

Another Brick in the Wall: The Court's Judgment in *KdG/Susan Kuijpers*, 17 May 2018 [C-147/16]^{*}

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Abstract: In a relatively recent strand of case law, the European Court of Justice (ECJ) established the duty for national courts to apply EU consumer law *ex officio*, due to the weak position the consumer is deemed to hold *vis-à-vis* the seller or supplier. This development has to be seen in the context of the decentralized enforcement of EU (consumer) law and the procedural autonomy of the Member States. However commendable the outcome in this type of cases may be, the way the ECJ finds its decision is often not entirely logical. It is argued that this is also the case in the recent judgment in *KdG/Kuijpers*, which dealt with default proceedings before judicial courts. This article examines the reasoning in the Advocate General's (AG) opinion and the ECJ's judgment. It will become clear that there seem to be some loose ends in both. It is not the purpose of this contribution to provide for an overarching theoretical scheme that covers all of the Court's case law concerning procedural autonomy or the *ex officio* application of EU (consumer) law. The sole aim is to pinpoint some oddities. This is necessary if we want to check whether the law in books and the law in action coincide with one another, and if so, to what extent that is the case.

1. Introduction

1. Since the *Océano Grupo* decision, the Court of Justice of the European Union (ECJ) has continuously extended the doctrine of *ex officio* application of consumer law. The types of procedural settings in which the ECJ applied such an assessment have increased. The case that will be discussed here deals *inter alia* with the question (i) whether a national court that has to render a judgment in default against a consumer has the possibility/the obligation to assess of its own motion whether the contract containing the clause upon which the claim is based falls within the scope of the Unfair Contract Terms Directive (UCTD) and (ii) if so, whether the clause is unfair. As will be shown, the outcome lies completely in the line of expectations. In addition, the ECJ's reasoning does not add something new, though that may be considered less positive.

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In the following parts, I will first discuss the facts of the case (2.), the Advocate General's opinion (3.) and the Court's judgment (4.). The preliminary question, the AG's opinion and the actual decision will subsequently be analysed more thoroughly in the commentary section (5.). This contribution ends with some concluding remarks (6.).

2. Facts of the Case

2. The case concerns a female student, Mrs Kuijpers, who failed to pay a total sum of 1.546 euros to Karel de Grote Hogeschool (KdG), a university college. This sum constituted her registration fees for two academic years and the costs related to a study trip. The school urged her to pay the entire amount, though she argued that she was unable to pay the full sum at once. She eventually agreed to a payment plan proposed by the school's social facilities, according to which she had to pay a fixed monthly sum over a period of eight months. Some months later, however, and despite having received a letter of formal notice, she failed to pay the monthly instalment as foreseen by the payment plan. Consequently, KdG summoned her before the Justice of the Peace (*vrederechter, juge de paix*) of Antwerp, seeking to obtain the principal sum of 1.546 euros, together with default interest at 10% per annum (269,81 euros) and a costs indemnity (154,60 euros) as foreseen by the payment plan. Mrs. Kuijpers did not appear before the court, nor was she represented.

3. The national court upheld KdG's claim with regard to the principal sum. The court, however, did not agree with the claimant's allegation that Mrs. Kuijpers also had to pay the interests and costs indemnity, given the potential unfair nature of the applicable clause in case of non-payment. According to Article 806 of the Belgian Judicial Code (BJC), however, the court was required to uphold KdG's claim in total given the non-appearance of Mrs. Kuijpers, unless the legal procedure or the claim is contrary to public policy.¹ Against this background, the national court decided to stay the proceedings and to refer *inter alia*² the following question to the ECJ for a preliminary ruling:

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- 1 It should be noted that Art. 806 BJC has been amended once again. In addition to an obligatory *ex officio* public policy control, the court *can* also invoke *ex officio* those rules of law that grant judges an *ex officio* power (e.g. Art. 1231 Belgian Civil Code, stating that the court *may* moderate excessive indemnification clauses). Recently, the Belgian Constitutional Court found Art. 806 BJC to be in accordance with Arts 10 and 11 of the Belgian Constitution, holding the principle of equal treatment (Grondwettelijk Hof 7 June 2018, www.const-court.be/public/n/2018/2018-072n.pdf).
 - 2 The other questions concerned (1) whether or not the KdG, being a free educational establishment which provides subsidized tuition, should be regarded as an undertaking within the meaning of EU Law, (2) whether or not the contract between a consumer and a free subsidized educational establishment relating to the provision of subsidized tuition by that establishment falls within the scope of Directive 93/13 (UCTD) and (3) whether or not the free educational establishment which provides the aforementioned tuition should be regarded as a seller or supplier within the meaning of that directive.

Does a national court, when a claim is lodged with it against a consumer in relation to the performance of a contract and that court, under national procedural rules, has the power only to examine of its own motion whether the claim is contrary to mandatory national rules, have the power to examine in the same manner, of its own motion, even if the consumer does not appear at the hearing, whether the contract in question comes within the scope of [Directive 93/13] as implemented in Belgian law?

3. Opinion of the Advocate General

4. Advocate General Sharpston begins her opinion by recalling that it is settled case law that a national court is under the obligation to examine *ex officio* whether a term in a contract concluded between a seller or supplier and a consumer falls within the scope of the UCTD and, if so, whether such term is unfair. The relevance of the case at hand, however, lies in the assessment whether this still applies when the consumer has not at all taken part in the proceedings.³

In order to carry out such assessment, the AG pinpoints three principles that should be taken into account.⁴ First of all, the system of protection provided 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. This leads to the consumer agreeing to terms drawn up in advance without being able to influence the content of those terms. Second, the provision that unfair terms are not binding on the consumer (Article 6 UCTD) is a mandatory provision. It aims to replace the formal balance the contract establishes between the rights and obligations of the parties with an effective balance, re-establishing the equality between them. This provision must be regarded as one of equal standing to national rules which rank within the domestic legal system as rules of public policy. The assessment of whether or not the UCTD is applicable to a given situation logically precedes that analysis. Third, the imbalance that exists between the consumer and the seller or supplier can only be properly remedied by positive action, unconnected with the actual parties to the contract. That positive action consists of a court or tribunal's *ex officio* analysis of the question whether a contract falls within the scope of the UCTD and of the fairness of its terms. The protection conferred on consumers by that directive extends to cases in which the consumer did not raise the unfair nature of the term, be it as a consequence of the unawareness of his rights or of the deterrent effect of costs of judicial proceedings.

The AG subsequently discusses the well-known principle of procedural autonomy, along with its equally well-known limitations – the principles of equivalence and effectiveness –, to guide the procedural rules that make the

3 Opinion AG Sharpston 30 November 2017, paras 20–21.

4 Opinion AG Sharpston 30 November 2017, paras 22–25 and the references there.

aforementioned positive action possible.⁵ In the light thereof, she examines case law of the Court to identify some underlying principles.⁶ These can be summarized as follows. The principle of effectiveness does not require the national judicial system to intervene where none of the parties to a contract has brought proceedings before the national courts. If proceedings have been brought, those courts must examine, of their own motion, in all cases and whatever the rules of their domestic law, whether a contract falls within the scope of the UCTD. If it does, they must also of their own motion examine the fairness of that contract's terms. The mandatory nature of the rules laid down in the directive means that they must be applied irrespective of the status afforded to the national rules implementing them by the national legal order and of the parties' procedural actions or submissions. The fact the consumer was not the party initiating the proceedings, that he did not appear at the hearing or that he did not invoke the UCTD does, according to the AG, not alter this conclusion.⁷

Finally, the AG assesses Article 806 BJC in light of the aforementioned principles. She points out that, at first sight, Belgian legislation allowing courts to examine of their own motion only whether a claim is contrary to national rules of public policy, without being entitled to consider at the same time whether the claim in question contravenes the principles laid down in the UCTD, could appear problematic. Subsequently, however, she turns to the duty of harmonious interpretation, stating that where the national court has the power under national law to examine *ex officio* the validity of a legal measure in the light of national rules of public policy, it must also exercise that power regarding EU rules of mandatory nature, in accordance with the principles of equivalence and effectiveness. As a consequence thereof, the AG considers that under Article 806 BJC the national court is obliged to assess *ex officio* whether a clause is unfair in the light of the UCTD in the same way as it does so for national rules of public policy.⁸ She concludes that 'a national court has the power and the obligation to examine of its own motion whether a contract comes within the scope of [the UCTD], even where it has not been specifically requested to do so, *inter alia* because the consumer has not taken part in the proceedings'.⁹

5 Opinion AG Sharpston 30 November 2017, para 26.

6 Opinion AG Sharpston 30 November 2017, paras 27–32, referring to ECJ 6 October 2009, ECLI:EU:C:2009:615, *Asturcom*, curia.europa.eu/juris/liste.jsf?num=C-40/08, ECJ 9 November 2010, ECLI:EU:C:2010:659, *Pénzügyi Lízing*, curia.europa.eu/juris/liste.jsf?num=C-137/08, ECJ 14 June 2012, ECLI:EU:C:2012:349, *Banco Español*, curia.europa.eu/juris/liste.jsf?num=C-618/10 and ECJ 1 October 2015, ECLI:EU:C:2015:637, *ERSTE Bank Hungary*, curia.europa.eu/juris/liste.jsf?num=C-32/14.

