences" for the supplier, e.g. in long term insurance or energy supply contracts.[87] The BGH wishes to protect the business model of the supplier, even if the terms of the conditions have been declared unfair. So far, the BGH has refused to make a reference to the ECJ because of the – in its opinion – substantial difference between a revision of a clause and its "mere" amendment by way of interpretation.

However, this argument does not seem convincing because ultimately the BGH does what has been expressly forbidden by the ECJ: it rewrites and revises the contract without any clear legislative reference, and thereby endangers the very principle of transparency. Again, the supplier can use "risk free" an unfair term by relying on the power of the courts to modify it to an "acceptable, fair" level under an alleged hypothetical will of the parties. Possibly the new series of references from Spanish courts will lead to a clarification.[88]

The recent Opinion of Advocate General Wahl in *Kásler*[89] seems to suggest a different reading in cases where total nullity of the clause would work to the detriment of the consumer, and a balanced interpretation may be upheld by referring to national law. This situation is indeed different from that of the BGH, as the latter primarily aims to maintain the business interest of the supplier and not so much protect consumers in relation to restitution of overcharges paid before the final judgment on the unfairness of the term.

85. *Banco Espanol*, cited *supra* note 33, para 69.

86. See more generally on the different ways and means in which contracts are interpreted Beale, Hartkamp, Kötz, and Tallon, *Cases, Materials and Texts on Contract Law, Ius Commune Casebooks on the Common Law of Europe* (Hart, 2002).

87. BGH, judgment of 14 March 2012, NJW (2012), 1865 para 25; BGH 23 Jan. 2013, NJW 2013, 991; critique by Micklitz and Reich, "Luxemburg ante portas – Jetzt auch im deutschen runderneuerten AGB-Recht?", in *Liber amicorum Ulrich Magnus* (Sellier, 2014), p. 633.

88. Preliminary references from the Juzgado de Primera Instancia no 2 de Marchena, cited *supra* note 42, see in this context Iglesias Sánchez, "Unfair Terms in mortgage loans: A suitable way to protect housing in times of economic crisis? *Aziz* v. *Catalunyacaixa*", this Review 955–974.

89. Case C-26/13, *Arpád Kásler et al* v. *OTP Jelzálogbank*, pending, Opinion of 12 Feb. 2014, paras. 98–100.

5.3. *Erga omnes effects of the declaration of nullity*

Invitel[90] deals with a collective action of the Hungarian National Consumer Protection Office against a telecommunications services provider which used a unilateral price amendment clause without a valid reason and without explicitly describing the method by which prices could vary. What is of particular interest are the consequences on individual contracts with the defendant business company of a potential prohibition under the collective action. Most contract lawyers might consider the answer as being commonly known. What is at stake? Judgments are binding *inter partes* only. In this case, the parties are the consumer agency and a company, so the final judgment of the competent court might bind only these two parties. But what about the potential effect of the collective action, more precisely of the action for an injunction, on individual contracts which contain exactly the same term that has been declared void in the collective action?

Article 6(1) Directive 93/13/EEC plays a decisive role. According to its wording, this rule is not restricted to individual procedures but, due to Article 7(2), it is deeply linked to an action for an injunction. In her Opinion, the Advocate General argued: "These terms are therefore intended for use in a large number of consumer contracts. They can therefore be combated effectively only if the decision of the national court finding a particular term to be unfair is accorded fairly wide applicability" (para 51). And the ECJ decided: "These terms…are not binding on either the consumers who are parties to the actions for an injunction or on those who have concluded with that seller or supplier a contract to which the same GBC apply" (*Invitel,* para 38).

The Advocate General focused on the *effet utile* of the Directive, which requires an extension of *res judicata* (*Rechtskrafterstreckung*). Whereas the Advocate General explicitly excludes third parties not involved in the proceedings, since their right to be heard has not been respected, the ECJ does not comment on this question despite referring directly to the Advocate General's Opinion, although it limits the effects to "those who have concluded with that seller or supplier a contract". The submission of the Hungarian court does not require a distinction to be drawn between the two forms of extension of *res judicata*, as the relevant Hungarian law does not include third parties. The addressee of the extension of *res judicata* is the same user of the term; it does not concern the term itself, which has been declared illegal, even though the contract is applied literally identically by another businessman.

90. *Invitel*, cited *supra* note 43. Detailed discussion in Micklitz et al., op. cit. *supra* note 3, para 3.22b; see also for a comment, Bottino, (2012) *Revue européenne de droit de la consommation*, 587, 590.

