

## Public and Private Enforcement in the Field of Unfair Contract Terms

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**Abstract:** In 1993, the European legislator enacted the European Directive on Unfair Contract Terms in order to protect consumers from terms creating a significant imbalance between the rights and obligations of the parties to the detriment of the consumer. This article deals with (1) the non-binding nature of an unfair contract term, (2) the possibility to prevent the further use of unfair contract terms by applying for an injunction, and (3) the possibility to act in a repressive manner by imposing administrative and/or penal sanctions on sellers and suppliers using unfair contract terms.

This article will show that national courts are required by the European Court of Justice (ECJ) to invoke the unfairness of a contract term of their own motion and must draw all the consequences of that finding in order to ensure that consumers are not bound by an unfair term. Although the jurisprudence of the ECJ, mainly based on the principles of equivalence and effectiveness, reinforces consumer protection, its impact in reality may not be exaggerated. As long as the case does not lead to court proceedings, the obligation, on behalf of the national courts, to invoke of their own motion the unfairness of a contractual term is not really helpful. Since (1) consumers are in most cases not aware of (the possibility to invoke) rules on unfair contract terms and (2) consumer protection associations often have only limited financial means to apply for injunctions, private enforcement mechanisms can in themselves not realize consumer protection from unfair contract terms. Therefore, public enforcement mechanisms should also be available in order to protect consumers.

**Résumé:** En 1993, le législateur Européen a promulgué la Directive sur les clauses abusives en vue de protéger les consommateurs contre des clauses qui créent au détriment du consommateur un déséquilibre significatif entre les droits et les obligations des parties. Cet article traite 1) le caractère non-liant d'une clause abusive, 2) la possibilité d'éviter l'utilisation dans le futur d'une clause abusive par un ordre de cessation et 3) la possibilité de sanctionner l'utilisation des clauses abusives d'une manière répressive par imposer des sanctions administratives et/ou pénales sur des entreprises qui utilisent des clauses abusives dans leurs contrats avec des consommateurs.

Cet article démontre que les tribunaux nationaux sont obligés par la Cour de Justice Européenne à invoquer d'office le caractère abusif d'une clause contractuelle et d'en tirer toutes les conséquences afin de garantir que ladite clause ne lie pas les

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consommateurs. Bien que la jurisprudence de la Cour de Justice, par l'application des principes d'équivalence et d'effectivité, a renforcé la protection du consommateur, l'impact de cette jurisprudence sur le plan pratique ne peut pas être exagéré. Pour autant que l'affaire n'est pas portée devant le tribunal, l'obligation d'invoquer d'office le caractère abusif d'une clause contractuelle ne peut pas aider le consommateur. Comme 1) dans la plupart des cas, les consommateurs ne connaissent pas les règles concernant les clauses abusives et 2) des organisations de protection des consommateurs ne disposent que des fonds limités à exiger la cessation de l'utilisation d'une clause abusive, les mécanismes de droit privé de mise en œuvre ne suffisent pas à protéger les consommateurs contre des clauses abusives. Par ces motifs, des mécanismes publics de mise en œuvre doivent être disponibles à lutter contre les clauses abusives.

## 1. Introduction

Standard terms are widely used by sellers and suppliers in their relations with consumers. These terms are drafted in advance by or on behalf of these companies, consumers not being able to influence their content. The weak position in which consumers find themselves creates the risk that the terms that are incorporated in the contract are (far too) detrimental to them. Therefore, the European legislator enacted a European Directive<sup>1</sup> that aims at protecting consumers against unfair contract terms – the Unfair Contract Terms Directive (UCTD). After a brief discussion of the concept of an *unfair* contractual term – in particular in the context of some recent judgments of the European Court of Justice (ECJ) – this article will focus on the private and public enforcement mechanisms available to tackle unfair contract terms.

More specifically, attention will be paid to (1) the *non-binding nature of an unfair contract term* (and in particular to the jurisprudence developed by the ECJ in this regard), (2) the possibility (on behalf of among others consumer protection authorities) to *prevent the further use of unfair contract terms* by applying for an injunction,<sup>2</sup> and (3) the possibility to act in a repressive manner by imposing administrative and/or penal sanctions on sellers and suppliers using unfair contract terms. Although the emphasis will be laid on the enforcement mechanisms that are available under Belgian law, references will occasionally also be made to French and German law.

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1 Council Directive 93/13/EEC of 5 Apr. 1993 on unfair terms in consumer contracts, *OJL* 21 Apr. 1993, 95/29 (hereinafter UCTD).

2 An injunction can be described as a cease and desist order, issued by a court or other public body, whereby a court or body orders a party to stop a certain practice: F. CAFAGGI & S. LAW, 'Unfair Contract Terms – Effect of Collective Proceedings', *Landmark Cases of EU Consumer Law. In honour of Jules Stuyck* (Cambridge: Intersentia 2013), p 661. Generally, the injunction itself does not provide compensation for individual consumers.

## 2. The Concept of an Unfair Contract Term: A Brief Introduction in the Light of Recent Case Law of the ECJ

The UCTD determines that a contractual term *which has not been individually negotiated* must be regarded as unfair if, *contrary to the requirement of good faith*, it causes *a significant imbalance in the parties' rights and obligations* arising under the contract, to the detriment of the consumer (Art. 3)

The ECJ does not itself assess the unfairness of a contractual term. It is the task of the referring court to determine whether a particular term is unfair in the light of the circumstances of the case. However, this does not mean that the ECJ doesn't play a role at all. More specifically, the ECJ can interpret general criteria that are used by the EU legislature in order to define the concept of an unfair term and therefore provide the criteria that may or must be taken into account by the referring court when determining the unfairness of a term.<sup>3</sup> In other words, the ECJ limits itself to providing the referring court with guidance that the latter must take into account in order to assess whether the term at issue is unfair.<sup>4</sup>

The ECJ has recently stressed in *Aziz* that, in referring to concepts of good faith and significant imbalance in the parties' rights and obligations arising under the contract, the UCTD merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated. In order to ascertain whether a term causes a significant imbalance, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis enables the national court to evaluate whether and, as the case may be, to what extent the contract places the consumer in a legal situation less favourable than that provided for by the national law in force.<sup>5</sup>

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- 3 ECJ 14 Nov. 2013, Case C-537/12 and C-116/13, *Banco Popular Español v. Maria Teodolinda Rivas Quichimbo* and *Banco de Valencia v. Joaquín Valldeperas Tortosa*; ECJ 21 Mar. 2013, Case C-92/11, *RWE Vertrieb v. Verbraucherzentrale Nordrhein-Westfalen*; ECJ 26 Apr. 2012, Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési*; ECJ 16 Nov. 2010, Case C-76/10, *Photovost s.r.o. v. Iveta Korckovska*; M. BOTTINO, 'Arrêt Invitel: l'effet ultra partes des clauses déclarées abusives', *REDC (Revue Européenne de Droit de la Consommation)* 2012, p 590; N. GAVRILOVIC, 'The Unfair Contract Terms Directive through the Practice of the Court of Justice of the European Union: Interpretation or Something More?', *ERCL (European Review of Contract Law)* 2013, p 176.
  - 4 E. TERRY, 'Unfair Contract Terms – Statutory Provisions, Price Increase Terms and the Role of the CJEU', *Landmark Cases of EU Consumer Law. In honour of Jules Stuyck* (Cambridge: Intersentia 2013), p 699.
  - 5 ECJ 14 Mar. 2013, Case C-415/11, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya*; ECJ 16 Jan. 2014, Case C-226/12, *Constructora Principado v. José Ignacio Menéndez Álvarez*. See on *Aziz* also: S. MORACCINI-ZEIDENBERG, 'Clauses abusives: précisions procédurales et matérielles de la CJEU', *La Semaine Juridique Entreprise et Affaires* 2013, p 1331; V. MICHEL, 'Clause abusives', *Semaine juridique. Europe* 2013, p 228; H.W. MICKLITZ, 'Unfair Contract Terms – Public Interest

Once this comparison has taken place, the national court must, in order to assess whether such imbalance arises ‘contrary to the requirement of good faith’, determine whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in *individual* contract negotiations.<sup>6</sup> Basically this means that a trader cannot simply pursue his own interests of contractual efficiency against the legitimate expectations of the consumer. The trader must, in contract situations where there has been no individual negotiation, take reasonable account of the consumer’s ability to bargain.<sup>7</sup>

In the application of the fairness test, default provisions of national law seem to be the major reference point for the ECJ.<sup>8</sup> However, other elements must also be taken into account when assessing whether a contractual term is unfair.<sup>9</sup> Article 4 of the UCTD itself determines that the unfairness of a contractual term must be assessed taking into account *the nature of the goods or services* for which the contract was concluded and by referring, at the time of conclusion of the contract, to *all the circumstances attending the conclusion of the contract* and to all the other *terms of the contract*<sup>10</sup> or of another contract on which it is dependent.<sup>11</sup>

The ECJ’s case law has shown that other elements will also play a role. Next to the criteria mentioned in Article 4 of the UCTD, the conclusion that a commercial practice is unfair<sup>12</sup> and the fact that a contractual term does not inform the consumer in plain and intelligible language on his rights<sup>13</sup> are

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Litigation before European Courts’, *Landmark Cases of EU Consumer Protection Law. In honour of Jules Stuyck* (Cambridge: Intersentia 2013), p 633.

6 ECJ 14 Mar. 2013, *Mohamed Aziz*, *supra* n. 5, para. 16.

7 H.W. MICKLITZ & N. REICH, ‘The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)’, *CMLR (Common Market Law Review)* 2014, p 788.

8 H.W. MICKLITZ, ‘Unfair Contract Terms – Public Interest Litigation before European Courts’, *Landmark Cases of EU Consumer Protection Law*, p 644.