7 Opinion AG Sharpston 30 November 2017, paras 33–34.

8 Opinion AG Sharpston 30 November 2017, paras 35–36. This approach was already advocated by Professor Reinhard Steennot. See R. STEENNOT, 'De bescherming van de consument door het Hof van Justitie: een brug te ver?', *TPR (Tijdschrift voor Privaatrecht)* 2017(1), pp 123 and 132.

9 Opinion AG Sharpston 30 November 2017, para 37.

4. Judgment of the Court

5. The ECJ begins its judgment by referring to the same principles as the AG, be it in a less extensive manner.¹⁰

In view of these considerations, the Court recalls that national courts are under an obligation to assess *ex officio* whether a contractual term is unfair and to correct the imbalance which exists between the consumer and seller or supplier.¹¹ Pursuant to this obligation, the national court, as a preliminary matter, has to examine whether the contract containing the term which is at the basis of the claim falls within the scope of application of the UCTD.¹² These obligations are necessary to ensure that the consumer enjoys effective protection as provided for by the UCTD, especially in the light of the real risk that the consumer is unaware of his rights or encounters difficulties in enforcing them. Consequently, the protection offered by the UCTD to consumers extends on the one hand to cases in which the consumer does not call upon the fact that the contract falls within the scope of that directive. On the other hand, the consumer would also be protected in cases where he fails to raise the unfair nature of a term contained in a contract which he concluded with a seller or a supplier, be it due to his unawareness of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve.¹³

Regarding the implementation of these obligations by a national court giving judgment in default, the ECJ refers to the aforementioned principle of procedural

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- 10 Judgment of the Court, 17 May 2018, paras 26–28. The ECJ, however, on the one hand does not refer to *Asturcom* and *ERSTE Bank Hungary*, yet on the other hand refers to ECJ 7 November 2014, ECLI:EU:T:2014:938, *Banco Santader*, curia.europa.eu/juris/liste.jsf?num=T-399/11, ECJ 26 January 2017, ECLI:EU:C:2017:60, *Banco Primus*, curia.europa.eu/juris/liste.jsf?num=C-421/14 and ECJ 29 November 2016, ECLI:EU:C:2016:252, *Sales Sinués and Drame Ba*, curia.europa.eu/juris/liste.jsf?num=C-381/14.
- 11 Judgment of the Court, 17 May 2018, para 29, referring to ECJ 26 October 2006, ECLI:EU:C:2006:675, *Mostaza Claro*, curia.europa.eu/juris/liste.jsf?num=C-168/05 and ECJ 21 February 2013, ECLI:EU:C:2013:88, *Banif Plus Bank*, curia.europa.eu/juris/liste.jsf?num=C-472/11.
- 12 Judgment of the Court, 17 May 2018, para 30, referring to *Pénzügyi Lízing* and (by analogy) ECJ 4 June 2015, ECLI:EU:C:2015:357, *Faber*, curia.europa.eu/juris/liste.jsf?num=C-497/13. The latter case concerned not the *ex officio* assessment whether a contract as a whole or a contractual clause therein falls within the scope of the UCTD, but the assessment by the national court of its own motion whether a buyer may be considered as a consumer in the meaning of that directive.
- 13 Judgment of the Court, 17 May 2018, paras 31–32, referring to *Mostaza Claro* and ECJ 16 November 2010, ECLI:EU:C:2010:685, *Pohotovost*, curia.europa.eu/juris/liste.jsf?num=C-76/10. The English translation of the Court’s judgment only mentions the failure of the consumer to raise the unfair nature of the term. However, as the language of the case was Dutch, and thus only the Dutch version of the judgment is authentic (Art. 41 Rules of Procedure of the Court of Justice), it is necessary to emphasize here that the Court also extends the protection to cases in which the consumer did not call upon the fact that the contract falls within the scope of the UCTD.

autonomy together with the principles of equivalence and effectiveness.¹⁴ Whereas normally the principle of effectiveness is at the centre of attention,¹⁵ in this judgment the Court only engages with the principle of equivalence. As to the latter, the ECJ recalls that Article 6 UCTD is a mandatory provision, which must be regarded as a provision of equal standing to national rules of public policy. This classification extends to all provisions of the directive that are essential to attain the objective pursued by Article 6 UCTD. It follows that, where the national court has the power under national procedural law to examine *ex officio* whether a claim is contrary to national rules of public policy,¹⁶ it must also exercise that power for the purposes of assessing of its own motion whether the disputed term on which the claim is based and the contract containing the term fall within the scope of the UCTD and, if so, whether that term is unfair, such in the light of the criteria laid down in that directive.¹⁷ The Court subsequently answers the question of the referring court by pointing out that the UCTD must be interpreted as meaning that a national court giving judgment in default and which has the power, under national procedural rules, to examine of its own motion whether the term upon which the claim is based is contrary to national public policy rules, is required to examine of its own motion whether the contract containing that term falls within the scope of that directive and, if so, whether that term is unfair.

5. Comments

6. In this commentary section, I will first examine the formulation of the preliminary question (5.1.), before assessing the reasoning in the AG's opinion (5.2.1.) and the Court's judgment (5.2.2.). Finally, this section will consider what is (not) new in the judgment (5.3.).

14 Judgment of the Court, 17 May 2018, para 33, referring (by analogy) to ECJ 30 May 2013, ECLI:EU:C:2013:341, *Asbeek Brusse*, curia.europa.eu/juris/liste.jsf?num=C-488/11. The latter case did not concern default proceedings, but the *ex officio* assessment by the court in appellate proceedings. This may explain why, erroneously, the English translation refers to appellate proceedings, thereby indicating that the system concerning the translation of official EU documents should be reassessed (*infra*).

15 P. CRAIG & G. DE BÚRCA, *EU Law: Text, Cases and Materials - Sixth Edition* (Oxford: Oxford University Press, 6th edn 2015), p 246; J. KROMMENDIJK, 'Is there light on the horizon? The distinction between 'Rewe effectiveness' and the principle of effective judicial protection in Article 47 of the Charter after *Orizzonte*', 53. *CMLR (Common Market Law Review)* 2016(5), p 1402; M. BOBEK, 'Why There Is No Principle of 'Procedural Autonomy' of the Member States' in H.-W. Micklitz & B. De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Cambridge-Antwerp-Portland: Intersentia 2012), p 315; S. PRECHAL, *Directives in EC Law* (Oxford: Oxford University Press 2005), p 138.

16 This is the case in the Belgian judicial system for a court giving judgment in default, as is apparent from the information provided in the order for reference.

17 Judgment of the Court, 17 May 2018, paras 34-36, referring to *Asbeek Brusse*.

5.1. *The Formulation and Interpretation of the Preliminary Question*

7. The first issue that will be discussed is the way the preliminary question was formulated, along with the way the AG and the ECJ interpreted and answered it.

5.1.1. *Mere Possibility or Obligation to Examine Ex Officio?*

8. According to the English version of the referred question, the national court has ‘*the power*’ to carry out a public policy control. The referring court, however, was the Justice of the Peace of Antwerp, who adjudicated the case in Dutch. This means that the case’s authentic language is also Dutch.¹⁸ The Dutch wording of the question reads that the national court under national law has ‘*de bevoegdheid*’ to assess if a claim lodged before it is contrary to national rules of public policy. There are two possible ways to interpret this concept. The first one being in the non-legal, common meaning, the other one being in the legal sense (to be more precise in a Hohfeldian scheme).

9. On the one hand, one can assume that the referring court had the intent to use the concept ‘*bevoegdheid*’ in its common, non-legal meaning. Within this meaning, someone has the *possibility* to do something without, however, being *obliged* to do so. It will be shown that in the context of the *ex officio* application of (consumer) law, the dichotomy between the mere possibility of a court to act of its own motion and the obligation to do so is important and has already been addressed by the ECJ.¹⁹ It thus follows that the uncertainty concerning the (non-) existence of an obligation in this meaning of the word ‘*bevoegdheid*’ is problematic.

10. On the other hand, one may also see ‘*bevoegdheid*’ within a Hohfeldian, subjective rights-scheme. According to this scheme, which has been transposed in the Belgian legal context by Professor Walter Van Gerven half a century ago, the correct translation of ‘*bevoegdheid*’ should have been ‘*authority*’. The concept of ‘*authority*’ implies that the holder of the right not only *can* commit the action to which the right entitles him (*de macht, the power*), but also that he is *allowed* to do so (*de faculteit, the faculty*). The concept ‘*power*’, however, only indicates whether or not the holder can or cannot behave in a specific way. It does not affect the question whether or not he was allowed to do so.²⁰ Thus, it follows from a Hohfeldian point of view that the

18 *Supra*, fn. 13.