However, the ECJ's formulation in paragraph 40 of its *Invitel* decision is more flexible: "The application of a penalty of invalidity of an unfair term with regard to all consumers who have concluded a consumer contract to which the same GBC apply ensures that those consumers will not be bound by that term, but does not exclude the application of other types of adequate and effective penalties provided for by national legislation". This would make it theoretically possible to extend the *effet utile* to the term, regardless of the original user, for instance if a Member State wants to use some sort of system of "*ex parte*" court order, so that each and every trader must abstain from using the banned terms on penalty of fines or other sanctions. It is hardly comprehensible why a trader using the same term, found to contravene the Directive, should be allowed to require a "legitimate interest".

Are Member States now obliged to introduce *erga omnes* effect to actions for injunctions declaring a contract term to be unfair or are they only entitled to do so, as the Directive lays down minimum requirements only? The Opinion and the judgment read together suggest that the Member States are under an obligation to extend *res judicata* beyond the contracting parties. Both seem to start from the premise that adequate and effective protection under Article 7 cannot be limited to the parties of the litigation, but must include all those who have concluded a consumer contract with that supplier. Some uncertainty results from the operative provisions of the judgment, which reads (following the Opinion): "Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) and (2) thereof,…does not preclude the declaration of invalidity of an unfair term included in the standard terms of consumer contracts in an action for an injunction…." There is no equivalent to this formula in the reasoning of the judgment, where the minimum character of the Directive and the potential link to the extension of *res judicata* is not discussed. One might therefore wonder whether further clarification is needed in order to decide on the mandatory character of the extension to third parties. Even if Member States are obliged to introduce an extension of *res judicata*, they have substantial leeway in shaping the extension. This goes together with the principle of procedural autonomy as stressed by the Advocate General (Opinion, para 28).

It is not yet clear whether and how this extension of *res judicata* by the Advocate General and the ECJ in *Invitel* can be applied to actions by private consumer or similar associations. In traditional procedural thinking, *res judicata* only refers to identical parties both on the plaintiff and on the defendant side, and is limited to the litigation at hand, excluding any *erga omnes* effect. Such an understanding seems to be in line with Article 4(1) which requires individual circumstances being taken into account. However,

the relationship between Article 4(1) and collective actions is far from clear.[91] On the other hand, an unfair term must be regarded as being void as such – a consequence which has to be respected *ex officio* by any competent court being confronted with the same term against the same supplier. It therefore cannot be enforced any more against the consumer. This opinion conforms to a new theory on the procedural structure of collective actions under EU and German law by Halfmeier,[92] referring to the concept of *actio popularis*. Such litigation brought by a consumer or users association does not defend an individual right, but enforces a public interest (*entsubjektivierter Streitgegenstand der Popularklage*).[93] The plaintiff owes its standing to a legislative act (e.g. Art. 7(2) of Directive 93/13, or Directive 2009/22/EC[94] on injunctions and its implementation into national law), not to an individual right. This justifies an *erga omnes* effect of a declaration by the court voiding an unfair term, at least in favour of consumers who have been harmed by an identical unfair clause used by the same defendant.

5.4. *Full restitution of money paid over under an unfair term?*

If a term has been found unfair and therefore is "not binding" on the consumer, the latter has a right under civil law of restitution of money paid without justification, e.g. if a price acceleration clause has rendered void, as in the *RWE* case. The consumer is entitled to restitution of money which he did not need to pay, and the supplier must return the overcharge to which he was not entitled. The success of this type of unjust enrichment action depends on national law. The Court however has insisted in several judgments that the national court has to draw "all the consequences that follow under national law, so that the consumer is not bound by that term".[95] This of course includes restitution in full, not only in part.

The question now before national courts, which has not yet reached the ECJ, is whether this EU right to restitution can be restricted by national prescription rules, that is to say can be reduced to a considerable extent by national rules which make part of the claim subject to prescription. This is a problem of German law on restitution of overcharged consumers in insurance or energy supply contracts. The conflict and the circumstances are of

91. The distinction between abstract control in the action for injunction and concrete control in individual litigation overstates the differences. What is needed and what is possible is a context-related standard yardstick of control, see Micklitz, op. cit. *supra* note 3, 3.20.