9 H.W. MICKLITZ & N. REICH, ‘The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)’, *CMLR* 2014, p 791.

10 See in particular: ECJ 21 Feb. 2013, Case C-472/11, *Banif Plus Bank Zrt v. Csipai*, where the Court decided that the national court *must* take into account all other terms of the contract. See also ECJ 21 Mar. 2013, Case C-92/11, *RWE*, *supra* n. 3.

11 See for example ECJ 4 Jun. 2009, Case C-243/08, *Pannon GSM v. Erzsebet Sustikné Györfi*; ECJ 16 Jan. 2014, Case C-226/12, *Constructora Principado*, *supra* n. 5.

12 ECJ 15 Mar. 2012, Case C-453/10, *Perenicova v. SOS*. See also H. JACQUEMIN, ‘Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU’, *ERPL (European Review of Private Law)* 2013, pp 581–584; B. KEIRSBILCK, ‘The Interaction between Consumer Protection Rules on Unfair Contract Terms and Unfair Commercial Practices: Perenicova and Perenic’, *CMLR* 2013, pp 247–264; H.W. MICKLITZ & B. KAS, ‘Overview of Cases before the CJEU on European Consumer Contract Law (2008–2013)’, *ERCL* 2014, pp 13–15.

13 ECJ 21 Mar. 2013, Case C-92/11, *RWE*, *supra* n. 3; ECJ 26 Apr. 2012, Case C-472/10, *Nemzeti*, *supra* n. 3. See also M. MEISTER, ‘Protection des consommateurs’, *Semaine Juridique. Editions*

elements among others on which the competent court may base its assessment of the unfairness of a contractual term.

Finally, the ECJ, when providing criteria to the national courts for the assessment of the unfairness of contractual terms, has frequently referred to the annex to the UCTD, which contains a non-exhaustive list of the terms which may be regarded as unfair. Although the ECJ has stated on several occasions that this list has only an indicative nature,<sup>14</sup> it also stressed – for example in *Invitel* – that it is *an essential element* on which the competent court may base its assessment as to the unfair nature of that term.<sup>15</sup> In other words, the mere fact that a contractual term can be found in the annex of the UCTD does not suffice in itself to establish automatically the unfair nature of a contested term but is nevertheless an important element to be taken into account by the national court in its assessment.

In this context it is important to emphasize that many Member States, when implementing the UCTD, have gone beyond the Directive,<sup>16</sup> for example, by inserting a black list of terms that must always be regarded as unfair and/or a grey list of terms that are presumed to be unfair (grey list).<sup>17</sup> This will, of course, have an important impact on the analysis of the unfairness of contractual terms by the national courts of these Member States. Once the court finds that a contractual term is prohibited by the black list of contractual terms, no further analysis is necessary. The term is automatically unfair.

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*Générales* 2013, p 227; E. TERRY, ‘Unfair Contract Terms – Statutory Provisions, Price Increase Terms and the Role of the CJEU’, *Landmark Cases of EU Consumer Law*, p 693.

14 ECJ 4 Jun. 2009, Case C-243/08, *Pannon*, *supra* n. 11; ECJ 14 Mar. 2013, Case C-415/11, *Mohamed Aziz*, *supra* n. 5.

15 ECJ 26 Apr. 2012, Case C-472/10, *Nemzeti*, *supra* n. 3. See also ECJ 30 May 2013, Case C-488/11, *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v. Jahani*; E. TERRY, ‘Unfair Contract Terms – Statutory Provisions, Price Increase Terms and the Role of the CJEU’, *Landmark Cases of EU Consumer Law*, pp 694–695.

16 Since the Directive is based on the principle of minimum harmonization (Art. 8), national legislators retained the possibility to offer additional protection to consumers: see e.g., ECJ 15 Mar. 2012, Case C-453/10, *Perenicova*, *supra* n. 12; J. STUYCK, ‘Case C-243/08, *Pannon GSM Zrt. V. Erzsébet Sustikné Györfi* and Case C-40/08, ‘*Asturcom Telecomunicaciones SL v. Maria Cristiba Rodriguez Nogueira*’, *CMLR* 2010, p 881; R. TAMAS, ‘Arrêt Caja de Madrid: L’extension indirecte de la protection des consommateurs en matière de clauses abusives’, *REDC* 2011, pp 407–408.

17 For example: Belgium (black list in Art. VI. 83 Code of Economic Law), Germany (black and grey list in ss 308–309 *Bürgerliches Gesetzbuch*), the Netherlands (black and grey list in Arts 236 and 237 of Book 6 of the Civil Code). The same approach, using a black and a grey list, has been used in the proposal for a Common European Sales Law (Arts 84 and 85 CESL).

### 3. Private and Public Enforcement Mechanisms

#### 3.1. Three Categories of Enforcement Mechanisms

Enforcement in the field of unfair contract terms can take place in many different ways. In general, three important categories of enforcement mechanisms must be distinguished:

- civil remedies in the individual relation between a seller or supplier on the one hand and a consumer on the other hand, which ensure that an unfair contract term *does not bind the consumer* (private enforcement);
- remedies preventing the further use of unfair contract terms (private or public enforcement, depending on the identity of the entity applying for an injunction (e.g., private consumer protection associations versus governmental protection authorities));
- administrative and/or penal sanctions for the use of unfair contract terms (public enforcement).

#### 3.2. The Provisions on Enforcement Mechanisms Incorporated in the UCTD

The UCTD itself contains several provisions regarding the enforcement mechanisms that must *at least* be available in each Member State.

##### 3.2.1. The Non-binding Nature of Unfair Contractual Terms in the Relation between Traders and Consumers

First, Member States must ensure that unfair terms used in a contract concluded with a consumer by a seller or supplier are *not binding* on the consumer (Art. 6(1) UCTD).<sup>18</sup> The ECJ has repeatedly stated that Article 6(1) of the UCTD is a mandatory provision that 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.<sup>19</sup> It must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.<sup>20</sup>

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18 The proposal for a Common European Sales Law (CESL) also determines that an unfair contract term is not binding (Art. 79).

19 ECJ 26 Oct. 2006, Case C-168/05, *Mostaza Claro v. Centro Movil Milenium*; ECJ 15 Mar. 2012, Case C-453/10, *Perenicova*, *supra* n. 12; ECJ 17 Jul. 2014, Case C-169/14, *Juan Carlos Sánchez Morcilo and Maria del Carmen Abril Garcia v. Banco Bilbao Vizcaya Argentaria*.

20 ECJ 6 Oct. 2009, Case C-40/08, *Asturcom Telecomunicaciones v. Christina Rodriguez Nogueira*. See also J. STUYCK, 'Case C-243/08, Pannon GSM Zrt. V. Erzsébet Sustikné Györfi and Case C-40/08, Asturcom Telecomunicaciones SL v. Maria Cristiba Rodriguez Nogueira', *CMLR* 2010, pp 891-892.

We will come back to the exact meaning of the ‘non-binding’ nature of a contract term in section III of this article but would like to emphasize already that the contract itself must remain binding upon the parties insofar the contract is capable of continuing in existence without the unfair terms (Art. 6(1) UCTD).

### 3.2.2. *The Prevention of the Continued Use of Unfair Contract Terms*

Secondly, Member States must ensure that, in the interests of *consumers and of competitors*, adequate and effective means exist to *prevent the continued use* of unfair terms in contracts concluded with consumers by sellers or suppliers (Art. 7.1 UCTD). Persons or organizations, having a legitimate interest under national law in protecting *consumers*, must be able to take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply *appropriate and effective means* to prevent the continued use of such terms (Art. 7.2 UCTD). These remedies may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations that use or recommend the use of the same general contractual terms or similar terms (Art. 7.3 UCTD).

The further use of an unfair contract term can be prevented by offering the possibility to apply for an *injunction* to one or more entities, such as consumers, consumer protection associations, competing sellers, organizations that represent sellers or suppliers (in a specific sector), and national consumer protection authorities. Whereas consumer protection associations and national protection authorities, entrusted with the supervision of the rules on unfair contract terms, mainly act in order to protect consumers, competing sellers will act in order to preserve their own interests. Organizations representing businesses will mainly act to preserve the interest of their members. However, an injunction applied for by a competing seller or organization representing sellers or suppliers will also contribute indirectly to the protection of consumers.

The possibility for actions preventing the further use of unfair contract terms is considered important because of their deterrent nature and dissuasive purpose. Their deterrent and dissuasive nature and their independence of any particular dispute mean – according to the ECJ – that such actions may be brought before the courts or competent administrative bodies even though the terms that are sought to have been prohibited have not been used in specific contracts.<sup>21</sup>

In *Invitel*, the ECJ had to deal with an action against a price increase term brought in the public interest by the Hungarian national protection authority. More specifically, the ECJ had to determine whether the Hungarian legislation

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21 ECJ 27 Feb. 2014, Case C-470/12, *Photovost*, *supra* n. 3; ECJ 26 Apr. 2012, Case C-472/10, *Nemzeti*, *supra* n. 3.



that implied that an injunction produces effects with regard to all consumers who have concluded a contract with that seller, including those who were not party to the proceedings for an injunction, was compatible with Articles 6 and 7 of the UCTD.