19 See also the analysis in H.B. KRANS, *Nederlands burgerlijk procesrecht en materieel EU-recht* (Deventer: Wolters Kluwer 2010), pp 38–41.

20 W. HOHFELD, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’, 23. *Yale L.J. (Yale Law Journal)* 1913(1), pp 44–54; W. SEAVEY, ‘The Rationale of Agency’, 29. *Yale L.J.* 1920(8), pp 860–861; A. CORBIN, ‘Legal Analysis and Terminology’, 29. *Yale L.J.* 1919(2), p 167. See in Belgian context W. VAN GERVEN, ‘Een nieuwe analyse van het begrip “Recht”, - De “Juristic Conceptions” theorie’, 24. *RW (Rechtskundig Weekblad)* 1960–1961(42), pp 2046–2048. The Hohfeldian scheme distinguishes different types of subjective rights, each having their own specific consequences concerning the obligations they create.

translation of the referred question was wrong. Instead of referring to ‘*the power*’, it should have referred to ‘*the authority*’.

11. From a Hohfeldian perspective, however, the English translation might be a better representation of the legal reality than the original Dutch formulation. An authority can be seen as the sum of a power and a faculty, and this last concept entails the absence of legal constraint (i.e. the *mere possibility* for the holder, allowing him to do as he sees fit).²¹ The wording of the referring court could thus be interpreted as if the court is *not* under an *obligation* to conduct the *ex officio* public policy assessment, but has the freedom to choose whether or not to do so.²² This also seems to be the interpretation the ECJ gives to Article 806 BJC in the *KdG/Kuijpers* judgment. The ECJ holds that when a national court has *the power* under national procedural rules to examine of its own motion as to whether the term upon which the claim is based is contrary to public policy, it is *required* to examine of its own motion whether the contract containing the term falls within the scope of the UCTD and, if so, whether that term is unfair.²³ In Belgian case law and doctrine, it is established and well-accepted though that the national court has the *obligation* (and not the mere possibility) to carry out a public policy control in default cases.²⁴ This was also emphasized by the Belgian Government during the proceedings before the ECJ.²⁵ Likewise, AG Sharpston considered the *ex officio* assessment under Article 806 BJC to be an

21 W. VAN GERVEN, 24. *RW* 1960–1961(42), p 2045.

22 A. WALLERMAN, ‘Towards An EU Law Doctrine On The Exercise Of Discretion In National Courts? The Member States’ Self-Imposed Limits On National Procedural Autonomy’, 53. *CMLR* 2016(2), p 343 under reference to A. BARAK, *Judicial Discretion* (New Haven: Yale University Press 1989) p 7–12 and B. HESS, ‘Juridical discretion’ in M. Storme and B. Hess (eds), *Discretionary power of the judge: limits and control* (Mechelen: Kluwer 2003), p 46.

23 Judgment of the Court, para 37 as well as the actual dictum.

24 J.-F. VAN DROOGHENBROECK, ‘Traits essentiels des réformes de procédure civile “pots-pourris IV et V”’, 32. *JT (Journal des Tribunaux)* 2017, pp 635–636; P. THIRIAR, B. VANLERBERGHE, J. LAENENS, D. SCHEERS & S. RUTTEN, *Handboek Gerechtelijk Recht* (Antwerp-Cambridge: Intersentia, 4th edn 2016), p 410; B. ALLEMEERSCH, P. VAN ORSHOVEN & S. VOET, *Tussen gelijk hebben en gelijk krijgen* (Louvain-The Hague: Acco, 7th edn 2016), pp 288–289; B. MAES, P. VANLERSBERGHE, N. CLIJMANS & S. VAN SCHEL, *Gerechtelijk privaatrecht na de hervormingen van Potpourri I tot V* (Bruges: die Keure 2017) pp 281–283; D. SCHEERS & P. THIRIAR, ‘Burgerlijk procesrecht na Potpourri V’, 81. *RW* 2017–2018(19), p 729; S. MOSSELMANS, ‘Taak van de rechter bij verstek’, 80. *RW* 2016–2017(1), pp 14–15 (analysed case law) and pp 18–19; P. Taelman & T. De Jaeger, ‘Actuele Topics Burgerlijk Procesrecht: Potpourri & Rechtsplegingsvergoeding’ in M. Dambre & P. Lecocq (eds), *Rechtskroniek voor de vrede- en politierechters 2018/Chronique de droit à l’usage des juges de paix et de police 2018* (Bruges: die Keure 2018), pp 296–301; H. BOULARBAH & M.-C. VAN DEN BOSSCHE, ‘Artikel 806 Ger. W.: Much Ado About Nothing?’ in J. Flo, L. Jansens & Vlaams Pleitgenootschap (eds), *Smaakmakers in het procesrecht* (Antwerp-Cambridge: Intersentia 2016), p 137–139 (analysed case law) and pp 142. See more specifically in the context of consumer protection law R. STEENNOT, ‘Ambtshalve toepassing van de informatie-inwinningsverplichting van de kredietgever’, *T.Vred./JJP (Tijdschrift van de Vrederechters/Journal des Juges de Paix)* 2017(11–12), p 576.

25 Opinion AG Sharpston, 30 November 2017, para 19.

obligation, rather than a mere possibility.²⁶ As the Hohfeldian concept ‘power’ (as used in the English translation) says nothing about the presence or absence of legal constraint on the holder of the right (i.e. the (non-) existence of an *obligation* to commit the action to which the right entitles the holder),²⁷ its use is more appropriate than the notion ‘*bevoegdheid*’ (the Hohfeldian ‘authority’) as relied upon by the referring court. The latter would imply a discretionary power of the national court to determine whether or not to carry out an *ex officio* public policy control, whereas in Belgian legal reality the national court is under the obligation to do so.

12. In sum, it becomes clear that both interpretations of the notion ‘*bevoegdheid*’ – the common meaning of the word ‘power’ vs. the Hohfeldian meaning of ‘authority’ – are not entirely flawless. The first interpretation gives, or at least could give, rise to confusion. Though it is not necessarily wrong, it is not necessarily correct either, as there is a blind spot concerning the (non-) existence of an obligation. The second interpretation is nothing more and nothing less than wrong, since it would imply that the national court can freely decide whether or not it will carry out the *ex officio* public policy assessment. The wording of the question should have referred to *the obligation* of an *ex officio* assessment, rather than *the power* to carry out such control. Such phrasing would indisputably have correctly reflected (Belgian) legal reality.

5.1.2. *Relevance of the Nature Under National Law*

13. The need for a correct qualification of the nature of the *ex officio* public policy assessment is twofold.

First, anyone who is not familiar with Belgian (procedural) law reading the judgment of the Court might conclude that the *ex officio* public policy assessment has an optional character under Belgian law. However, this is an incorrect conclusion, as Belgian judges are *obliged* to conduct such an assessment.²⁸ Moreover, there seems to be such an obligation to some extent in *all* the European Member States.²⁹

26 Opinion AG Sharpston, 30 November 2017, paras 36–37.

27 Note that ‘power’ in the Hohfeldian sense seems to coincide with the common meaning of the word ‘power’. This is not the case though for the concept ‘authority’, as the latter in the Hohfeldian sense indicates the absence of legal restraint, where this could not necessarily be deduced from the common meaning of the word ‘authority’.

28 See the references under fn. 24. See also B. HESS & P. TAELEMAN, ‘Consumer Actions Before National Courts’ in B. Hess & S. Law (eds), *An Evaluation Study of National Procedural Laws and Practices in Terms of their Impact on the Free Circulation of Judgments and on the Equivalence and Effectiveness of the Procedural Protection of Consumers Under EU Consumer Law – Report Prepared by a Consortium of European Universities Led by the MPI Luxembourg for Procedural Law as Commissioned by the European Commission (JUST/2014/RCON/PR/CIVI/0082) – Strand 2. Procedural Protection of Consumers* (Brussels: Publications Office of the European Union 2017) Ch. 3, p (158) at 210.