92. Halfmeier, *Popularklagen im Privatrecht* (Mohr, 2006), p. 295.

93. Ibid, at p. 303.

94. O.J. 2009, L 110/30.

95. *Invitel*, cited *supra* note 43, para 42; most recently, see Case C-397/11, *E. Jörös* v. *Aegon*, judgment of 30 May 2013, nyr, paras. 41–42.

paradigmatic importance for the impact of EU private law on national prescription rules and more broadly on the potential effects of a void term and the chances and opportunities not only to improve the future protection of consumers but to compensate them for financial loss.[96]

The German Federal Supreme Court (*Bundesgerichtshof* – BGH), in a continuous but not uncontested case law, has the prescription period for claims of restitution run not from the date when the illegality has been firmly established in legal proceedings, but from the much earlier date when an "average consumer" could have brought a claim after having received the final settlement of his account, even if there is a risk that the contested term is upheld in later proceedings as not being unfair.[97] This case law puts the risk of declaring a term to be void or not entirely on the consumer; the supplier will profit from lengthy proceedings, unless the consumer has taken the initiative to take his claim to court or simply refused to pay. According to information relating to Germany from consumer advice centres (*Verbaucherzentralen*), only a small minority of consumers concerned will take the chance of bringing proceedings in an unsettled legal issue; the great majority will abstain, but run the risk that part of their claim will be prescribed once the final judgment on the illegality of the clause has been handed down. In the *RWE* case, proceedings lasted about 7 years before the price increase clauses were finally declared to be illegal: due to the 3 year prescription period in German civil law (§ 195 BGB) more than half the money paid by the "silent majority" of the gas supplier's clients did not need to be refunded.

It is not yet clear whether and how this case law on cut-off periods, which reduces consumer restitution to an average of about 50 percent, can be challenged under EU law. As a general principle, such rules on prescription are subject to national law, but must still meet the requirements of effectiveness and equivalence.[98] Effectiveness means that national law may not make (full!) restitution practically impossible or excessively difficult. There is some case law of the ECJ concerning the working of prescription rules on citizens' rights established under EU law. As a general rule, the consumer (the client, worker) must have had a chance to know that his claim will be prescribed under

96. See for the importance of prescription periods barring consumers from enforcing their rights Case C-473/00, *Cofidis* v. *J.-L. Frédout*, [2002] ECR I-10875 and in particular the final judgment of the Tribunal d'Instance de Vienne du 16 May 2003 which translates the ECJ judgment into the French context (unpublished, on file with the authors).

97. BGH 14 July 2010, IV ZR 208/09, not published, concerning an unfair clause in a life insurance contract: prescription starts with the settlement ("Abrechnung") of the contract; similar for energy supply contracts: BGH 23 May 2012, VIII ZR 210/11, NJW 2012, 2647; 12 Jan. 2013, VIII ZR 80/12, NJW 2013, 991: date of the final yearly "Abrechnung".

98. Details in Reich, *General Principles of EU Civil Law* (Intersentia, 2013), ch. 4.

applicable prescription rules.[99] In the German cases on restitution of unfairly reduced benefit payments under a cancelled life insurance, or overcharged energy prices, the consumer did not know and could not reasonably have known whether and when the contested term would finally be declared to be void (or not!). The "average consumer" is not an expert. If the term has been annulled with definite effects, he is entitled to full, not just to partial compensation; a prescription period should only run from that date, not from an earlier date as in the case law of the BGH which applies the date of the yearly settlement. If the final judgment on the illegality of the term was handed down in 2013 and the consumer received from *RWE* a yearly settlement statement, his claim for restitution under the case law of the BGH would be limited to the 3 year period between 2010 and 2012 and not go back till 2006. This means that he is deprived of more than half of his claim, as full compensation of that part is made practically impossible by the method of determining the prescription period in the case law of the BGH.

6. The new methodology of the ECJ and the reactions in legal doctrine – *Aziz* as an example

In *Aziz*,[100] the Advocate General and the ECJ investigated three terms at the heart of Spanish mortgage contracts. Just as in *RWE,* the ECJ went quite far in its guidance on the "correct" and "fair" interpretation of what it is "disproportionate". What the ECJ is really doing is assessing and weighing the fairness of contract terms to a degree of detail which can normally only be found at the level of the national appeal courts.

6.1. *Concrete guidance on the assessment of standard contract terms*

By means of three contract terms the Caixa bank strengthened its position: a) via the acceleration clause – in case of default by the debtor in respect of just one of the total of 396 monthly instalments, the lending bank may automatically call in the totality of the loan, b) via the default interest clause – if the borrower incurs default, without the need for any notice or reminder whatsoever, he must pay default interests of 18.75 percent p.a. on the capital sum due, c) via unilateral determination of the amount owed – for the

99. Case C-326/96, *Levez* v. *Harlow*, [1998] ECR I-7835 para 31; Case C-295/04, *Manfredi* v. *Lloyd Adriatica*, [2006] I-6619, paras. 78–79; Case C-246/09, *S. Bulicke* v. *DBS*, [2010] ECR I-7003, paras. 40. The cases do not, however, relate to the specific prescription problems of *long-term contracts*; the BGH should at least have made a reference to the ECJ for reasons of clarity.