The ECJ decides in *Invitel* that the application of a penalty of invalidity of a contractual term *with regard to all consumers who have concluded a consumer contract to which the same general business terms apply* constitutes an effective means of consumer protection, since it ensures that consumers will not be bound by that term. However, the ECJ also emphasizes that this finding does not exclude the application of other adequate and effective means provided for by national legislation.<sup>22</sup> Article 7 of the UCTD does not harmonize the penalties applicable when a contract term is considered unfair in the context of a public interest procedure. It is up to the Member States to decide which procedures they elaborate and sanctions they provide to prevent the further use of an unfair contract term, the only requirement being that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers. Nevertheless, the ECJ sets the minimum standard in *Invitel*, since it determines explicitly that adequate and effective means are to include the possibility for persons and for organizations having a legitimate interest under national law to take action in order to obtain a judicial decision as to whether the contract terms drawn up for general use are unfair and where appropriate to have them prohibited.<sup>23</sup> Moreover, as will be discussed in more detail below, terms that are found to be unfair in an action for an injunction may not be binding on 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 general business conditions apply*.

In this context, it is also worth mentioning that the UCTD does not contain any provisions enabling the identification of the court which is to have territorial jurisdiction to hear actions for an injunction to prevent the continued use of unfair contractual terms *brought by consumer protection associations*.<sup>24</sup> In *ACICL*, the Spanish Consumer Protection Association (ACICL) argued that the fact that it had to apply for an injunction before the court where the defendant (i.e. the seller or supplier using unfair contract terms) is established or has his address could give rise to considerable difficulties for the consumer protection association. More specifically, ACICL argued that this rule might make it

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22 ECJ 26 Apr. 2012, Case C-472/10, *Nemzeti*, *supra* n. 3.

23 ECJ 26 Apr. 2012, Case C-472/10, *Nemzeti*, *supra* n. 3.

24 Also it does not regulate the question of the number of instances of jurisdiction in respect of decisions declining territorial jurisdiction in such a scenario. In the absence of Community legislation, it is up to the Member States to establish such rules, provided that these rules meet the requirements set by the principles of equivalence and effectiveness.



necessary to abandon the action on financial grounds as a result of the geographical distance to the court having jurisdiction.

The ECJ did not follow this reasoning. The ECJ argued that the difficulties that ACICL experienced were rather connected to the consumer association's financial situation than to the procedural rules.<sup>25</sup> What is interesting also is the fact that the ECJ stresses that a consumer protection association is not in an inferior position vis-à-vis the seller or supplier.<sup>26</sup> The imbalance which exists in the relation between a seller or supplier and a consumer is not present in the relation between a seller or supplier and a consumer protection association. Therefore, the principle of effectiveness does not preclude a provision implying that a consumer protection association must bring an injunction before the court of the defendant's establishment.<sup>27</sup>

### 3.2.3. *Administrative and Penal Sanctions*

The UCTD does not oblige Member States to impose administrative or penal sanctions on sellers and suppliers using unfair contract terms. It focuses on private enforcement mechanisms, rather than public enforcement mechanisms. However, it is clear that the UCTD does not prevent Member States from introducing (proportionate) administrative or penal sanctions.

### 3.2.4. *Assistance of Consumer Protection Associations in Individual Disputes*

It is interesting to mention that the UCTD does not contain any provisions governing the role that may or must be accorded to consumer protection associations in individual disputes involving a consumer. Therefore, the UCTD does not govern whether such associations must be entitled to intervene in support of consumers in such individual disputes. It is up to the national legislator to determine whether or not consumer protection associations are allowed to intervene in individual disputes, the only precondition being that those rules meet the requirements of the principle of equivalence and the principle of effectiveness, the latter meaning that national rules may not make it excessively

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25 ECJ 5 Dec. 2013, Case C-413/12, *Asociación de Consumidores Independientes de Castilla y León v. Anuntis Segundamano España*.

26 See also D. BERLIN, 'Une association de défense des consommateurs n'est pas un consommateur', *La Semaine Juridique. Editions Générales* 2013, p 1353.

27 See also H.W. MICKLITZ & B. KAS, 'Overview of Cases before the CJEU on European Consumer Contract Law (2008-2013)', *ERCL* 2014, p 36, who argue that the distinction between individual consumers and consumer protection associations is debatable, since consumer protection associations often do not have the same level of resources and competence as businesses. They also argue that the answer of the ECJ could have been different in the case of a cross-border procedure.

difficult or impossible in practice to exercise the rights conferred by European Union law. More specifically, the ECJ argued that national legislation which does not allow a consumer protection association to intervene in support of a consumer in proceedings for enforcement, against the latter, of a final arbitration award is not incompatible with the UCTD.<sup>28</sup>

#### **4. Private Enforcement: The Non-binding Nature of Unfair Contract Terms**

According to the UCTD, unfair contract terms cannot bind the consumer. In this section, several questions will be dealt with. What is exactly the meaning of ‘not-binding’? To what extent is it necessary for national courts to invoke of their own motion the unfairness of a term and which consequences must be given to that unfair term? What is the impact of an unfair contract term on the contract in which this term has been incorporated?

##### **4.1. *The Non-binding Nature of an Unfair Contract Term***

As already mentioned, unfair contract terms cannot bind consumer (Art. 6 UCTD). But what does this exactly mean? The European legislator has deliberately chosen for a vague concept and it is up to the Member States to determine the exact legal consequences of an unfair contract term.<sup>29</sup>

In determining the characteristics which a national remedy implementing Article 6(1) of the UCTD must have, reference is often made to the criteria developed by Tenreiro, who was involved in the drafting of the UCTD. According to Tenreiro, the civil remedy chosen by the Member States must comply with five requirements in order to meet the objectives of Article 6(1) of the UCTD:<sup>30</sup>

- the consumer must be able to refuse to honour the obligations imposed by an unfair term, *without the need of a previous judicial declaration of unfairness*;
- the consumer must be able to invoke the unfairness of a term *at any time* from the conclusion of the contract;

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28 ECJ 27 Feb. 2014, Case C-470/12, *Photovost*, *supra* n. 4. See also H.W. MICKLITZ & B. KAS, ‘Overview of Cases before the CJEU on European Consumer Contract Law (2008-2013)’, *ERCL* 2014, pp 38-40.

29 F. CAFAGGI & S. LAW, ‘Unfair Contract Terms – Effect of Collective Proceedings’, *Landmark Cases of EU Consumer Law. In honour of Jules Stuyck*, p 669; H.-W. MICKLITZ, J. STUYCK & E. TERRYIN (eds), *Cases, Materials and Text on Consumer Law* (Portland: Hart Publishing 2010), p 299; P. NEBBIA, ‘Unfair Contract Terms’, *European Union Private Law* (Cambridge: Cambridge University Press 2010), p 225.

30 M. TENREIRO, ‘The Community Directive on Unfair Terms and National Legal Systems. The Principle of Good Faith and Remedies for Unfair Terms’, *ERPL* 1995, p 282.

- the courts must be obliged to invoke this remedy *of their own motion*, without any need for special demand from the consumer;
- the consequences of a declaration of unfairness must go back to the beginning of the performance of the contract by the parties (*ex tunc*);
- the consumer *cannot give up his right* to invoke the unfairness of a term.

Looking more closely at the law of some Member States, it immediately becomes clear that different approaches have been used.

Whereas some Member States determine that unfair contract terms must be considered not written (*non-écrites*) (e.g., France (Art. L-132-1 *Code de la Consommation*)) or having no effect (*unwirksam*) (e.g., Germany (§306 BGB)), other Member States determine that unfair contract terms are *null and void* (e.g., Belgium, Art. VI. 84 §1 Code of Economic Law) or *voidable* (the Netherlands, Art. 233a of Book 6 *Civil Code*). Within the category of nullity, a distinction is made between the so-called absolute nullity and the relative nullity (e.g., Belgium<sup>31</sup>). Where absolute nullity implies that an unfair contract term is automatically considered null and void, the consumer needs to invoke the nullity in the case of a relative nullity.

Finally, some Member States had chosen for a more flexible approach, entitling the court not only to declare an unfair term null and void but also to alter or amend the term, or even the contract, in the light of the particular circumstances (e.g., Denmark, Spain).

It is clear that the objectives of Article 6(1) of the UCTD are realized when the national legislation implies that unfair contract terms have no effect at all, since this implies that the seller will not be able to rely on the unfair contract term in its relation to the consumer.<sup>32</sup>

Whether the relative nullity, as it exists for example in Belgium, is compatible with Article 6(1) of the UCTD is less clear. In the past, it has been argued that a relative nullity would not allow the court to invoke this nullity of its own motion, which would render this remedy not only contrary to the Tenreiro criteria, but also to the ECJ's jurisprudence discussed below (see B, 2). However, this argument is not very convincing (anymore), since the Court of Cassation has clearly stated in 2005 that, in addition to rules of public order, mandatory rules

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31 In Belgium, it was for a long time unclear whether the rules on unfair contract terms were 'simply' mandatory rules or rules of public order. In the meantime, a decision of the Court of Cassation has made it clear that the rules on unfair contract terms are in principle mandatory provisions, their violation leading to relative nullity: Cass. 26 May 2005, *Pasicrisie* 2005, p 1115.

32 See also H. JACQUEMIN, 'Procedural aspects of European Consumer Protection Law and the Case Law of the CJEU', *ERPL* 2013, p 577.

also need to be invoked by the courts of their own motion.<sup>33</sup> The main problem therefore seems to be that the relative nullity, according to Belgian law, is a remedy that needs to be decided by the court.<sup>34</sup> In absence of such a decision, the *voidable* clause persists. Therefore, Belgian consumers would not be able to invoke the nullity of an unfair contract term outside a court procedure, which is clearly incompatible with the Tenreiro criteria. Although the ECJ has not yet explicitly decided on the question whether Article 6(1) of the UCTD actually requires that consumers can invoke the non-binding nature of an unfair contract term outside court proceedings, it is highly likely that the ECJ will argue that consumers should be able to do so. Therefore, the Belgian legislator had better determined that unfair contract terms cannot have any effect.