29 B. HESS & P. TAELEMAN in *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law*, pp 208 *et seq.*

Second, and way more important, it may seem that the ECJ is conversing a discretionary power of the national courts under domestic law into an obligation under European law. The Court has not refrained to do so in several older judgments either.³⁰ According to Professor Anna Wallerman, the practise of transforming a mere possibility into an obligation is another way in which the ECJ limits the procedural autonomy of the Member States, thereby increasing the impact of EU law on the national legal order of the Member States.³¹ As opposed to the traditional limitations on the *content* of national rules imposed by the principles of equivalence and effectiveness, this type of limitation deals with the *way the rules are formulated*.³² I will later discuss the possible legal basis for such transformations as well as the shortcomings in the ECJ's *KdG/Kuijpers* judgment. It should be noted here, however, that, unabated the fact that in my opinion the Court engaged in this case with a wrong reading of Belgian law as it seems to have started from the presumption that there is a mere possibility (and not an obligation) to examine *ex officio* the compliance of the term upon which the claim is based, and thus in this concrete case there is no conversion from an possibility to an obligation, the judgment expresses in an unequivocal way the willingness of the Court to intervene in a far-reaching way with the national (procedural) legal order and the national procedural autonomy.³³

5.2. Reasoning of the AG and the Court and Procedural Autonomy of the Member States: Where does the Shoe Pinch?

14. As the end of the previous chapter preluded, I will now analyse the case discussed in terms of procedural autonomy and its limitations. It should, however, be stressed that I do not aim to propose an overarching and exhaustive scheme, as there is a lack of space to do so here.³⁴ Instead, I will focus on some (reoccurring)

30 *Asturcom*, para 54, where the Court held that '[t]he national court or tribunal is also under such an obligation where, under the domestic legal system, it has a discretion whether to consider of its own motion whether such a clause is in conflict with national rules of public policy'. Other cases include ECJ 24 October 1996, ECLI:EU:C:1996:404, *Kraaijeveld* curia.europa.eu/juris/liste.jsf?num=C-72/95, paras 57, 58 and 60, ECJ 12 February 2008, ECLI:EU:C:2008:78, *Kempter*, curia.europa.eu/juris/liste.jsf?num=C-2/06, para 45, ECJ 30 May 2013, ECLI:EU:C:2013:340, *Erika Jörös*, curia.europa.eu/juris/liste.jsf?num=C-397/11, *Asbeek Brusse* and *Faber*. See also in the context of *res judicata*, ECJ 26 April 2012, ECLI:EU:C:2012:242, *Invitel*, curia.europa.eu/juris/documents.jsf?num=C-472/10, para 41. See also R. STEENNOT, *TPR* 2017(1), p 129.

31 A. WALLERMAN, 53. *CMLR* 2016(2), pp 343 and 359.

32 A. WALLERMAN, 53. *CMLR* 2016(2), p 340.

33 This is nothing new. See in this regard C. PAVILLON, 'ECJ 26 October 2006, Case C-168-05 *Mostaza Claro v. Centro Móvil Milenium SL - The Unfair Contract Terms Directive: The ECJ's Third Intervention in Domestic Procedural Law*' in 24 *ERPL* (*European Review of Private Law*) 2007(5), pp 741-744.

34 In this regard, it should be noted that there may be not such a thing as 'an' overarching and exhaustive scheme. See in this same vein A. WALLERMAN, 53. *CMLR* 2016(2), p 342, fn. 10. E.g.

inconsistencies in the Court's reasoning. These inconsistencies may indicate that the ECJ is not always following a conceptual well-developed framework, and sometimes rather works from some sort of gut feeling. This in turn complicates a scientific legal analysis. That being said, it does not necessarily bring along that the judgments the ECJ finds in this context are undesired.

5.2.1. *The Rewe-based Opinion of the AG*

15. In *KdG/Kuijpers*, AG Sharpston refers to the principle of procedural autonomy.³⁵ As is well-known, the principle was first established in two separate judgments of 16 December 1976.³⁶ As from that moment, there has been an ongoing academic debate regarding the development of a conceptual framework that can be used to explain and link the different judgments of the ECJ dealing with procedural autonomy.³⁷

where some authors seem to consider the so called 'procedural rule of reason', as stated for the first time in ECJ 14 December 1995, ECLI:EU:C:1995:441, *Van Schijndel*, curia.europa.eu/juris/liste.jsf?num=C-430/93 and ECJ 14 December 1995, ECLI:EU:C:1995:437, *Peterbroeck*, curia.europa.eu/juris/liste.jsf?num=312/93, as a global correction on the principles of equivalence and autonomy (and their sometimes unreasonable outcomes) (J.W. RUTGERS, 'Ambtshalve toepassing van Europees recht in het civiele geding' in R.J.C. Flach, L.M. Klap-de Nooijer, J.W. Rutgers & E.M. Wesseling-van Gent, *Amice. Rutgers-bundel* (Deventer: Kluwer 2005), p (295) at 296-297, others see it only connected to the principle of effectiveness (S. PRECHAL, 'Community Law In National Courts: The Lessons From Van Schijndel', 35. *CMLR* 1998(3), p 690 and J. KROMMENDIJK, 53. *CMLR* 2016(5), pp 1406-1407). In my opinion, the latter view is the correct one, as the Court in its judgments explicitly frames the procedural rule of reason within the assessment whether or not the application of EU law is rendered practically impossible or excessively difficult (i.e. the principle of effectiveness) (see *Van Schijndel*, para 19). Another aspect that has been subject to extensive discussions in scholarship, is how the principle of effective judicial protection relates to *Rewe*-effectiveness (see in this regard the short, yet speaking, overview in B. THORSON, *Individual rights in EU Law* (Switzerland: Springer International Publishing 2016), pp 17-18.

35 Opinion AG Sharpston, 30 November 2017, para 26.

36 ECJ 16 December 1976, ECLI:EU:C:1976:188, *Rewe*, curia.europa.eu/juris/liste.jsf?num=C-33/76, para 5, and ECJ 16 December 1976, ECLI:EU:C:1976:191, *Comet*, curia.europa.eu/juris/liste.jsf?num=C-45/76, para 13. However, it took until 2004 before the ECJ itself used the term for the first time (ECJ 7 January 2004, ECLI:EU:C:2004:12, *Wells*, curia.europa.eu/juris/liste.jsf?num=C-201/02, para 65).

37 See e.g. S. PRECHAL & R. WIDDERSHOVEN, 'Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection', 4. *REALaw (Review of European Administrative Law)* 2011(2), pp 31-50; L.M. RAVO, 'The role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions' in EUT Edizioni Università di Trieste (ed.), *Sources of Law and Legal Protection* (Trieste: EUT Edizioni Università di Trieste 2012) pp 101-125; J. KROMMENDIJK, 53. *CMLR* 2016(5), pp 1395-1418; T. EILMANSBERGER, 'The Relationship Between Rights and Remedies in EC Law: In Search of The Missing Link', 41. *CMLR* 2004(5), pp 1199-1246; A. GERBRANDY, 'Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Judgment of the Court (Third Chamber) of 4 June 2009, not yet reported', 47. *CMLR* 2010(4), pp 1199-1220. See more generally

16. In the context of procedural autonomy, the AG refers to former case law of the ECJ on the *ex officio* application of the UCTD to deduce what the principles of equivalence and effectiveness require from the national procedural rules.³⁸ It is argued that the references to *Asturcom*, *Banco Español de Crédito* and *ERSTE Bank Hungary* are appropriate, as in these cases the assessment of the effectiveness of the national rules indeed took place in the broader analysis of the *Rewe*-mantra.³⁹

On the contrary, however, the reference to *Pénzügyi Lízing* in the AG's opinion is somewhat odd. Nowhere in the latter judgment is there any reference to the principle of procedural autonomy along with the *Rewe*-principles of equivalence and effectiveness. Moreover, the Court held in *Pénzügyi Lízing* that '[i]n order to safeguard the effectiveness of the consumer protection intended by the European Union legislature, the national court must thus, in all cases and *whatever the rules of its domestic law*, determine whether or not the contested term was individually negotiated between a seller or supplier and a consumer' (emphasis added).⁴⁰ This actually shows that the ECJ did not rely on the *Rewe*-effectiveness as a basis for its conclusions. The latter intrinsically implies that an assessment has to be conducted as to whether or not the national procedural rule renders the application of EU law practically impossible or excessively difficult, implicitly entailing that it *does* matter what the rules of domestic law prescribe. One can assume that this is a(nother) delusive formulation by the ECJ. Alternatively, this wording may also deviate from the other three cited judgments as a consequence of the different compositions of the treating chambers of the Court.⁴¹ It should, however, be stressed that all actors involved (both the AG and the judges of the ECJ) are *per se* outstanding jurists. This does not only follow from the criteria contained in the TFEU to assure this (see in particular the Articles 253 and 254 TFEU),⁴² but also from the individual *curriculum vitae* of the AG and the judges. Moreover, *Pénzügyi Lízing* was treated in grand chamber, thus even further

D.-U. GALETTA, *Procedural Autonomy of EU Member States: Paradise Lost?* (London: Springer 2010), xvi+145 p. The expression of 'connecting the dots' was borrowed from M. BOBEK, 'The Effects Of EU Law In The National Legal Systems' in C. Barnard & S. Peers (eds), *European Union Law* (Oxford: Oxford University Press 2017), p (143) at 168.

38 Opinion AG Sharpston, 30 November 2017, paras 27-33.

39 *Asturcom*, para 38, *Banco Español*, para 46 and *ERSTE Bank Hungary*, para 49. The term '*Rewe*-mantra' was first used by Prechal and Widdershoven (S. PRECHAL & R. WIDDERSHOVEN, 4. *REALaw* 2011 (2), p 33).

40 *Pénzügyi Lízing*, para 51. This consideration was repeated in the AG's opinion in *Kuijpers*, para 30.