100. This is a more advanced version of Micklitz, op. cit. *supra* note 2.

enforcement proceedings the lender may unilaterally determine the balance of the loan and can thus autonomously create an important condition for the conduct of the simplified mortgage enforcement proceedings. The ECJ largely relied on the arguments of the Advocate General in the assessment of the acceleration clause as well as of the default interest clause, but took a different position with regard to assessment of the unilateral determination.

Both Advocate General and ECJ first stress the importance of the obligation to pay instalments which then has to be balanced against reasons which refrained the consumer to perform correctly as well as the procedural remedies foreseen under the national law to remedy the potential misbehaviour. There is one notable difference in the assessment of the acceleration clause between the Advocate General and the ECJ. The Advocate General makes a strong reference under the requirement of good faith to the expectations of the consumer, a reference which is totally missing in the judgment of the Court. Without saying it explicitly both have in mind that losing the home and running the risk to be evicted is a serious threat that cannot so easily be outweighed by the non-payment of a single instalment of the loan.

In the assessment of the default interest clause, the ECJ follows the Advocate General in using point 1(e) of the indicative list (the Annex to the UCTD) to interpret and understand the default interest clause; but both dig deep into the purposes which "may be lawfully pursued by default interest under national law and whether it constitutes, for example, merely a flat-rate amount to cover damage caused by default or is also intended to encourage the parties to observe the agreement" (*Aziz* Opinion, para 86). The reference to national rules on default interests is not just the starting point in the assessment, but might also be the limit of European consumer law. The Advocate General and the ECJ explicitly recognize that the regulation of default interest may be shaped by national legal cultures;[101] but this is a rather strange reference in a market which is dominated by global standards and an ever stronger attempt to create a European capital market. It opens up a new defence line for Member States who may feel tempted to disguise a consumer unfriendly regulation of default interests by reference to the respective national legal culture. Contrary to the Advocate General who limits herself to

101. See for similar discussion on the role and importance of national cultures (not legal culture) in the law on unfair commercial practices, Case C-220/98, *Estée Lauder and Lancaster Group (Lifting)*, [2000] ECR I-117, thereto Wilhelmsson at p. 62 and Micklitz at p. 96 in Howells, Micklitz and Wilhelmsson, *European Fair Trading Law* (Ashgate, 2006).

weighing the different interests, the ECJ applies the proportionality rule in private law relationships.[102]

There is a notable difference between the reasoning of the Advocate General and the ECJ on the unilateral determination of the amount owed. The Advocate General underlines the key function of that clause for the enforcement proceedings: without such a unilateral determination of the amount, Caixa bank would not be able to initiate the mortgage enforcement proceedings, but would first have to go to court and ask for a determination of its claim. The difference is obvious. If Caixa bank can unilaterally determine the amount owed, it can rely on a speedy enforcement procedure which cuts the borrower off from any potential reference to the fairness of the standard form contract. If that is not so, the borrower may raise the fairness test before the court which has to determine the amount owed. The ECJ, contrary to the Advocate General and without referring to the Opinion, emphasizes point 1(q) from the UCTD Annex (hindering the consumer's right to a legal remedy) as the point of reference. The reference to the national rules remains key, just as the link of the term to the procedural consequences resulting from the separation of the declaratory and the enforcement proceedings. The Advocate General, however, does not hesitate to provide guidance to a possible reading of the respective national legal rules and she is quite outspoken of the criteria the national court has to take into consideration in its final assessment.

6.2. *A "hidden constitutionalization" in Aziz?*

Aziz adds a new layer to the "constitutitionalization of the private law debate", a layer we would like to term "hidden" constitutitonalization. Neither Advocate General Kokott nor the ECJ refer to the Charter of Fundamental Rights, although the "respect for his or her….home" is written into Article 7;[103] this is, however, in a rather weak format, as a mere principle according to Article 52(5).[104] If it had used the Charter, the ECJ would have

102. See for a deeper discussion Kennedy, "A transnational genealogy of proportionality in private law", in Brownsword et al. (Eds.), *The Foundations of European Private Law* (Hart, 2011), p. 185.

103. For a discussion with references to the case law of the European Court of Human Rights see now the Opinion of A.G. Wahl of 21 Nov. 2013 in *Macinský*, cited *supra* note 2, notes 45, 57.