The case law of the ECJ has made it clear that the ‘flexible approach’ entitling the court to amend or alter the unfair contractual term is not compatible with the UCTD. In *Banco Español*, the ECJ decided that Article 6 UCTD precludes national legislation which allows a national court, in the case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to *modify that contract by revising the content of that term*.<sup>35</sup> The same reasoning can be found in *Brusse*. In that case, the national court reduced the amount of the penalty clause, which was considered unfair. The ECJ however stated that Article 6 of the UCTD does not allow the national court to do so. On the contrary, the national court is required to *exclude the application of that clause in its entirety* with regard to the consumer.<sup>36</sup> The contract must continue in existence, in principle, without any other amendment than the deletion of the unfair term.

The same reasoning can be found in the recent joined cases *Unicaja Banco* and *Caixabank*.<sup>37</sup> These cases related to the Spanish law on mortgages determining that default interests on loans or credits for the purchase of a habitual dwelling, secured by mortgages charged on the dwelling in question, may

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33 Cass. 14 Apr. 2005, *Pasicrisie* 2005, p 862. Even before this judgment several scholars argued that courts needed to invoke mandatory rules of their own motion. *Contra* (in Dutch): E. KRINGS & B. DE CONINCK, ‘Het ambsthalfve aanvullen van rechtsgronden’, *TPR (Tijdschrift voor privaatrecht)* 1982, pp 675–676.

34 On this issue, see (in French) E. SWAENEPOEL, S. STIJNS & P. WÉRY, ‘Onrechtmatige bedingen – Clauses abusives’, *DCCR (Droit de la consommation – Consumentenrecht)* 2009, pp 193–194. See also *inter al.* (in Dutch) I. CLAEYS, ‘Nietigheid van contractuele verbintenissen in beweging’, *Sancties en nietigheden* (Brussel: Larcier 2003), pp 267 and 269; S. STIJNS, ‘Zijn onrechtmatige bedingen nietig?’, *Liber Amicorum Yvette Merchiers* (Brugge: die Keure 2001), pp 921–946.

35 ECJ 14 Jul. 2012, Case C-618/10, *Banco Español*, *supra* n. 3. See also P. ROTH, ‘The Adjustment of Long-Term Supply Contracts: Experience from German Gas Price Case Law’, *ERPL* 2013, p 740.

36 ECJ 30 May 2013, Case C-488/11, *Asbeek Brusse*, *supra* n. 15.

37 ECJ 21 Jan. 2015, Cases C-482/13 and C-484/13 C-487/13, *Unicaja Banco v. José Hidalgo Rueda a.o. and Caixabank v. Manuel Maria Rueda Ledesma a.o.*

not be more than three times the statutory rate of interest (and may accrue only on the outstanding principal). If that ceiling is exceeded, the default interest rate must be adjusted so that it falls within the statutory limit. The ECJ had to answer the question whether the obligation to *adjust* the default interest rate was contrary to the UCTD. The ECJ decides that it is not; insofar the national courts are not only obliged to reduce the default rate of interest, which is more than three times the statutory rate of interest, but must also examine whether the agreed default interest rate – independent of being three times higher than the statutory interest rate – is unfair in the meaning of the UCTD. If the agreed default interest rate is to be considered unfair, the court must remove the term instead of adjusting it.

In all these cases, the obligation to remove the unfair term is justified by the objective of the UCTD. If a national court would be able to revise the content of an unfair contract term, this would weaken the dissuasive effect on sellers and suppliers of the straightforward non-application of those unfair terms. This in turn could compromise the attainment of the long-term objectives of the UCTD. Indeed, the possibility to revise the content of unfair contract terms would imply that suppliers can use unfair terms without any risk.

In Germany, the ECJ's judgments in *Banco Español* and *Brusse* have led to the question whether the jurisprudence of the German Supreme Court in civil matters (*Bundesgerichtshof* (BGH)), using the theory of supplementary interpretation of the contract ('*ergänzende Vertragsauslegung*') can be upheld. This theory has been used by the BGH to modify contested clauses to the hypothetical will of the parties. More specifically, the BGH has used this approach when the nullity of the unfair clause would lead to unacceptable economic consequences for the supplier, for example, in long-term insurance and energy supply contracts.<sup>38</sup> Micklitz and Reich have argued convincingly that this theory is contrary to the ECJ's jurisprudence, since it does what the ECJ has forbidden explicitly: amending the contract. Moreover, the application of this theory would allow suppliers to use an unfair term without incurring any risk by relying on the courts to modify it to an acceptable level under an alleged hypothetical will of the parties.<sup>39</sup>

Finally, the question arises whether the supplier, after the deletion of the unfair term, still has the possibility to invoke supplementary provisions of national law. For example, if a penalty clause is unfair and is therefore deleted

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38 Bundesgerichtshof 14 Mar. 2012, *NJW* (*Neue Juristische Wochenschrift*) 2012, p 1865; Bundesgerichtshof 23 Jan. 2013, *NJW* 2013, p 991. See also: H.W. MICKLITZ & N. REICH, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *CMLR* 2014, p 793.

39 H.W. MICKLITZ & N. REICH, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *CMLR* 2014, p 793.

from the contract, will the supplier still be entitled to a compensation on the basis of supplementary provisions of national law (e.g., incorporated in the civil code)?

In *Kásler*,<sup>40</sup> the ECJ argues that Article 6(1) of the UCTD does not preclude the national court, in accordance with the principles of the law of contract, from substituting the unfair term by a supplementary provision of national law.<sup>41</sup> The situation was, however, specific, since the mere deletion of the unfair contract term would have led to the annulment of the contract (in this case a loan) in its entirety, which would have been to the detriment of the consumer.

Whereas the ECJ's decision in *Kásler* clearly implies that the substitution of an unfair term by a supplementary provision of national law is possible if the mere deletion, without replacement, would be contrary to the consumer's interests, it does not deal with the situation where the replacement of the unfair term by a supplementary provision is in the supplier's interest. Neither *Banco Espanol* or *Brusse* precluded explicitly the national courts from applying supplementary provisions of national law after the deletion of the unfair term.<sup>42</sup> The only thing the ECJ prohibited was for the national court to amend or alter the term (or the contract), for example, to an acceptable level or the hypothetical will of the parties. In *Unicaja Banco* and *Caixabank*<sup>43</sup> however, the ECJ states that the possibility for the national court of substituting a supplementary provision of national law for an unfair term is *limited* to cases in which the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to disadvantageous consequences. By arguing so, the ECJ seems to make it impossible for the national courts to apply supplementary provisions of national law in the event where a contractual term has been considered unfair and the deletion of the unfair term does not lead to the annulment of the contract.

Let me illustrate this point by using the example of the Belgian rules on penalty clauses. In the case of an unfair penalty clause (e.g., a penalty clause of 30% of the contract price for late payment), *Brusse* already made it clear that the national court did not have the possibility to amend the penalty clause, for example, by reducing the penalty to what would have been acceptable in the

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40 ECJ 30 Apr. 2014, Case C-26/13, *Árpád Kásler and Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt.*

41 D. BERLIN, 'Obscurité des clauses contractuelles . . . et de la directive', *La Semaine Juridique. Editions générales* 2014, p 564.

42 Of course, it is possible that no supplementary provisions of national law are available. For example, if a price adjustment clause would be declared invalid in Belgium and therefore deleted from the contract, there are no supplementary provisions in the Civil Code adjusting the price to be paid. Therefore, the supplier will simply not be entitled to a higher price.

43 ECJ 21 Jan. 2015, Case C-482/13 and C-484/13-487/13, *Unicaja Banco* and *Caixabank*, *supra* n. 37.

circumstances of the case (e.g., 10% of the contract price). However, as was also accepted in Belgian jurisprudence, it seemed that the seller or supplier retained the possibility to claim compensation on the basis of supplementary provisions of national law *applying in the absence of any contractual term* relating to the compensation to be paid in the case of late payment.<sup>44</sup> In *Unicaja Banco* and *Caixabank*, the ECJ seems to make the use of supplementary provisions of national law in such situations impossible.

## **4.2. The Obligation for the National Courts to Invoke the Unfairness of a Contract Term of Their Own Motion and to Ensure the Consumer Is Not Bound by It**

### **4.2.1. The Very Beginning of the Ex officio Doctrine: Océano Grupo**

In *Océano Grupo*,<sup>45</sup> the ECJ had to determine for the first time whether a national court may determine of its own motion whether the term of a contract is unfair. Since the arguments of ECJ have been repeated in many other cases relating to the UCTD, it is useful to cite them. More specifically, the ECJ argues that:

*‘The system of protection introduced by the UCTD 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. The consumer agrees to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms’.*

*‘The aim of Article 6 of the UCTD would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers’ fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion’.*

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44 More specifically, the supplier or seller in Belgium would still be entitled to interests for late payment at the rate of the statutory interest (at the moment 2.25%) (Art. 1153 of the Civil Code): Ghent 4 Jan. 2012, *NjW* (*Nieuw Juridisch Weekblad*) 2012, p 70.

45 ECJ 27 Jun. 2000, Cases C-240/98 to 244/98, *Océano Grupo Editorial v. Rocío Murciano Quintero* and *Salvat Editores v. José M. Sánchez Alcón Prades* *ao*.



*'The system of protection laid down by the Directive is based on the notion that the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract'.*

Although this decision made it crystal clear that national courts have the power to invoke the unfairness of a jurisdiction clause of their own motion, the ECJ's decision raised several questions, including:

- Do the national courts have the mere possibility to invoke the unfairness of a contract term, or are they required to do so<sup>46</sup>? And if so, what courts are?
- Is the impact of the ECJ's decision limited to jurisdiction clauses or does the same reasoning apply to other unfair contract terms?
- Can the consumer decide not to invoke the unfairness of a contract term?