41 It is submitted that different chambers handle similar cases in different ways. See in this regard J. KROMMENDIJK, 53. *CMLR* 2016(5), p 1418. Another related concern is that the somewhat (unsatisfactory) reasoning in the Court's judgments might reflect the compromise that had to be struck in order to obtain a majority within a divided (chamber of the) Court (G. DE BÚRCA, 'National Procedural Rules And Remedies: The Changing Approach Of The Court Of Justice' in J. Lonbay & A. Biondi, *Remedies for Breach of EC Law* (New York: Wiley 1996), Ch. 4, p (37) at 45). See also below.

42 K. LENAERTS & P. VAN NUFFEL, *European Union Law* (London: Sweet & Maxwell 2011), pp 536-537. See for a thorough, critical analysis also M. BOBEK (ed.), *Selecting Europe's*

minimizing the chance that the not-mentioning of the procedural autonomy along with its limitations is due to conciseness or even forgetfulness of the Court. In my opinion, a more plausible basis for the judgment of the Court in *Pénzügyi Lízing* and for the AG's conclusion in *Kuijpers* is the principle of effective judicial protection, and more specific the principle of effective consumer protection.⁴³ This also follows from the reference to 'the effectiveness of consumer protection' in *Pénzügyi Lízing*,⁴⁴ as repeated in the AG's conclusion.⁴⁵ As rightly proposed by Professor Prechal and Professor Widdershoven, the principle of effective judicial protection should be seen separately from the *Rewe*-effectiveness.⁴⁶ Be that as it may, it is clear that the minimum requirements prescribed by the *Rewe*-effectiveness are not at the basis of the Court's findings in *Pénzügyi Lízing*.⁴⁷ This in turn means that the AG has at least to some degree wrongfully deduced the principles she proposes from the *Rewe*-effectiveness, as one of the cases on which she bases them was issued in another context.

17. Another strange twist in the AG's opinion, is the reference to the duty of harmonious interpretation. AG Sharpston argues that Article 806 BJC only prescribes an assessment of rules of public policy, and that it could possibly follow that the national court might not be allowed to investigate whether the claim is contrary to the principles laid down by the UCTD.⁴⁸ It seems that the AG aims at the hypothesis where in the national legal order of Member States the legislation transposing the UCTD is not granted a public policy status.⁴⁹ Subsequently, the

Judges: A Critical review of the appointment procedures to the European courts (New York: Oxford University Press 2015), xi + 323 p.

43 As will be shown below, however, these two do not necessarily coincide, nor does the first completely encompass the second.

44 *Pénzügyi Lízing*, para 51.

45 Opinion AG Sharpston, 30 November 2017, para 30.

46 S. PRECHAL & R. WIDDERSHOVEN, 4. *REALaw* 2011(2), p 50.

47 See in the regard that the *Rewe*-mantra (as prescribed by Prechal) is only the minimum minimorum S. PRECHAL & R. WIDDERSHOVEN, 4. *REALaw* 2011(2), p 38; S. PRECHAL, 35. *CMLR* 1998(3), p 689; A. WARD, *Judicial Review and the Rights of Private Parties in EC Law* (Oxford: Oxford University Press 2007), p 87; R. SCHÜTZE, *European Constitutional Law* (Cambridge: Cambridge University Press 2016), pp 387-389; S. PRECHAL, *Directives in EC Law*, p 139.

48 Opinion AG Sharpston, 30 November 2017, para 35.

49 If it does, there would be no problem. In Belgium, for example, it is generally assumed that the national rules concerning unfair contract terms are merely imperative law. This, however, does not mean that national courts do not have to raise these rules of their own motion. See R. STEENNOT & S. DEJONGHE, *Handboek Consumentenbescherming en Handelspraktijken* (Antwerp-Oxford: Intersentia 2007), pp 158-161; R. STEENNOT, *Syllabus Consumentenbescherming* (Antwerp-Oxford: Intersentia 2010), p 210. Some authors, however, have in the past argued that the rules concerning unfair contract clauses are of public policy. See E. BALATE & T. BOURGOIGNIE, 'Le traitement des clauses abusives en droit belge: examen critique au regard du projet 826 sur les pratiques du commerce et sur l'information et la protection du consommateur', 1. *TBH (Tijdschrift voor Belgisch Handelsrecht)* 1989, p 655: 'Le caractère d'ordre public autorise en outre que le moyen soit soulevé pour la première fois devant la Cour de cassation.' In its judgment of 26 May 2005, the Belgian Court of

AG states that according to the principle of harmonious interpretation, ‘*these rules* must be interpreted in accordance *with EU law*’ (emphasis added).⁵⁰ When conducting a textual analysis, the EU law to which she refers seems to be Article 6 UCTD, along with the interpretation given to it by the Court that it concerns a provision of equal standing to national rules of public policy.⁵¹ In addition, the AG’s use of ‘*these rules*’ might refer to national rules of public policy. According to the AG, ‘national rules of public policy’, as mentioned in Article 806 BJC, might thus also include the principles laid down by the UCTD. As such, in my opinion she is in fact also saying that the national legislation transposing the principles laid down in the UCTD should be considered as falling under the national concept of public policy. It is difficult to understand why the AG uses such a complex construction regarding the status the principles of the UCTD (and the accompanying transposition legislation) should have in the national legal order to justify why they should be taken into consideration *ex officio*, when merely two paragraphs earlier she held that the ‘mandatory nature of the rules that [the UCTD] lays down means that they must be applied *irrespective of the status afforded to the national rules implementing them* by the national legal order and of the parties’ procedural actions or submissions’ (emphasis added). The brief reference in paragraph 36 to the principles of equivalence and effectiveness also seems somewhat artificial.

The importance of the identified distinction (between the Court holding that certain provisions are of equal standing to national rules of public policy on the one hand, and that certain provisions should be regarded as part of the national rules of public policy on the other hand) lies in the full effect of the consequences which the national legal orders of the Member States attribute to the public policy status.⁵² If, as

Cassation held that ‘[a]ttendu que la loi du 2 août 2002 relative à la publicité trompeuse et à la publicité comparative, aux clauses abusives et aux contrats à distance en ce qui concerne les professions libérales, entrée en vigueur le 30 novembre 2002, a remplacé la loi du 3 avril 1997; [a]ttendu qu’aucune de ces lois ne prévoit qu’elle s’applique aux contrats en cours; que leurs dispositions concernant les clauses abusives *ne sont pas d’ordre public*’ (Cass. 26 May 2005, C.04.0215.F, jure. juridat.just.fgov.be/view_decision.html?justel=F-20050526-4&idxc_id=200539&lang=FR). See also G. GATHEM & J. LAFFINEUR, ‘Les clauses abusives dans les contract conclus entre les vendeurs et les consommateurs’ in M. Coipel & P. Wéry (eds), *Les pratiques du commerce, l’information et la protection du consommateur – Commentaire de la loi du 14 juillet 1991 et de la loi du 2 août 2002* (Waterloo: Wolters Kluwer 2006), p (217) at 291). See also the illuminating overview at I. DEMUYNCK, *De inhoudelijke controle van onrechtmatige bedingen* (Gent: unpublished PhD. Dissertation 2000), pp 724–731.

50 Opinion AG Sharpston, 30 November 2017, para 36. See generally M. BOBEK in *European Union Law*, p (140) at 153–158.

51 Opinion AG Sharpston, 30 November 2017, para 24, under reference to *Asturcom*.

52 It is not my aim to address the existence of and conditions under which a European public policy could/should exist, nor do I want to carry out an analysis of the possibility of the Court to elevate certain rules to (rules of equal standing to) national rules of public policy. See in this regard H. SCHEBESTA, ‘Does the National Court Know European Law? A Note on *Ex Officio* Application after *Asturcom*’, 18. *ERPL* 2010

the AG implicitly seems to indicate, the (national transposition of the) UCTD would belong to national public policy, *all* consequences the national legal order attributes to public policy rules should apply. This would not only mean that these rules should be applied *ex officio* (this is what the Court seems to be willing to achieve) but also that the nullity for a violation of these rules would be absolute. That would in turn mean that parties cannot renounce from relying on it, and moreover, that the award of the nullity would not depend on whether or not one of the parties made a claim to that end.⁵³ However, as the Court has already made clear, the consumer *can* renounce from the protection provided by the UCTD.⁵⁴ This means that the interpretation the Court has in mind for Article 6 UCTD does not completely correspond with (at least the Belgian) national concept of nullity. Thus, the earlier case law of the Court seems to impede the assertion that the (national implementation of the) UCTD is part of the national rules of public policy.^{55, 56}

5.2.2. *The Reasoning of the European Court of Justice*

18. As mentioned above, the Court starts from the same assumptions as the AG with regard to the protection of consumers.⁵⁷ As opposed to the AG, however, the ECJ does not immediately turn to the principle of procedural autonomy. Instead, it

(4), pp 864-870; M. SØRENSEN, 'In the Name of Effective Consumer Protection and Public Policy!', 24. *ERPL* 2016(5), pp 817-822; S. PRECHAL & N. SHELKOPLYAS, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond', 12. *ERPL* 2004(5), pp 589-611.