104. For an interesting discussion of the civil law consequences of "principles" rather than "rights" see now the very detailed and learned Opinion of A.G. Cruz Villalón of 18 July 2013 in Case C-176/12, *Ass. de mediation sociale* v. *CGT* (judgment of 15 Jan. 2014, nyr) concerning Art. 27 of the EU Charter of Fundamental Rights, which is on "Workers' right to information and consultation within the undertaking". The A.G. considered "on the basis of the second sentence of Article 52(5) of the Charter, that Article 27 of the Charter, given specific substantive and direct expression in Article 3(1) of Directive 2002/14, may be relied on in a

had to investigate the extent to which this principle and other fundamental rights can and might be used to give housing a deeper constitutional dimension.

This does not mean, however, that the Advocate General and the ECJ were not aware of the constitutional dimension behind *Aziz*. We deliberately use the term "hidden" constitutionalization, as the Advocate General and the ECJ tend to build the constitutional dimension into their arguments. What comes closest to constitutional weighing is in the Opinion, where the Advocate General underpins the consequences of the interplay of contract law and national proceedings (Opinion in *Aziz*, para 52). The ECJ confirms this reading but adds an even stronger constitutional element, by stressing the overall purpose for which the loan had been granted: housing, the establishment of the family home (*Aziz*, para 61). The reasons for such a "covert approach" might be also found in the attitude of the Spanish Constitutional Court which had confirmed the constitutionality of the Spanish enforcement proceedings as early as 1981.[105] On open constitutionalization of the contract terms in *Aziz* would have forced the ECJ to engage in a constitutional dialogue with the Spanish Constitutional Court. On the other hand *Asbeek* demonstrates that the ECJ is fully aware of the citizenship dimension of consumer rights, where it stresses the "essential needs" of the consumer/tenant to access housing.[106]

Why does the ECJ not openly address the constitutionalization? It is true that Directive 93/13, contrary to more recent consumer law directives, naturally does not contain a reference to the Charter of Fundamental Rights which did not exist at its time of enactment. But is this the reason? Certainly not.[107] Our tentative argument is that the ECJ must be well aware of the risk of turning each and every private law conflict into a constitutional conflict. By keeping a low profile, the ECJ is able to give weight to the constitutional dimension without opening Pandora's box and paving the way for every private law conflict to acquire a constitutional dimension.[108] However, one may wonder whether this is really satisfactory. It would have been more

dispute between individuals, with the potential consequences which this may have concerning non-application of the national legislation" (para 80). The Grand Chamber of the Court, paras. 47–49 denied any (horizontal) direct effect of the principle enshrined in Art. 27 Charter due to its imprecise formulation, distinguishing *Kücükdevici.*

105. See the discussion of the Spanish background to *Aziz* in Iglesias Sánchez, op. cit. *supra* note 88.

106. *Asbeek*, cited *supra* note 38, para 32.

107. See for an analysis of the EU policy on the use or non-use of the reference to the Charter, Kosta, *Fundamental Rights in Internal Market Legislation* (EUI Florence, 2013).

108. It will be one of the most important challenges for legal doctrine to draw a line between normal private law cases and those that bear a constitutional dimension. See now Sieburgh, "A method to substantively guide the involvement of EU law in private law matters", (2013)

convincing if the ECJ had openly addressed the pros and cons, the chances and the limits of the constitutionalization of private law.

7. The new procedural design for effective legal protection: From *ex officio* to compensatory function

The recent ECJ case law on unfair terms – strongly supported by the Opinions of its Advocates General – emphasizes the *ex officio* obligation of national courts to apply the UCTD to litigation before it, even if the consumer has not raised such questions himself or was not even in a procedural situation to rely on the Directive. There are some limits to this obligation, discussed in section 3 above, which result from the need to balance it with national principles governing the rules on civil procedure. The insistence of the ECJ on this *ex officio* obligation has put Member State law on trial and seems to contradict the well-established principle of "procedural autonomy". But this "procedural autonomy" – or rather "competence" in the words of former Advocate General van Gerven[109] – is not without limits and has to be balanced with the principle of "effectiveness", which has a long tradition in EU law.[110] Without going into details, it can be said that the latter is now part of a specific aspect of the constitutionalization of civil law under the Charter of Fundamental Rights, namely its recognition by Article 47(1) of the Charter, which reads:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article".

Article 19(1) TEU puts the responsibility for "providing remedies sufficient to ensure effective legal protection in the fields covered by Union law" on Member States through the status of their courts of law as "Union courts". Article 19(1) TEU puts a special obligation on Member States which is subject to interpretation and scrutiny of the ECJ under its mandate to "ensure that in the interpretation and application (of the Treaties) the law is observed", a provision following directly the obligation to provide for sufficient remedies. The case law of the ECJ makes it clear that national procedural rules which are

E.R.P.L., 1165; Mak, "The one and the many: Translating insights from constitutional pluralism to European contract law Theory", (2013) E.R.P.L., 1189. Also the editorial to the special issues of 5/6 E.R.P.L. (2013).