Other questions remained, such as:

- Are national procedural rules, preventing that the unfairness of a contractual term is invoked ex officio, compatible with the UCTD?
- What are the exact consequences of the finding that a contract term is unfair?

#### 4.2.2. *Obligation to Invoke the Unfairness of All Kinds of Contract Terms Ex officio*

In the meantime, the ECJ's jurisprudence has made it clear that the national courts do not only have the power to invoke the unfairness of a term ex officio but also have an obligation to do so. This finding does not only apply to jurisdiction clauses but to all kinds of unfair contract terms, including, for example, penalty clauses and price adjustment clauses.

It was in *Mostaza Claro* and *Pannon* that it became clear that a national court *is actually required* to invoke the unfairness of a contract term of its own motion.<sup>47</sup> This requirement is justified by the ECJ on the basis of the nature and

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46 M. EBERS, 'From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Law and Res Judicata', *ERPL* 2010, p 829.

47 ECJ 4 Jun. 2009, Case C-243/08, *Pannon*, *supra* n. 11; ECJ 26 Oct. 2006, Case C-168/05, *Mostaza Claro*, *supra* n. 19; A. ANCERY & M. WISSINK, 'ECJ 4 June 2009, Pannon GS Zrt. V. Erzsébet Sustikné Györfi', *ERPL* 2010, p 308; C. CHENEVIÈRE, 'Arrêts Pannon et Asturcom: Le caractère abusive des clauses attributives de compétence dans la lignée de la jurisprudence Oceano', *REDC* 2010, p 354; M. EBERS, 'From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Law and Res Judicata', *ERPL* 2010, p 830; J. STUYCK, 'Case

importance of the public interest underlying the protection offered by the UCTD. Only if national courts are actually obliged to invoke the unfairness of a contractual term *ex officio*, it will be possible to compensate the imbalance that exists between the consumer, on the one hand, and the seller or supplier, on the other hand. Although *Pannon* related to a jurisdiction clause, the wording of the ECJ's decision already clarified that the unfairness of *any* contractual term needs to be invoked by the national court of its own motion. In later cases, the ECJ has explicitly acknowledged this, for example, by applying this obligation to penalty clauses.<sup>48</sup>

*Pannon* made it also clear that the national court must test the unfairness of a term, even if a consumer does not invoke the protection that is offered to him on the basis of the UCTD. It is not necessary that the consumer has successfully contested the validity of such a term beforehand.<sup>49</sup> Even when principles of national procedural law imply that the court must remain passive (judicial passivity), the court must do so and therefore go beyond the ambit of the dispute.<sup>50</sup>

The requirement to invoke the unfairness of a contractual term exists regardless of the consumer's presence before the court.<sup>51</sup> Even when the consumer is not present, the national court is required to invoke the unfairness of the term of its own motion. In addition, the fact that a consumer is represented by a lawyer, not being familiar with the rules on unfair contract terms and therefore not invoking the unfairness of the term, does not exempt the national court from the obligation to invoke of its own motion the unfairness of the contractual term. The protection of the consumer's interest prevails.

According to the ECJ's jurisprudence, the national court is (only) obliged to invoke the unfairness of a term *ex officio* when the legal and factual elements necessary for that task are available to it. The wording of the ECJ makes it clear that the national court is certainly not limited in its inquiry to the facts that are explicitly brought forward by the litigating parties. The court needs to take into account all factual information that is available to it, either because it can be

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C-243/08, *Pannon GSM Zrt. V. Erzsébet Sustikné Györfi* and Case C-40/08, *Asturcom Telecomunicaciones SL v. Maria Cristiba Rodriguez Nogueira*, *CMLR* 2010, p 883.

48 ECJ 9 Nov. 2010, Case C-137/08, *Penzügyi Lizing v. Ferenc Schneider*.

49 A. ANCERY & M. WISSINK, 'ECJ 4 June 2009, *Pannon GS Zrt. V. Erzsébet Sustikné Györfi*', *ERPL* 2010, p 308; J. STUYCK, 'Case C-243/08, *Pannon GSM Zrt. V. Erzsébet Sustikné Györfi* and Case C-40/08, *Asturcom Telecomunicaciones SL v. Maria Cristiba Rodriguez Nogueira*', *CMLR* 2010, pp 883 and 890.

50 A. ANCERY & M. WISSINK, 'ECJ 4 June 2009, *Pannon GS Zrt. V. Erzsébet Sustikné Györfi*', *ERPL* 2010, p 313.

51 A. ANCERY & M. WISSINK, 'ECJ 4 June 2009, *Pannon GS Zrt. V. Erzsébet Sustikné Györfi*', *ERPL* 2010, p 316.

found in the case file or because the court knows of that information in another way.<sup>52</sup>

In this context, it is also important to mention the *Penzugyi* case, in which the ECJ decided that a national court must investigate of its own motion whether a *jurisdiction clause* falls within the scope of the UCTD.<sup>53</sup> If necessary, the court must take of its own motion all measures of enquiry which are necessary to find out whether the UCTD is applicable (e.g., whether the term has been negotiated individually). Recent cases have made it clear that this reasoning does not only apply to jurisdiction clauses but also to other types of contract terms.<sup>54</sup> However, it seems that this far-reaching obligation to investigate is restricted to the examination as to whether the UCTD is applicable. It must be distinguished from the more moderate obligation to investigate ex officio whether a contract term – that falls under the scope of the UCTD – is actually unfair, which is dependent on the availability to the court of all legal and factual elements necessary for that task.<sup>55</sup>

#### 4.2.3. ‘*Audi alteram partem*’

When a national court found of its own motion that a contractual term is unfair, the court must inform the parties to the dispute of that fact. It must invite each of them to set out its views on that matter. Both parties must have the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure. The fact that the seller or supplier must have the possibility to convince the court that the term is not unfair, results from the principle of *audi alteram partem*<sup>56</sup> and cannot be considered to undermine the principle of effectiveness.

#### 4.2.4. *Procedural Autonomy and the Ex officio Doctrine*

The question arises as to whether or not the obligation to invoke the unfairness of a contractual term ex officio is contrary to the principle of procedural autonomy

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52 A. ANCERY & M. WISSINK, ‘ECJ 4 June 2009, Pannon GS Zrt. V. Erzsébet Sustikné Györfi’, *ERPL* 2010, p 314.

53 ECJ 9 Nov. 2010, Case C-137/08, *Penzügyi*, *supra* n. 48.

54 ECJ 21 Feb. 2013, Case C-472/11, *Banif Plus Bank*, *supra* n. 10; H.W. MICKLITZ, B. KAS, ‘Overview of cases before the CJEU on European Consumer Contract Law (2008-2013)’, *ERCL* 2014, p 22.

55 V. TRSTENJAK, ‘Procedural aspects of European Consumer Protection Law and the Case Law of the CJEU’, *ERPL* 2013, p 472.

56 ECJ 21 Feb. 2013, Case C-472/11, *Banif Plus Bank*, *supra* n. 10; H.W. MICKLITZ & B. KAS, ‘Overview of Cases before the CJEU on European Consumer Contract Law (2008-2013)’, *ERCL* 2014, pp 21-22.

which implies that, in the absence of community legislation, the Member States are free to determine the procedural rules in order to ensure the protection of the rights which individuals acquire under Community law,<sup>57</sup> in this case, under the UCTD. Procedural rules are indeed a matter of the domestic legal order. However, national procedural rules must be compatible with the *principles of equivalence and effectiveness*.<sup>58</sup>

The *principle of equivalence* implies that procedural rules applicable in the field of unfair contract terms may not be less favourable than those governing similar domestic situations, that is, rules of domestic law of the same ranking. The *principle of effectiveness* implies that national procedural rules may not make it impossible in practice or excessively difficult to exercise the rights provided by Community legislation.<sup>59</sup> Whether this is the case must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In any event, the national court is required to interpret and apply all of the national provisions at issue in order to ensure, as far as possible, that the rights guaranteed by EU law are implemented effectively.<sup>60</sup>

The principle of equivalence played an important role in *Asturcom*.<sup>61</sup> The case related to an arbitration award, which had become final because the consumer did not bring an action for the annulment of the award within the time limit prescribed for that purpose. The national court hearing an action for enforcement of this arbitration award – which had required the force of res judicata and was made in the absence of the consumer – wanted to know whether in such circumstances it was required to invoke the unfairness of the arbitration clause of its motion. When dealing with the principle of equivalence, the ECJ argues that Article 6 of the UCTD must be regarded as a provision of equal standing to rules of public policy. Therefore, if a national court seized with an action for enforcement of a final arbitration award *is required or has the possibility* to assess of its own motion whether an arbitration clause is in conflict with

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57 The principle of procedural autonomy has been clearly recognized in: ECJ 14 Dec. 1995, Case C-430-432/93, *Van Schijndel and Van Veen v. Stichting Pensioenenfonds*.

58 ECJ 26 Oct. 2006, Case C-168/05, *Mostaza Claro*, *supra* n. 19; ECJ 6 Oct. 2009, Case C-40/08, *Asturcom*, *supra* n. 20; M. EBERS, 'From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Law and Res Judicata', *ERPL* 2010, p 825; V. TRSTENJAK, 'Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU', *ERPL* 2013, pp 461-462.