53 Other national consequences may include the application of *in pari causa turpitudinis cessat repetitio* and the (possibly delayed) starting point of the limitation period (see e.g. Article 1304 BCC). See in the context of the UCTD: S. GEIREGAT, 'Nietigheid en 'meest gunstige interpretatie': de remedies bij onrechtmatige bedingen in consumentenovereenkomsten in het licht van de rechtspraak van het Hof van Justitie', *TPR* 2016(1), pp 121-122. In Belgium and France, there is a distinction made between absolute and relative nullity. Other Member States, including the Netherlands, Germany and Austria, distinguish between 'nullity' and 'voidability'. See V. TRSTENJAK, 'Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU', 21. *ERPL* 2013(2), pp 458-459 and the references there.

54 See in this regard ECJ 4 June 2009, ECLI:EU:C:2009:350, *Pannon*, curia.europa.eu/juris/liste.jsf?num=C-243/08.

55 S. GEIREGAT, *TPR* 2016(1), p 168. Geiregat proposes to stop focussing on the traditional national divisions. Instead, attention should be given to an autonomous European sanction. A related question, however, is to which extent such a European sanction would conflict with the basic ideas of procedural (and remedial) autonomy of the Member States.

56 Another speaking example of the ambivalent assessment of the Court of the public policy character of certain Treaty-provisions relates to Art. 81 EC-Treaty (Art. 101 TFEU). In arbitration-related matters, the Court held that this provision was of public policy (ECJ 1 June 1999, ECLI:EU:C:1999:269, *Eco Swiss*, curia.europa.eu/juris/liste.jsf?num=C-126/97), while in other contexts it did not (*ex officio* application (*Van Schijndel*) and refusal to enforce foreign judgment (ECJ 11 May 2000, ECLI:EU:C:2000:225, *Renault*, curia.europa.eu/juris/liste.jsf?num=C-38/98)). See more extensively S. PRECHAL & N. SHELKOPLYAS, 12. *ERPL* 2004(5), pp 602-605.

57 Judgment of the Court, 17 May 2018, paras 26-28.

relies on two obligations it already established in previous cases. First, the obligation for the national court to assess of its own motion whether the contract containing the term that is at the basis of the claim falls within the scope of application of the UCTD. Second, the obligation for the national court to assess of its own motion whether a contractual term is unfair and, if so, to correct the imbalance that exists between the consumer and the seller or supplier. The Court considers these obligations necessary for ensuring that consumers enjoy effective protection. The protection the UCTD confers on consumers therefore also extends to cases in which the consumer did not raise the unfair nature of the term.⁵⁸ Only within this proposed framework, the Member States are, in the absence of EU legislation, responsible for the procedural rules in respect of the implementation of these obligations, within the limits of equivalence and effectiveness.⁵⁹

19. When merely analysing the judgment, one might conclude that the Court transformed a mere possibility of an *ex officio*-assessment into an obligation to conduct such an assessment. Making abstraction of the fact that in reality there has always been an obligation, and thus that the Court *ipso facto* could not transform a possibility into an obligation, there also seems to be a problem with the Court's reasoning behind the transformation. The ECJ bases its reasoning on the principle of equivalence, according to which the procedural rules governing proceedings to safeguard EU law may not be less favourable than those governing similar domestic actions.⁶⁰ What the Court is doing here, however, is granting EU law *better* protection compared to domestic law, (wrongfully) assuming that under national law there was a mere possibility for an *ex officio* public policy assessment. The Court thus seems to interpret the prohibition of negative discrimination of claims based on EU law as a basis for positive discrimination of these claims. Admittedly, the principle of equivalence only prohibits a less favourable procedural treatment of claims based on EU law. As such, it does not explicitly preclude a better treatment of claims based on EU law. However, the only consequence attached to the principle of *equivalence* (what's in a name?) is that the procedural treatment of claims based on EU law has to be equal to that of domestic claims.⁶¹ It cannot be at the basis of an alteration of Member States' national procedural rules in the direction of a uniform European standard.⁶² This also seems to correspond with the Court's case law that the principle of equivalence does not require the Member States to extend their most favourable national regime to all actions based on EU law.⁶³

58 Judgment of the Court, 17 May 2018, paras 29-32.

59 Judgment of the Court, 17 May 2018, para 33.

60 Judgment of the Court, 17 May 2018, para 34.

61 See in the same vein A. WALLERMAN, 53. *CMLR* 2016(2), p 353; S. PRECHAL & N. SHELKOPLYAS, 12. *ERPL* 2004(5), pp 590 and 593.

62 M. EBERS, 'From *Océano* to *Asturcom*: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata' in 18. *ERPL* 2010(4), p 839.

63 ECJ 15 September 1998, ECLI:EU:C:1998:401, *Edis*, curia.europa.eu/juris/liste.jsf?num=c-231/96, para 36; ECJ 1 December 1998, ECLI:EU:C:1998:577, *Levez*, curia.europa.eu/juris/liste.jsf?

Consequently, one can argue that the transformation of a possibility into an obligation cannot be based on an ordinary reading of the principle of equivalence, as the latter requires that a claim based on EU law is treated in *the same way* as a similar claim founded on national law.⁶⁴

20. Now it is clear that the principle of equivalence cannot justify the conversion of a possibility into an obligation, one can only wonder what could. Wallerman proposes the principle of sincere co-operation, as enacted in Article 4 (3) TEU, as the basis for such transformation.⁶⁵ The fact that the Court nowhere explicitly refers to this principle does not exclude this, as in other cases this was neither the case.⁶⁶

Another possible basis for the conversion of a possibility into an obligation could be the duty of the Member States to guarantee effective consumer protection. This was even explicitly ruled by the Court.⁶⁷ This principle of effective consumer protection seems to be related to the principle of effective judicial protection (PEJP), as enacted in Article 47 of the Charter of Fundamental Rights of the European Union. Some argued that this might be the key to allow positive intervention in the Member States to adjust their national procedural rules.⁶⁸ As such, this principle can explain how the Court was able to impose an obligation on the national courts, rather than to just leave their domestic legislation unapplied.⁶⁹ However, it is submitted that the

num=C-326/96, para 42; ECJ 15 September 1998, ECLI:EU:C:1998:403, *Ansaldo*, curia.europa.eu/juris/liste.jsf?num=C-279/96, paras 29-30. T. TRIDIMAS, 'Enforcing Community Rights in National Courts: Some Recent Developments' in C. Kilpatrick, T. Novitz & P. Skidmore, *The Future of Remedies in Europe* (Oxford: Hart Publishing 2000), p (35) at 39-41; D.-U. GALETTA, *Procedural Autonomy of EU Member States: Paradise Lost?*, p 25.

64 S. PRECHAL & N. SHELKOPLYAS, 12. *ERPL* 2004(5), pp 590-591; M. SØRENSEN, 24. *ERPL* 2016(5), pp 810 and 817. The ECJ also seems to indicate this, see e.g. *Faber*, para 39.

65 A. WALLERMAN, 53. *CMLR* 2016(2), pp 339 and 353.

66 A. WALLERMAN, 53. *CMLR* 2016(2), pp 339 and 353.

67 Judgment of the Court, 17 May 2018, para 31. See however *infra*. The Court first refers to effective consumer protection to deduce two obligations, but then refers to the principle of procedural autonomy when assessing the question of how these two obligations should be applied. The ECJ presented the concept of effective consumer protection for the first time in *Océano Grupo* (ECJ 27 June 2000, ECLI:EU:C:2000:346, *Océano Grupo*, curia.europa.eu/juris/liste.jsf?num=C-240/98, para 26). Since then, the Court has iterated it on several occasions (e.g. ECJ 21 November 2002, ECLI:EU:C:2002:705, *Cofidis*, curia.europa.eu/juris/liste.jsf?num=C-473/00, para 33, *Mostaza Claro*, para 28 and *Pohotovost*, para 42).

68 S. PRECHAL & R. WIDDERSHOVEN, 4. *REALaw* 2011(2), p 41.

69 The latter being the consequence of the negative obligation which the PEJP brings along, and which according to some is the only consequence underlying the *Rewe*-effectiveness due to the latter's negative formulation. See S. PRECHAL & R. WIDDERSHOVEN, 4. *REALaw* 2011(2), pp 40-42; J. KROMMENDIJK, 53. *CMLR* 2016(5), p 1405. This also explains why it is unlikely that such transformation is based upon *Rewe*-effectiveness. See in this regard A. WALLERMAN, 53. *CMLR* 2016(2), pp 351-352.

principle of effective consumer protection does not completely fall under the umbrella of the PEJP. The expanded interest in the role Alternative Dispute Resolution (ADR) can play in consumer disputes illustrates that an effective consumer protection can also be guaranteed through extrajudicial means.⁷⁰ Whatever may be the exact relationship between the principle of effective judicial protection and the need to guarantee an effective consumer protection, it seems at least to some extent clear that these two principles both might justify an active, positive intervention.⁷¹ This is the case, because their main objective lies in guaranteeing that individuals can usefully rely on their Union rights (positive formulation) rather than making sure individuals are not prevented by domestic law to do so (negative formulation).