109. Op. cit. *supra* note 28.

110. See Tridimas, *The General Principles of EU Law*, 2nd ed. (OUP, 2006), p. 419; Reich, "The principle of effectiveness and EU private law", in Bernitz et al. (Eds.), *General Principles of EU Law and European Private Law* (Kluwer, 2013), p. 301.

solely based on the principle of party autonomy and on a limited role of the judge in civil litigation, and likewise of a restricted availability of defences, may preclude the very working of the effectiveness principle in EU consumer law. The ECJ again uses the method of balancing because it does not completely abandon the well-established principles of civil procedure, but only adapts them to the specific position of the consumer as the weaker party, not only with regard to contracting, but also with enforcing his rights. Civil procedural law has a "compensatory function" which has been described again and again by the ECJ, for instance in *Pénzügyj Lizing*:[111]

> "[A]ccording to settled case law, the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position *vis-à-vis* the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms…The Court of Justice has also held that, on account of that weaker position, Article 6(1) of the Directive provides that unfair terms are not binding on the consumer. As is apparent from case law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them…In order to guarantee the protection intended by the Directive, the Court has also stated that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract". (para 46)

This balancing approach has been repeated by the ECJ in many judgments.[112] As Trstenjak and Beysen write:

> "the ECJ has not fundamentally called into question the concepts of procedural and remedial autonomy of the Member States in matters covered by the consumer protection directives. The ECJ has, however, resorted to a consumer-oriented interpretation of those concepts. By emphasizing the weak position of the consumer, the ECJ implicitly raised the effectiveness threshold which national procedural rules for the enforcement of rights under the consumer protection directives must meet".[113]

111. Cited *supra* note 25.

112. See Reich, "Balancing in private law and the imperatives of the public interest: National experiences and (missed?) European opportunities", in Brownsword et al., op. cit. *supra* note 102, p. 221.

113. Trstenjak and Beysen, op. cit. *supra* note 47, at 121.

Similar to making use of mandatory contract law provisions,[114] it has been criticized as resulting in "paternalism" by imposing on the consumer a protection he may not need or want. The ECJ has taken account of this paradox resulting from a potential "overprotection" by insisting that the *ex officio* control may not be done against the will of the consumer, which must be assessed by the competent court within its procedural rules.[115] But it can be said in defending the ECJ that it has quite a realistic image of the consumer as a "passive market citizen" who may not know his rights, and – even if he knows them – may not be active to defend them. The consumer should not be expected to be a sort of legal expert in asserting his rights; he or she will need third party support in order to allow an effective implementation of consumer law provisions. This does not imply a denial of autonomy but, on the contrary, would make it effective in everyday transactions.[116] Weatherill has approvingly remarked that Directive 93/13 "…has been used as an instrument to bend national procedural law to the service of dilatory consumers who have missed opportunities allowed by national law to attack unfair terms prohibited by EU law".[117]

Therefore consumer law has a compensatory function which is implicitly recognized in the tandem of Article 47 Charter and Article 19 TFEU. The ECJ, in our opinion, is justified in insisting on the *ex officio* control of unfair terms in civil proceedings. There may be more effective and efficient ways to reach similar results, but these were not before the ECJ. *Ex officio* control may only be a "second best", but at least it does not leave the consumer "standing out in the rain". Whether these principles also apply to collective actions of consumer associations is now before the ECJ; in a recent case both Advocate General Mengozzi and the Court denied such an extension of the effectiveness principle to injunctions brought by consumer associations.[118]

114. See Grundmann and Kerber, "Information intermediaries", in Grundmann, Kerber and Weatherill (Eds.), *Party Autonomy and the Role of Information in the Internal Market* (De Gruyter, 2001), p. 264, preferring information-type rules over mandatory standards; Ogus, "The paradoxes of legal paternalism and how to resolve them", (2010) *Legal Studies*, 61; Wagner, "Zwingendes Privatrecht", (2010) *Zeitschrift für Europäisches Privatrecht*, 243, pleading for a restrictive use of mandatory rules in contract law.

115. *Supra* at note 30.

116. In this sense see Weatherill, op. cit. *supra* note 6, p. 310, discussing the limits of the concept of "empowered consumer".

117. Ibid., at p. 314.

118. *Asociación de Consumidores Independientes de Castilla y León,* cited *supra* note 73.