59 ECJ 26 Oct. 2006, Case C-168/05, *Mostaza Claro*, *supra* n. 19.

60 ECJ 30 May 2013, Case C-397/11, *Erika Jörös v. Aegon Magyarország Hitel*.

61 ECJ 6 Oct. 2009, Case C-40/08, *Asturcom*, *supra* n. 20. See also: H. SCHEBESTA, 'Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom', *ERPL* 2010, p 847.

domestic rules of public policy, it is also *obliged* to assess of its own motion whether that arbitration clause is unfair in the light of the UCTD, the only requirement being that it has available to it the legal and factual elements necessary for that task.<sup>62</sup>

The same reasoning can be found in *Erika Jörös*, in which the ECJ had to decide whether a national court, before which appeal proceedings have been brought concerning the validity of terms in a consumer contract, is entitled to examine the unfair nature of the terms at issue *if that ground for invalidity was not raised in the proceedings at first instance and new facts or evidence cannot generally be taken into consideration in appeal proceedings under national law*. The ECJ stated that the principle of equivalence implies that, where the national court ruling in appeal proceedings has a *discretion or obligation* to examine of its own motion the validity of a legal measure in the light of national rules of public policy, even though no conflict in that area was raised in first instance, it *must* also exercise such a power for assessing, of its own motion, whether a contractual term falling within the scope of the UCTD is unfair.<sup>63</sup>

The importance of the principle of effectiveness can be clearly seen in *Banco Español de Crédito*.<sup>64</sup> The case relates to the Spanish *order for payment procedure*, applying to outstanding, liquid, and payable pecuniary debts which do not exceed a certain value. In the context of this simplified procedure for the recovery of debts, creditors must only prove that the debt exists but do not have to state other elements, such as the rate of interest for late payments. The national court for which such a procedure is brought must issue an enforcement order when all formal conditions for the initiation of the procedure are met. The court is not able to examine, *in limine litis* or at any other stage of the procedure, the justification for the application in the light of the information available to it, unless the debtor refuses to pay his debt or lodges an objection within twenty days of the date on which the order to pay was notified. If the value of the case exceeds a certain amount, the objection has to be made with the assistance of a lawyer.

The ECJ argues that such national procedural rules are liable to undermine the *effectiveness* of the protection offered by the UCTD. First, there is a significant risk that consumers will not launch the objection, either because the period provided for objection is too short, because the costs of a procedure are too high (especially in relation to the amount of the disputed debt), or because

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62 See also: C. CHENEVIERE, 'Arrêts Pannon et Asturcom: Le caractère abusive des clauses attributives de compétence dans la lignée de la jurisprudence Océano', *REDC* 2010, p 360-361; M. EBERS, 'From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Law and Res Judicata', *ERPL* 2010, pp 834-835.

63 ECJ 30 May 2013, Case C-397/11, *Erika Jörös*, *supra* n. 60.

64 ECJ 14 Jul. 2012, Case C-618/10, *Banco Español*, *supra* n. 3. See also: N. REICH, *General Principles of EU Civil Law* (Cambridge: Intersentia 2014), p 105.

consumers are unaware of their rights. It cannot be accepted that sellers or suppliers would have the possibility to avoid the application of the rules on unfair contract terms by initiating a simplified procedure for the recovery of debts instead of an ordinary procedure. Therefore, the national courts must invoke of their own motion the unfairness of a contract term in the context of such procedure if they have available to them the legal and factual elements necessary for that task. The specific characteristics of court procedures which take place under national law cannot constitute a factor that is liable to affect the legal protection from which consumers must benefit under the UCTD.<sup>65</sup>

In *Aziz*, which concerned the remedies available to the consumer against the execution of a mortgage containing unfair terms that disadvantage a defaulting consumer, the principle of effectiveness was used to decide that the Spanish legislation relating to mortgage enforcement proceedings was incompatible with the objectives of the UCTD. In *Aziz*, however, the ECJ does not deal with the duty of the national courts to invoke the unfairness of a term of their own motion, but with the relationship between mortgage enforcement procedures and declaratory proceedings.<sup>66</sup>

The problem was that the Spanish legislation contained only a limited list of grounds on which a debtor may object to mortgage enforcement proceedings. The unfairness of a term in the loan agreement on which enforcement is based was not one of them and could only be invoked in a separate declaratory proceeding. Moreover, the court before which declaratory proceedings have been brought to assess whether such a term is unfair could not grant interim relief, including, in particular, the staying of the enforcement proceedings. If the court hearing the declaratory procedures found that the term in the loan agreement was, in fact, unfair and annulled the mortgage enforcement proceedings *after enforcement has taken place*, the consumer would only be entitled to compensation. The consumer who was evicted would not be able to regain ownership of his house. Therefore, the ECJ argues that national legislation which does not allow the court hearing declaratory proceedings – that is, the court before which the consumer argues that that term in a loan agreement is unfair – to adopt interim measures, in particular the staying of the mortgage enforcement proceedings, is contrary to the UCTD where the grant of such relief is necessary to guarantee the full effectiveness of the final decision of the court hearing the declaratory proceedings.<sup>67</sup>

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65 ECJ 4 Jun. 2009, Case C-243/08, *Pannon*, *supra* note 11.

66 H.W. MICKLITZ & B. KAS, 'Overview of Cases before the CJEU on European Consumer Contract Law (2008–2013)', *ERCL* 2014, p 26.

67 ECJ 14 Mar. 2013, Case C-415/11, *Mohamed Aziz*, *supra* n. 5. See also: ECJ 14 Nov. 2013, Case C-537/12 and C-116/13, *Banco Popular Español v. María Teodolinda Rivas Quichimbo* and

In *Aziz*, a new procedural remedy, which links the enforcement procedures and the declaratory procedures together, is introduced. More specifically, national courts are obliged to grant interim relief whenever this is necessary in order to preserve the rights of over-indebted consumers against the disastrous effects of the separation of the declaratory and enforcement procedures.<sup>68</sup>

#### 4.2.5. *The Consequences of an Unfair Contractual Term*

Once it has become clear that a contractual term is unfair, the court must draw all the consequences which, under national law, result from that finding.<sup>69</sup> More specifically, the court must ensure that the consumer is not bound by that term.<sup>70</sup>

##### 4.2.5.1. *No Protection against the Consumer's Will*

However, the consumer cannot be protected against his will. The national courts must abstain from not applying the term when the consumer opposes that non-application.<sup>71</sup> In this way, the ECJ pays respect to the principle of party autonomy.<sup>72</sup> The possibility on behalf of the consumer to oppose the non-application of the contractual term requires that the consumer has been informed by the court about the unfairness of that clause and its non-binding

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*Banco de Valencia v. Joaquín Valldeperas Tortosa*. See on *Aziz* also: V. MICHEL, 'Clause Abusives', *Semaine juridique. Europe* 2013, p 228; S. MORACCINI-ZEIDENBERG, 'Clauses abusives: précisions procédurales et matérielles de la CJEU', *La Semaine Juridique Entreprise et Affaires* 2013, p 1331. In order to comply with *Aziz*, the Spanish legislator adapted its legislation and introduced the possibility for the party opposing the mortgage enforcement proceedings to object to those proceedings on the ground that the contractual clause upon which the enforcement was based was unfair. However, in *Sanchez Morcillo* (ECJ 17 Jul. 2014, Case C-169/14, *supra* n. 19), the Spanish legislation was once again found to be incompatible with the UCTD, because of the fact (1) that the assessment of the unfairness of the relevant terms was left to the discretion of the judge and (2) that the Spanish procedure on the one hand allowed the creditor to file an appeal against the court of first instance's judgment admitting the debtor's opposition to the enforcement procedure, but on the other hand did not allow the debtor to appeal if the opposition would be rejected by the court of first instance. In this case, reference is not only made to the UCTD, but also to Art. 47 of the Charter of Fundamental Rights of the European Union.

68 H.W. MICKLITZ, 'Unfair Contract Terms - Public Interest Litigation before European Courts', *Landmark Cases of EU Consumer Protection Law*, p 641.

69 ECJ 15 Mar. 2012, Case C-453/10, *Perenicova*, *supra* n. 12.

70 ECJ 30 May 2013, Case C-397/11, *Erika Jörös*, *supra* n. 60.

71 ECJ 4 Jun. 2009, Case C-243/08, *Pannon*, *supra* n. 11; ECJ 21 Feb. 2013, Case C-472/11, *Banif Plus Bank*, *supra* n. 10.

72 A. ANCERY & M. WISSINK, 'ECJ 4 June 2009, Pannon GS Zrt. V. Erzsébet Sustikné Györfi', *ERPL* 2010, p 313; H.W. MICKLITZ & B. KAS, 'Overview of Cases before the CJEU on European Consumer Contract Law (2008-2013)', *ERCL* 2014, p 5.



nature.<sup>73</sup> Only when the consumer is conscious of the non-binding nature of the term, he is able to give his free and informed consent.<sup>74</sup>

In practice, the possibility to oppose the non-application of a contractual term is particularly relevant with regard to unfair jurisdiction clauses. The consumer who appears in court can, after being informed about the unfairness of the term, consent to continuing the procedure before the court where he appears. It is highly unlikely that the consumer will oppose the non-application of other unfair terms.<sup>75</sup>

#### 4.2.5.2. *The Link between Individual and Collective Redress*

In *Invitel*, the ECJ decided that where the unfair nature of a term has been recognized in an action for an *injunction brought in the public interest* (abstract injunction procedure), the national courts are required, of their own motion, and also with regard to the future, to draw all the consequences *provided for by national law* in order to ensure that consumers who have concluded a contract to which the same terms apply will not be bound by that term.<sup>76</sup> In this way, *Invitel* interlinks the individual and collective redress<sup>77</sup> and deviates from the traditional principle of *res judicata*.