It should, however, be stressed that the abovementioned explanations for the conversion are somewhat preposterous in the given situation. They are all based on the assumption that national courts merely had a possibility of an *ex officio* public policy-assessment, and not an obligation. As mentioned before, this is not the case. All Member States are (at least to some extent) familiar with the obligation to assess *ex officio* compatibility with national rules of public policy, as the latter are deemed to be so essential for the good arrangement and functioning of society, that one cannot tolerate any derogations.⁷² This public policy character may be apparent from legislation or case law, though it does not find its right of existence in these sources. Rather, the latter follows from the concerns that play at a certain moment within a certain community. It follows from the fundamental character of the concerns which rules of public policy represent that it is in a democratic society not up to the legislative power to determine on a discretionary basis whether it will assign a mere possibility or an obligation on the national

70 See more extensively CH. HODGES, I. BENÖHR & N. CREUTZFELDT-BANDA (eds), *Consumer ADR in Europe* (Oxford: Hart Publishing 2012), xxxv + 479 p.; P. CORTÈS, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: Oxford University Press 2016), xxviii + 471 p. See for an assessment of the situation within the twenty-eight Member States of the European Union CH. HODGES, 'Consumer Alternative Dispute Resolution' in *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law*, Ch. 5, pp 280-311. Since the Treaty of Lisbon, there is in Article 81 (2) (g) TFEU also an explicit basis for the power of the Union to meddle in the development of alternative methods of dispute settlement.

71 A. ANCERY & M. WISSINK, 'ECJ 4 Juni 2009, *Pannon GSM Zrt. v. Erzsébet Sustikné Györfi*', 18. *ERPL* 2010(2), p 312.

72 G. VERSCHULDEN & P. TAELEMAN, *Basisbegrippen van recht* (Leuven: Acco 2017), p 39. This definition is only one of the possible ways to circumscribe the concept 'public policy'. Another way to put it could be that rules of public policy concern the essential interests of the State or the community or, in private law, the legal foundations upon which the economic or moral order of society rest (R. DE CORTE, B. DE GROOTE & D. BRULOOT, *Privaatrecht in hoofdlijnen - Vol. 2* (Antwerp-Cambridge: Intersentia 2017), p 249).

courts to assess compatibility with these rules of their own motion. Similarly, it is not up to the judiciary to decide not to apply rules of public policy. Such (double) discretionary power, however, is a necessary requirement for argumentations concerning the transposition from a *possibility* to an *obligation*, as given above.

21. Another interesting model was proposed in this journal by Professor Marie Sørensen. She attempted to create a step-by-step flowchart derived from the ECJ's case law on the *ex officio* application of consumer law.⁷³ The scheme consists of four steps. First, the Court needs to assess whether a particular directive is inspired by the main ideas concerning the protective stance towards consumers (step 1). If this is the case, the Court advances to the 'procedural rule of reason', where the battle between the effectiveness of EU law and the procedural autonomy of the Member States is fought (step 2). If this clash turns out in the advantage of the effectiveness of EU law, the latter should be applied of the court's own motion. If this is not the case,⁷⁴ the schedule continues. In the next step, the Court examines whether the relevant EU provision can be regarded as being of equal standing to national rules of public policy (step 3). Finally, the Court will conclude whether it can or must be applied *ex officio*, in accordance with the principle of equivalence (step 4).

Although I do not aim to carry out an in-depth analysis of Professor Sørensen's model, the Court's judgment in *Kuijpers* is an excellent opportunity to briefly verify it. The first step is fulfilled as the Court explicitly refers to the basic ideas underlying consumer protection.⁷⁵ According to the second step, the Court needs to address the procedural rule of reason. However, an analysis of the judgment shows that the Court immediately turns to step 3, assessing the application of the principle of equivalence in conjunction with the public policy character. This by itself is not necessarily a problem. Sørensen notes that the ECJ already skipped some of the steps in previous decisions.⁷⁶ Yet, this seems more problematic in the *KDG/Kuijpers* case. As was mentioned above, the third step only comes into play when the procedural rule of reason ended up in the demise of the principle of

73 M. SØRENSEN, 24. *ERPL* 2016(5), pp 797-798.

74 Sørensen gives the example of *res judicata*, under reference to *Asturcom*, to prove that the principle of effectiveness not always gets the overhand on national procedural autonomy. M. SØRENSEN, 24. *ERPL* 2016(5), p 809.

75 These basic ideas include that (i) the consumer is in a weak position vis-à-vis the seller in terms of bargaining power and level of knowledge, (ii) the formal balance established in the contract has to be replaced with an effective balance, re-establishing equality between the two parties, (iii) imbalance between the consumer and the seller can only be corrected by positive action unconnected with the actual parties to the contract, (iv) there is a real risk that the consumer is unaware of his rights or encounters difficulties in enforcing them and (v) the means must be adequate and effective to ensure that the rights laid down in Articles 6 and 7 of the UCTD are protected. See the Court's judgment, paras 26-28.

76 M. SØRENSEN, 24. *ERPL* 2016(5), pp 798-799 and the references over there.

effectiveness. Consequently, one may assume that the interests that underlie the national provision at issue (Article 806 BJC) justify the restriction on the effectiveness of EU law. However, in *Kuijpers* this seems to be unlikely. Pursuant to the *travaux préparatoires*, the *ratio legis* of Article 806 BJC is the reform of civil procedure in light of the more general concern for a more efficient judicial administration, without loss of quality. The Belgian legislator's aim was to limit the courts' workload in default cases by focussing on the essence. The gain of time could then be used in the battle against the judicial backlog in cases where all parties are present on the day fixed for the hearing.⁷⁷ In the ECJ's older case law, however, the Court was not very avid to favour a swift administration of justice over the effectiveness of consumer protection law.⁷⁸ According to Professor Sørensen's scheme, the Court's assessment of the *ex officio* application would have had to stop after the second step (in favour of an obligation on the national courts to examine of their own motion), rather than completely ignoring it.

5.3. *The Judgment of the Court: What's New?*

22. As to the actual decision of the Court, namely that even in default proceedings the national courts have to assess of their own motion whether the contract which is at the basis of the claim falls within the scope of the UCTD and, if so, whether the clause is unfair, the judgment is in line with the Court's earlier case law concerning *ex officio* application of consumer law in general and the UCTD in particular.

23. Though the first judgment in which the Court stipulated that the national courts have the power to examine of their own motion compliance with consumer law was given in the context of the UCTD,⁷⁹ it has over the years become clear that the ECJ has a *broad* scope in mind concerning competence of national courts to examine *ex officio* compatibility with consumer law. In *Rampion*, for instance, the Court held that the provisions of the Consumer Credit Directive (87/102/EEG) had to be applied by the national French court of its own motion.⁸⁰ This case also illustrated that *ex officio* assessment needs to be carried out regardless of which party initiates the proceedings.⁸¹ This view was later confirmed by the Court in its *Radlinger* judgment, which dealt with the application of Directive 2008/48/EG

77 *Travaux préparatoires* Belgian Chamber of Representatives, 2014–2015, nr. 54 1219/001, 3. See also H. BOULARBAH & M.-C. VAN DEN BOSSCHE in *Smaakmakers in het procesrecht*, p (127) at 136.

78 See e.g. *Banco Español*, in which the Court engaged with order for payment proceedings. The aim of such proceedings is similar to the aim of Article 806 BJC, namely the quick and easy settlement of uncontested claims. M. SØRENSEN, 24. *ERPL* 2016(5), p 804.

79 *Océano Grupo*, para 29.

80 ECJ 4 October 2007, ECLI:EU:C:2007:575, *Rampion*, curia.europa.eu/juris/liste.jsf?num=C-429/05, para 69. Note that the Consumer Credit Directive from 1987 has now been replaced by Directive 2008/48/EG.

81 See also M. EBERS in 18. *ERPL* 2010(4), p 832.

that replaced the Consumer Credit Directive.⁸² In the context of the Doorstep Selling Directive (85/577/EEC), the Court's judgment in *Martín Martín* makes equally clear the broad scope the Court has in mind.⁸³ Finally, reference can be made to the cases of *Duarte Hueros*⁸⁴ and *Faber*⁸⁵ in the context of the Consumer Sales Directive (1999/44/EG). In both cases, the ECJ held, *inter alia*, that national courts may under certain circumstances adapt the request of the consumer.⁸⁶ Moreover, the national court is obliged to assess of its own motion whether a claimant/defendant before it can be considered as a consumer in the sense of that directive. In this vein, the judgment in *Kuipers* does not add anything new to the settled case law.