8. Questions and hypotheses on the state of "social contract law in the EU"

The paper has demonstrated a remarkable surge in rather complex litigation on the UCTD before the ECJ. Our observation, based on a systematic screening of the preliminary references in the field of European consumer law[119] and on a deeper investigation into the development of over-indebtedness of consumers in a selected number of EU Member States,[120] suggests that this development has been if not triggered at least promoted by the financial crisis which seems to have hit hard at countries such as Greece, Hungary, Portugal, Romania, Spain, and Slovakia. Other countries do not figure in these preliminary findings – the reasons are unknown to us and would mandate more socio-legal research comparing the different degree to which consumers in the EU as a whole are affected.[121] It seems, though, that some preliminary hypotheses can be formulated based on the preceding research of our paper. Of course, they deserve deeper investigation and justify a discussion on their own.

The plaintiffs look to the ECJ as a "court of last resort" in the proper sense of the word, as the last means – maybe besides the European Court of Human Rights – to find "justice", – justice which they claim to be denied in their home countries, not only by courts but also by national governments. This catapults the ECJ into a prominent position, with chances and risks. On the more positive side might certainly be the potential rise of recognition in the Member States as an EU body which looks after the interests of the "men and women in the streets", and which overcomes the disinterest felt at the national and European political level. Insofar the ECJ might contribute to the development of a genuine European identity beyond market freedoms. On the more problematic side are the risks which could result from the potential mismatch in the raised expectations of the plaintiffs – who win in Luxembourg – and the national judicial and political reality which might produce much more modest results than the promises of the ECJ; this has been demonstrated with regard to German law on restitution for consumers who have been overcharged in

119. See Kas and Micklitz, "Rechtsprechungsübersicht zum Europäischen Vertrags- und Deliktsrecht (2008–2013)", 9 EWS (2013), 314–334 (part 1) and 10 EWS (2013), 353–380 (part 2).

120. See Domurath and Micklitz (Eds.), *The Impact of the Financial Crisis on the Overindebtedness of Consumers*, ERC-ERPL EUI Working Paper (2014, forthcoming).

121. The remarkable study by Rösler, *Europäische Gerichtsbarkeit auf dem Gebiet des Zivilrechts* (Mohr, 2012) tries to correlate the frequency of preliminary rulings by national courts with social indicators such as size of population, participation in EU-parliamentary elections, etc. at p. 184, but could not relate it to the effects of the financial crisis nor to the specific situation of some – mostly new – Member States. A more focused continuation of this research would be highly desirable.

gas-supply contracts (see section 5.4 above). Even deeper are the concerns over the legitimacy of the ECJ. Is it really up to the ECJ to remedy the social deficit?

Since the adoption of the Single European Act, it has been clear that the Internal Market can only be achieved if a minimum level of European social standards is guaranteed for all citizens. What the ECJ is doing, however, is far beyond laying down minimum standards. The concrete guidance imposed on national courts limit not only the procedural autonomy of the Member States but challenges the division of tasks between the ECJ and the national courts. The involvement of the ECJ might lead to a more centralized enforcement, one where the ECJ does not define minimum standards but Europe-wide, binding, basic if not maximum standards. This might be favourable for the consumers involved in the litigation, if national courts deprive the consumer of his or her European rights. However, is and should the definition of the standards of justice not be for the governments, the parliaments? And if the Member States fail because they cannot politically agree to adopt the necessary secondary EU law, how far can a European court go in pushing the Member States into a direction they do not want to go?

The references and the answers of the ECJ are concerned with a worrying denial of consumer rights by procedural limits of existing Member State law, as in *Aziz*, or by "freely bargained contract clauses", e.g. on the exclusive jurisdiction of the courts of the trader's business centre, as in *Penzügyi Lizing*. One might wonder what is behind the denial, in particular when judicial litigation is triggered by the financial and economic crisis, when consumers and citizens go to court to seek justice which they believe to be denied by the national government institutions, ministries, agencies and even parliaments? In *Aziz,* the Spanish Government intervened on the side of the bank – ironically *Caixa* has been subject to a bail-out by the Spanish Government. The rhetoric of "consumer empowerment" in the internal market, which is frequently hailed by EU institutions in the "shopping phase" of the consumer, is seemingly complemented by an attempt of the ECJ at an effective "social empowerment" in the critical post-marketing phase of over-indebtedness or unfair treatment of consumers. It looks as if the ECJ is in fact developing hand in hand with the consumers and citizens what has been called "a European civil society".[122]

The analysed case law underlines the close relationship between rights, remedies and procedures, between substantive consumer law and consumer law enforcement. *Ubi ius ibi remedium*. The harmonized private law brings the

122. Commandé, "The fifth European Union freedom: Aggregating citizenship … Around private law", in Micklitz (Ed.), *Constitutionalisation of European Private Law* (OUP, forthcoming 2014).