The derogation from the traditional concept of *res judicata* is justified by Article 6(1) of the UCTD, read together with Article 7 of the UCTD and by the objective of effective consumer protection. Extending *res judicata* to all consumers who have contracted with the same seller or supplier is essential if one wants to ensure that consumers are effectively protected from unfair contract terms. Indeed, the deterrent and dissuasive effect of an injunction would be compromised if the terms that would be considered unfair would continue to bind consumers who were not involved in the injunction procedure.<sup>78</sup>

Whereas it is clear that an action for an injunction in the public interest has an effect on individual contracts which are concluded by consumers with the *same seller or supplier*, it is less clear whether it will also have an effect on

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73 C. CHENEVIÈRE, 'Arrêts Pannon et Asturcom: Le caractère abusive des clauses attributives de compétence dans la lignée de la jurisprudence Oceano', *REDC* 2010, pp 354-355; M. EBERS, 'From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Law and Res Judicata', *ERPL* 2010, p 831; V. TRSTENJAK, 'Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU', *ERPL* 2013, pp 461-462.

74 ECJ 21 Feb. 2013, Case C-472/11, *Banif Plus Bank*, *supra* n. 11.

75 A. ANCERY & M. WISSINK, 'ECJ 4 June 2009, Pannon GS Zrt. V. Erzsébet Sustikné Györfi', *ERPL* 2010, p 313.

76 ECJ 26 Apr. 2012, Case C-472/10, *Nemzeti*, *supra* n. 3.

77 H.W. MICKLITZ, 'Unfair Contract Terms - Public Interest Litigation before European Courts', *Landmark Cases of EU Consumer Protection Law*, p 641.

78 M. BOTTINO, 'Arrêt Invitel: l'effet ultra partes des clauses déclarées abusives', *REDC* 2012, p 591.

identical terms used *by other sellers or suppliers*. In her opinion, Advocate General Trstenjak explicitly limits the effect of the extension of *res judicata* to the supplier against whom the injunction was directed and rejects an *erga omnes* effect of abstract injunctive proceedings, the main argument being that the right to be heard of other suppliers has not been respected.<sup>79</sup> The ECJ has not yet decided on this question, but the wording used in *Invitel* does not make an *erga omnes* effect of abstract injunctive proceedings impossible.<sup>80</sup> In any case, such *erga omnes* effect is, in my view, desirable, at least with regard to sellers and suppliers using an identical contractual term in identical circumstances. There seem to be no good reasons why these sellers or suppliers should be able to prevent the consumer from not being bound by the term.<sup>81</sup>

In *Invitel*, the injunction was applied for by the national consumer protection authority. The question arises whether the extension of *res judicata* can also be applied to actions that are launched by private consumer protection associations. In order to answer this question, one needs to take into account that, in case of an injunction applied for by a consumer protection association, the consumer protection association does not aim to defend a personal right but enforces a public interest. This should justify an *erga omnes* effect of a decision in which a court states, in the context of an injunction brought by a consumer protection association, that a term must be considered unfair, at least in favour of consumers who have been harmed by an identical unfair clause used by the same seller or supplier.<sup>82</sup>

#### 4.2.5.3. *Restitution of Amounts Paid without Justification*

The fact that national courts have to draw all the consequences that follow under national law from the finding that a contract term is unfair, in order to ensure that the consumer is not bound by the term, also implies that consumers who have paid money to the supplier or seller without justification (i.e. on the basis of the unfair term) will be entitled to full restitution of the money they did not need to pay. For example, if a penalty clause is unfair, damages that were paid on the basis of the unfair penalty clause must be restituted. Or, if the price of a long-term contract has been increased on the basis of an unfair price adjustment clause, the difference between the original price and the increased price must be reimbursed.

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79 See also: F. CAFAGGI & S. LAW, 'Unfair Contract Terms - Effect of Collective Proceedings', *Landmark Cases of EU Consumer Law. In honour of Jules Stuyck*, p 667.

80 M. BOTTINO, 'Arrêt Invitel: l'effet ultra partes des clauses déclarées abusives', *REDC* 2012, p 593.

81 H.W. MICKLITZ & N. REICH, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *CMLR* 2014, p 795.

82 See also: H.W. MICKLITZ & N. REICH, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *CMLR* 2014, pp 795-796.

The success of such unjust enrichment actions will depend on national law. For example, prescription rules might have a negative impact on their success. In Germany, for example, the BGH decided that the prescription period for claims of restitution does not run from the date where the illegality of the term has been established in legal proceedings but from the much earlier date when an average consumer could have brought a claim, even if there is a risk that the contested term is upheld in later proceedings as not being fair.<sup>83</sup> This reasoning puts the risk of declaring a contract term unfair on the consumer. The supplier will benefit from the lengthy proceedings, unless the consumer has taken the initiative to take his claim to court (which the average consumer will not do) or simply refused to pay.<sup>84</sup>

Prescription rules are subject to national law but must meet the principles of equivalence and effectiveness mentioned earlier. The question arises whether the *remedy of interim relief*, which was introduced in *Aziz* in the context of two connecting procedures under national law (declaratory and enforcement proceedings), can also be applied to national prescription rules preventing consumers from being repaid the amounts they have paid without justification. Micklitz, for example, argues that interim relief means that consumers do not lose potential rights which might result from the unfairness of a standard term, about which a decision still has to be taken. Therefore, a suspension of the prescription period during the proceedings may be necessary.<sup>85</sup>

#### 4.2.6. *Interim Conclusion*

According to the ECJ, national courts are required (1) to investigate of their own motion whether the UCTD is applicable and (2) to invoke of their own motion the unfairness of a contract term when the legal and factual elements necessary for that task are available to them. By introducing the *ex officio* doctrine, the ECJ has introduced a procedural remedy into the arsenal of consumer law which must ensure effective consumer protection.<sup>86</sup>

The principles of equivalence and effectiveness have been used to apply less strictly traditional concepts of procedural autonomy or interpret them in a

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83 Bundesgerichtshof 14 Jul. 2010, IV ZR 208/09; Bundesgerichtshof 23 May 2012, *NJW* 2012, 2647; H.W. MICKLITZ & N. REICH, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *CMLR* 2014, p 797.

84 H.W. MICKLITZ & N. REICH, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *CMLR*, p 797.

85 H.W. MICKLITZ, 'Unfair Contract Terms - Public Interest Litigation before European Courts', *Landmark Cases of EU Consumer Protection Law*, p 642.

86 H.W. MICKLITZ, 'Unfair Contract Terms - Public Interest Litigation before European Courts', *Landmark Cases of EU Consumer Protection Law*, p 640.

consumer-oriented way.<sup>87</sup> Effective consumer protection from unfair contract terms must prevail (1) over national procedural rules that limit the court's power to hear new defences in appeal or arbitration procedures (because of the fact that the rules on unfair contract terms are considered of equal standing as rules of public interests) and (2) over the efficiency of fast order for payment or execution procedures. National courts must ex officio draw all the consequences provided for by national law in order to ensure that consumers are not bound by an unfair term. Third-party effects of abstract injunction proceedings for individual consumer contracts must be ensured.<sup>88</sup>

It could be argued that by imposing on consumers protection they do not need or want, this jurisprudence results in paternalism. In my opinion, however, the ECJ has a rather realistic image of the consumer. The average consumer does not know his rights and, even if he knows them, is rather inactive to defend them. The risk that consumers would be protected against their will was countered in *Pannon*, where the ECJ decided that consumers, after being informed about the possibility not to be bound by an unfair contract term, can waive the non-application of the term. Therefore, they cannot be protected against their will.

#### **4.3. *The Impact of the Unfairness of a Contract Term on the Contract Itself***

In case of unfairness of a contract term, the question arises as to the fate of the contract in which the term has been incorporated. Article 6 of the UCTD determines that the contract itself must remain binding upon the parties insofar as the contract is capable of continuing in existence without the unfair terms. The objective pursued by the UCTD clearly does not consist in annulling all contracts containing unfair terms. On the contrary, it aims at restoring the balance between the parties, while in principle preserving the validity of the contract as a whole.<sup>89</sup>

The assessment whether the contract concerned can continue to exist without that term must take place on the basis of objective criteria. Both the wording of Article 6 of the UCTD and the requirements concerning the legal certainty of economic activities plead in favour of an objective approach in interpreting that provision.<sup>90</sup> When determining whether the contract can

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87 F. CAFAGGI & S. LAW, 'Unfair Contract Terms - Effect of Collective Proceedings', *Landmark Cases of EU Consumer Law. In honour of Jules Stuyck*, p 676; H.W. MICKLITZ & N. REICH, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *CMLR* 2014, p 784; V. TRSTENJAK & E. BEYSEN, 'European Consumer Protection Law: curia semper dabit remedium', *CMLR* 2010, p 121.

88 H.W. MICKLITZ & N. REICH, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *CMLR* 2014, p 784.

89 ECJ 15 Mar. 2012, Case C-453/10, *Perenicova*, *supra* n. 12; ECJ 30 May 2013, Case C-397/11, *Erika Jörös*, *supra* n. 60.

90 ECJ 30 May 2013, Case C-397/11, *Erika Jörös*, *supra* n. 60.

continue to exist without the unfair term, the situation of one of the parties to the contract, in this case the consumer, is not the decisive criterion. Therefore, the court cannot base its decision solely on a possible advantage for the consumer of the annulment of the contract as a whole.<sup>91</sup> In other words, if the annulment of the unfair term is sufficient to restore the balance, that is, to compensate the damages that the consumer has suffered, the contract itself cannot be annulled, since the annulment of the contract would in such circumstances be disproportionate and incompatible with the parties' interests. However, the contract must be annulled in its entirety if this is necessary to compensate the damages that the consumer suffers due to the unfair nature of the contract term.<sup>92</sup>

Finally, it is important to emphasize that the UCTD, being based on minimum harmonization,<sup>93</sup> does not prevent Member States from providing, in compliance with European Union law, that a contract concluded with a consumer by a trader which contains one or more unfair terms is to be void as a whole where that will ensure better protection of the consumer.<sup>94</sup>

## 5. Private (and Public) Enforcement through Injunctions: The Belgian Approach

In Belgium, several entities are given the possibility to apply for an injunction (Art. XVII. 7 Code of Economic Law): every person having a personal interest, the Minister competent for the rules on consumer protection and market practices (Minister of Economic Affairs), the head of department of the section within the Ministry of Economic Affairs, entrusted with the task of supervising the application of the rules on market practices (the so-called Economic Inspection), professional bodies with legal personality and consumer protection associations with legal personality meeting certain requirements.<sup>95</sup> The fact that every person having a personal interest can apply for an injunction implies that competitors of a seller or a supplier using unfair contract terms also have the possibility to apply for an injunction. However, an individual consumer is not entitled to apply for an injunction in order to protect *other* consumers from the use of an unfair contractual term.