24. When taking a closer *in-depth* look at the scope of the *ex officio* application in the context of the UCTD, the case seems to introduce something new, though nothing that could not have been expected. In *Océano Grupo*, the Court ruled that national courts have the power to examine *ex officio* the compatibility of exclusive jurisdiction clauses with the UCTD.⁸⁷ In *Cofidis*, it became clear that this power extends to all clauses included in contracts between a consumer and a seller or supplier.⁸⁸ The ECJ held in *Mostaza Claro* that national courts not only have the power to assess compatibility of clauses with the UCTD, but are under the *obligation* to do so.⁸⁹ The Court then extended the *ex officio* assessment to the question whether the contract upon which the claim is based falls within the scope of the UCTD, and whether the buyer can be considered as a consumer.⁹⁰ In *Pannon*, the ECJ concluded that the national court is not required to preclude the application of an unfair term if the consumer, after having been informed of the unfair nature of that clause, does not intend to invoke its unfair or non-binding status.⁹¹ Moreover,

82 ECJ 21 April 2016, ECLI:EU:C:2016:283, *Radlinger*, curia.europa.eu/juris/liste.jsf?num=C-377/14, para 59.

83 ECJ 17 December 2009, ECLI:EU:C:2009:792, *Martín Martín*, curia.europa.eu/juris/liste.jsf?num=C-227/08, para 36.

84 ECJ 3 October 2013, ECLI:EU:C:2013:637, *Duarte Hueros*, curia.europa.eu/juris/liste.jsf?num=C-32/12, para 43.

85 *Faber*, para 48.

86 More specifically, Mrs. Hueros, who had bought a car with a leaking, sliding roof requested before the national court only the rescission of the contract due to the leaking roof. The national court, however, held that the lack of conformity was minor. As such, only a reduction in price could be justified. As the applicable Spanish procedural rules did not allow Mrs. Hueros to adapt her request, the national court referred a question to the ECJ.

87 *Océano Grupo*, para 29.

88 *Cofidis*, paras 32–34. See also H. B. KRANS, *Nederlands burgerlijk procesrecht en materieel EU-recht*, pp 24–26. However, there are authors who interpret the clauses which can be assessed *ex officio* in a restrictive way. See the references under Krans, fn. 18.

89 *Mostaza Claro*, para 38.

90 *Pénzügyi Lízing*, para 56, *Faber*, para 48.

91 *Pannon*, para 35.

the Court increasingly clarified the types of procedural situations in which the obligatory *ex officio* assessment of the UCTD applies. Before *Kuijpers*, the Court already made clear that the analysis of the national courts' own motion of applicability and compatibility with the UCTD not only applies in ordinary proceedings,⁹² order for payment proceedings⁹³ and proceedings aiming at the enforcement of arbitral awards⁹⁴ and notarial deeds,⁹⁵ but also applies in appellate proceedings.⁹⁶ In *Kuijpers*, the Court ruled that the duty to carry out an *ex officio* analysis of the UCTD extends to normal default proceedings as well (i.e. default proceedings before a judicial court). With this judgment, the Court provides guidance to what according to some was deemed the greatest fear of most national courts: the total absence of the consumer during proceedings.⁹⁷ This finding seems to be in line with the proposition that specific rules of national law that apply to certain types of proceedings and prevent the national court from examining *ex officio* the applicability of the UCTD and the unfairness of a term, will be struck down by the Court in light of the purpose of the UCTD.⁹⁸

25. Moreover, a judgment issued by the Belgian Justice of the Peace of Oudenaarde-Kruishoutem on 11 July 2016 shows that the ECJ's decision in *Kuijpers* is not that innovative after all.⁹⁹ In that case, a consumer remained completely absent in the legal proceedings. The judge eventually ruled that, in the context of Article 806 BJC, it was up to the adjudicating court to assess of its own motion whether or not there was a violation of the rules on consumer credit. Precedents thus already existed in Belgian case law that correspond with the ECJ's decision in *Kuijpers*. The only innovative element in the latter decision is that it established an explicit externalization of the duty to assess *ex officio* compliance with the UCTD in the context of default proceedings.

92 *Océano Grupo, Cofidis, Banif Plus Bank*.

93 *Banco Español*.

94 *Mostaza Claro, Asturcom, Pohotovost'* and ECJ 28 July 2016, ECLI:EU:C:2016:602, *Tomášová*, curia.europa.eu/juris/liste.jsf?num=C-168/15.

95 ECJ 14 March 2013, ECLI:EU:C:2013:164, *Mohamed Aziz*, curia.europa.eu/juris/liste.jsf?num=C-415/11.

96 *Asbeek Brusse*.

97 A. ANCERY & M. WISSINK, 18. *ERPL* 2010(2), p 316; A. ANCERY, *Ambtshalve toepassing van EU-recht* (Deventer: Kluwer 2012), p 107.

98 See in this regard A. ANCERY, *Ambtshalve toepassing van EU-recht* (Deventer: Kluwer 2012), pp 308-313. The author distinguishes these kinds of limitations on the *ex officio* application of community law from general limits to judicial activism (more specifically the power of courts to collect on their own initiative the elements which are necessary for such an *ex officio* assessment and the situation wherein a party, after having been informed about the unfair nature of a contractual clause, decides not to appeal to the non-binding status of these clauses).

99 Justice of the Peace Oudenaarde-Kruishoutem 11 July 2016, *T.Vred./J.J.P* 2017(11-12), p 569, n. R. STEENNOT, 'Ambtshalve toepassing van de informatie-inwinningsverplichting van de kredietgever'.

6. Conclusion

26. Concluding, it can be argued that the Court's decision in *Kuijpers* was written in the stars. Almost ten years ago, Professor Alain Ancery and Professor Mark Wissink wrote in this very same journal that, if one day a situation like the one at hand would come before the ECJ, the Court would have to rule the way it now did.¹⁰⁰

As to the reasoning of the Court, one can only conclude that the Court applies a purposive approach by immediately turning to the principle of equivalence. This is not really surprising, considering that Article 806 BJC lends itself to such pragmatism. Consequently, though the judgment in itself can only be encouraged in light of ensuring a high level of consumer protection, as prescribed by Article 38 of the Charter, the reasoning seems to have some loose ends. It should be noted however that this is not something new, and that there seem to be no new loose ends in this judgment. This can be illustrated by the many references in the judgment to older case law dealing with similar problems. The reasons of this incoherent approach can be manifold. First, there is still no clarity on the exact content and capacity of certain concepts used by the Court, nor on their interdependence (e.g. *effet utile* of EU law, *Rewe*-effectiveness, the principle of effective judicial protection, effective consumer protection). Second, the different compositions of the chambers of the Court involved in cases concerning procedural autonomy along with the divergent academic backgrounds of the AG's and judges, may to some extent explain the varying approaches in the Court's judgments. Both reasons may constitute a vicious circle, as scholars try to determine the exact content of and relation between different concepts based on the AG's opinions and the Court's judgments. This turns out to be difficult, due to the varying approaches and formulations given by the Court over time to these concepts. The latter, however, may be explained by the diverging legal backgrounds of the AG's and judges, based on the different scholarly views on the very same concepts.

Lastly, this case illustrates the necessity to reconsider the remedies against linguistic problems and misconceptions of a Member States' national law. The first problem can be illustrated by the English translation of the Court's judgment. Instead of (correctly) referring to default proceedings, the English version refers to appellate proceedings in paragraph 33. It seems that the translator looked too closely at *Asbeek Brusse*, to which the Court referred in the aforementioned paragraph and which was given in the context of appellate proceedings. However, it should be remarked that (at least) in the German and French versions of the judgment a correct translation was used. An illustration of the second problem can be found in the dichotomy between the *power* to assess *ex officio* compatibility with the UCTD on the one hand and the *obligation* to do so on the other hand.¹⁰¹ A person who has no background on Belgian

100 A. ANCERY & M. WISSINK, 18. *ERPL* 2010(2), p 316.

101 Maybe the word 'dichotomy' is not the right one here, as strictly speaking a dichotomy indicates two non-overlapping concepts. Here, as indicated above, the normal sense of the word 'power' does

law may on the basis of this judgment wrongly assume that Belgian procedural law holds a mere possibility for the national court to consider the compatibility with rules of public policy of its own motion. This incongruence between legal reality and the wording of the Court does not help to elucidate the haze that contours the procedural autonomy of Member States in the context of *ex officio* powers/obligations of national courts. It should be stressed that this (possible) misunderstanding finds its roots in the formulation of the preliminary question by the Justice of the Peace of Antwerp. One might wonder whether it belongs to the ECJ's tasks to examine whether the terminology used in the referred question corresponds with the legal reality in the referring court's national legal order. However, as is apparent from the AG's Opinion, the Belgian Government raised during the proceedings that Article 806 BJC should be interpreted as holding *an obligation*, rather than a mere possibility.

27. By way of a general conclusion, the judgment seems to be the youngest scion in a strand of case law wherein the Court, based on a limping reasoning, expresses its desire for national courts to assess compatibility with consumer law of their own motion. All in all, it's just another brick in the wall.¹⁰²

not necessarily exclude that there is an obligation. However, as the judgment was delivered in Dutch, and the Dutch text mentions a '*bevoegdheid*', the latter may be understood as a mere possibility (*supra*).

102 *Another Brick In The Wall*, by Pink Floyd.