ECJ ever deeper into the procedural autonomy of the Member States. The *effet utile* of the EU requests obviously a rethinking of procedural rights, of remedies and of national procedures as a whole. It is striking to see that the references from national courts in the aftermath of *Aziz* focus very much on the procedural side of the Directive and much less on the substantive side. A considerable number of cases is concerned with a seemingly classic problem of "overcharging" consumers (*Pohotovost'*, *Invitel*, *RWE*). They refer to market failures despite the logic of the internal market which is meant to avoid such failures by greater choice for consumers but which cannot function once the consumer is tied to a – mostly long-term – contract in the field of financial services or SGEI (communication, energy).

Most litigation before the ECJ has a collective dimension going far beyond the individual litigation. Many proceedings started in national courts and referred to the ECJ seem to focus on a broad number of people; they have the character of *de facto* "Musterklagen" (model claims). Unfortunately, EU law has not yet developed any remedies on effective compensation in these "mass cases"; the Commission Recommendation on "common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations or rights granted under Union law" of 11 June 2013[123] is of no help and does not even touch on problems provoked by (successful!) "Musterklagen". Member State law is particularly deficient in this area as could be shown by a short look at German law after the *RWE* litigation, where the vast majority of customers is denied repayment of overcharges, and the energy company can keep its illegally gained profit by rules on prescription and "ergänzende Vertragsauslegung" developed in the case law of the BGH without ever being referred to or scrutinized by the ECJ under the principle of effective protection. But also the ECJ is drawing a debatable distinction between individual consumers and consumer organizations, which overtly overlooks that consumer organizations and business do not operate at the same level of competence and resources. After the much debated and in practice highly problematic decision in *Shearson Hutton*[124] where the ECJ held that a consumer organization to which the consumer has conferred her right, cannot rely on the jurisdictional privilege of the Brussels Convention, the ECJ in *Asociación de Consumidores*[125] deprived consumer organizations of the possibility to file an action for injunction at the place where the consumer organization has its main office. The two judgments demonstrate a lack of sensitivity to the collective dimension of consumer

123. COM(2013)3539/3.
124. Case C-89/91, *Shearson Hutton,* [1993] ECR I-00139.
125. *Asociación de Consumidores Independientes de Castilla y León,* cited *supra* note 73.

enforcement, in the Brussels regulation as well as in substantive consumer law.[126]

Concerning the legal side in the discussion of this paper, the most important hypothesis seems to be the emerging autonomous EU understanding of unfair terms legislation and imperatives of a uniform interpretation, as well as application of the UCTD in all 28 Member States. This seems to be even more surprising considering the deliberate "unclear clarity" or rather "clear unclarity" of Directive 93/13 when it was adopted. This is a topic of important legal discourse on a social contract law in the EU which has its origins in the high days of the social welfare State in the 1970s,[127] and which has now reached the European legal order, politically in the discussion on the social outlook of the Draft Common Frame of Reference[128] and, with regard to legal doctrine, in the interplay between European and national social standards of contract law. Consumer law has turned into a prominent field of conflict where the legal discourse crystallizes. It remains to be seen whether and to what extent the courts in the Member States are willing to integrate the emerging autonomous EU understanding of unfair terms legislation into their national legal systems. The incoming tide of references to the ECJ in the field demonstrates that the national courts face difficulties in getting to grips with the EU understanding.[129] Much will depend on side measures, on monitoring, on educational training, on judicial co-operation, on whether the "sleeping beauty" will remain awake or fall asleep again.

126. Stadler, "Kollektiver Rechtsschutz in Europa", (2009) JZ, 121.

127. Where private lawyers around Europe engaged in a discourse on the political side of private law; see for the US-German debate Joerges and Trubek (Eds.), *Critical Legal Thought* (Nomos, 1989); for the French discussion, see special issue on "L'École niçoise du droit économique", (2013/4) *Revue Internationale de Droit Économique*.

128. Hesselink, *CFR and Social Justice: A short study for the European Parliament* (Sellier, 2008); Brownsword et al., op. cit. *supra* note 102.

129. With regard to Spain see Iglesias Sánchez, op. cit. *supra* note 88. With regard to the situation in the Czech Republic see Tomancáková, "Consumer law regulation in the Czech Republic in the context of EU law: Theory and practice" and on Poland, Manko, "Resistance towards the Unfair Terms Directive in Poland: The interaction between the consumer acquis and a post-socialist legal culture", both in Devenney and Kenny (Eds.), *European Consumer Protection* (Cambridge University Press, 2012), pp. 397 and 412.