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91 ECJ 15 Mar. 2012, Case C-453/10, *Perenicova*, *supra* n. 12. See also: B. KEIRSBILCK, 'The Interaction between Consumer Protection Rules on Unfair Contract Terms and Unfair Commercial Practices: *Perenicova* and *Perenic*', *CMLR* 2013, p 252.

92 H. JACQUEMIN, 'Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU', *ERPL* 2013, pp 579-580.

93 J. STUYCK, 'Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociacion de Usuarios de Servicios Bancaris (Ausbanc)*', *ERCL* 2010, p 456.

94 ECJ 15 Mar. 2012, Case C-453/10, *Perenicova*, *supra* n. 12.

95 These associations must either be represented in the 'Conseil de Consommation' or recognized by the Minister.

The possibility for the entities mentioned to apply for an injunction meets the requirements of Article 7 of the UCTD. Adequate and effective means exist to *prevent the continued use* of unfair terms in contracts concluded with consumers by sellers or suppliers. Individuals or organizations having a legitimate interest under national law in protecting *consumers* are able to take action in accordance with the national law. That is to say, they are able to demand a decision from their national courts as to whether the contractual terms drawn up for general use are unfair and must be prohibited. In this way, they can apply appropriate and effective means to prevent the continued use of such terms.

In practice, most injunctions have been applied for by private consumer protection associations. Several cases were introduced by a consumer protection association against insurance companies, banks, airline companies and entities distributing gas and electricity. In all these cases, the consumer protection association, having only limited financial resources, only applied for an injunction against some companies (although it was clearly aware of the fact that other competing companies also violated rules on unfair contract terms). The strategy is to tackle certain companies within a specific sector, hoping that an injunction against one or two players will convince other players within that sector that were not involved in the case to adapt their contractual terms. This practice has not always been successful. Some companies, which were not involved in the case, clearly ignore the judgments rendered and do not adapt their contractual terms.

Belgian procedural rules do not allow to extend the consequences of an injunction applied for by a consumer protection association directly to other cases, such as individual disputes between a consumer and the seller against whom the injunction was directed (and, as discussed above, the ECJ's jurisprudence at the moment does not oblige the national courts to extend *res judicata* of a judgment following an injunction applied for by a *consumer protection association* to individual disputes). However, the national courts do have the *possibility* to take the judgment into consideration as a factual element on which they can base their decision to invoke of their own motion the unfairness of the term in an individual dispute between a consumer and that seller.

## 6. Public Enforcement Mechanisms: The Belgian Approach

A *mere* violation of the rules on unfair contract terms – contrary to the violation of most other provisions incorporated in Book VI of the Code of Economic Law relating to market practices and consumer protection – cannot lead to a penal sanction.<sup>96</sup> The absence of a penal sanction is rather logical as far as the violation of open norms is concerned, such as the general prohibition on terms creating a

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96 In France, there are also no penal sanctions in the case of a mere violation of the rules on unfair contract terms.

significant imbalance between the parties' rights and obligations. On the contrary, it would have been possible to provide for penal sanctions in case clear-cut provisions in the black list of unfair contract terms are violated. For example, principles of penal law, which require that the rules violated are sufficiently clear and precise, do not prevent a penal sanction to be imposed on a seller or supplier who violates the rule (included in a black list) that liability cannot be excluded in the case of death or injury caused by the seller's or supplier's fault.

According to the Code of Economic Law, a penal sanction for the violation of the rules on unfair contract terms is only possible:

- where a seller or a supplier violates the rules on unfair contract terms *in bad faith* (Art. XV.84 CEL); and
- where a court issues an injunction prohibiting a seller or a supplier to continue using a certain contract term because it is considered unfair, and the seller or the supplier nevertheless keeps using the unfair contract term (Art. XV. 85.1°).

In both situations, the 'level 3' penal sanction applies, meaning that a fine between EUR 26 and EUR 25,000 can be imposed (Art. XV.70 CEL).<sup>97</sup>

Next to the possibility for the competent Minister and the head of the department of the 'Economic Inspection' to apply for an injunction (Art. XVII.7 Code of Economic Law), the legislator has given to the public servants of the 'Economic Inspection' some other means to sanction the use of unfair contract terms.

First, these public servants have the power to track and trace unfair contract terms. In order to be able to verify the standard contract terms that are used by the seller or supplier, public servants can ask the seller or the supplier to provide a copy of the contracts terms that the seller or the supplier uses (Art. XV.3 Code of Economic Law). However, in practice the Economic Inspection makes only limited use of its competence to verify unfair contract terms. For example, in 2012, only 158 controls of contract terms took place.<sup>98</sup> In 2013, their number was even reduced to 28.<sup>99</sup>

When the public servants find that a contract term is unfair, they can issue a warning, accompanied with a timeframe within which the term(s) needs to be adapted (Art. XV. 31 Code of Economic Law). If the seller or the supplier does not comply with the warning, a penal sanction can be imposed by the criminal courts, since in such a situation the seller or the supplier will be considered

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97 At the moment, these amounts need to be multiplied by 6.

98 Algemene Directie Controle en Bemiddeling, Jaarverslag (Annual Report) 2012, p 54.

99 Algemene Directie Economische Inspectie, Jaarverslag (Annual Report) 2013, p 56.



violating the provisions of Book VI CEL in bad faith. In practice, however, penal sanctions are rare. Rather than submitting a *pro justitia* to the prosecutor, the public servants will use their competence to propose a so-called ‘transaction’ (Art. XV. 61 Code of Economic Law). Transactions imply that the seller or the supplier is asked to pay a certain amount. This amount cannot be higher than the amount which would be imposed in the case a penal sanction is imposed (Art. XV. 61 §1 CEL). Whereas in practice, the function of this ‘transaction’ is similar to an administrative fine, its legal status is clearly different. If the seller or the supplier pays the amount, it becomes impossible to start a penal procedure against the seller.

## **7. The Impact of Class Actions**

As argued above, consumers are entitled to full restitution of the amounts they have paid on the basis of an unfair contract term. However, not many consumers will go to court to demand the restitution of the amounts already paid. On 1 September 2014, the new rules on collective claims, which are incorporated in Book XVII of the new Code of Economic Law, have entered into force. These provisions allow a group of consumers to start a procedure for the compensation of the collective damage that they have suffered. Collective damage is defined as the totality of individual damages that a group of consumers has suffered due to a common cause (Art. I.21, 1° CEL).

It is clear that a collective action will be possible in case several consumers have suffered damages due to the use of an identical unfair term by the same seller or supplier. In that way, the collective action can be used to obtain the restitution of the amounts paid by consumers. This will clearly reinforce consumer rights, especially when the courts choose to apply the *opt-out* system, which implies that all consumers belong to the group, except for those who have expressed that they do not want to be part of the group. At the moment, it is still to be seen whether the procedure which requires that the group representative and the seller or supplier first try to reach an agreement will actually be used to receive restitution of the amounts paid on the basis of an unfair contract term.

## **8. Conclusions**

This article has shown that national courts are required to invoke the unfairness of a contract term of their own motion and have to draw all the consequences of that finding in order to ensure that consumers are not bound by an unfair term. Unfair contract terms need to be deleted from the contract and not reduced or amended, except where the deletion of the term would lead to the annulment of the contract, and this would expose the consumer to disadvantageous consequences.

Although many questions regarding *ex officio* application still remain, the ECJ has already addressed the issue of the relationship between the procedural

autonomy of the Member States and the principles of equivalence and effectiveness. It made it clear that the principle of procedural autonomy must be applied less strictly in order to achieve the objectives of the UCTD, that is, effective consumer protection from unfair contract terms. The ECJ clearly favours a realistic approach in which the consumer is seen as a rather passive market citizen.

Although the jurisprudence of the ECJ reinforces consumer protection, its impact in reality may not be exaggerated. As long as the case does not lead to court proceedings (e.g., because the consumer is not able to pay) the obligation on behalf of the national courts to invoke of their own motion the unfairness of a contractual term is not really helpful. For example, most consumers simply pay the amounts that companies ask them to pay on the basis of unfair penalty clauses or unfair price adjustment clauses because they are not aware of the unfair nature of the clause, do not dare to dispute the unfair contract term or even think they can no longer do so as they have agreed to the general business conditions.

Since (1) consumers are in most cases not aware of (the possibility to invoke) rules on unfair contract terms, (2) consumer protection associations often have only limited means to apply for injunctions, and (3) actions of competing companies and business organizations primarily serve other interests than consumer protection (and seem to be very scarce), private enforcement mechanisms can in themselves not realize consumer protection from unfair contract terms. Therefore, public enforcement mechanisms should also be available in order to protect consumers. This view is supported by economic literature which has shown that a combination of private and public enforcement mechanisms is the best way to achieve the objectives of consumer protection.

Finally, collective actions, such as those introduced in the Belgian Code of Economic Law, may reinforce consumer's rights to restitution of amounts paid on the basis of an unfair contract term. Only the future can tell whether collective claims will actually be used in this context.