The National Courts' Obligation to Gather and Establish the Necessary Information for the Application of Consumer Law - The Endgame?

Jarich Werbrouck[*] & Elise Dauw[†]

Ghent University, Belgium

Abstract

At the turn of the millennium, the Court of Justice of the European Union created – and has subsequently developed – the so-called 'ex officio doctrine' in consumer law cases. Although the Unfair Contract Terms Directive was initially – and remains – the main focus of the Court's efforts, it has become clear that other instruments of substantive consumer law are also to be applied of the national courts' own motion. An important prerequisite, however, is the courts' acquisition of necessary information. That aspect of the ex officio doctrine has also formed the subject of the Court's efforts to protect consumers as weaker contracting parties and litigants. This contribution analyses the Court's latest case-law and submits that the doctrine's development is reaching an endpoint. Also, a national (Belgian) perspective on that case-law is given in order to determine whether and, if so, which aspects of it give us cause to reflect upon and maybe even revise our own national approach.

Introduction

Da mihi factum, dabo tibi ius; *res iudicata pro veritate habetur*; *iudex secundum allegata et probata iudicat*; *actori incumbit probatio,…* Almost all aspects of procedural law can be associated with one or more ancient legal maxims. One might presume that, since they are long-established, every aspect of these principles is crystal clear. That is not, however, accurate. Apart from the various approaches and developments in the Member States' own legal systems, another factor continues to have a major impact on 'established' principles: the case-law of the Court of Justice of the European Union (the 'Court' or 'CJEU').

It would exceed the scope of this contribution to analyse the CJEU's impact on every aspect of procedural law. We have therefore opted to examine the national courts' role in applying EU law. More specifically, we examine its ex officio application in consumer cases. There is already extensive literature on this subject, demonstrating the importance of the Court's efforts. Accordingly, we confine ourselves to analysing the CJEU's case-law on the availability of the necessary legal and factual elements to the national court. We submit that the Court recently began a new phase in this doctrine's development.

For ease of comprehension, this contribution is structured chronologically. First, we recap the Court's most important, relevant case-law (*Pannon* and *Pénzügyi Lízing*) (I.). Secondly, we analyse the Court's recently initiated phase, that is the judgments in *Profi Credit Polska II*, *Bondora*, *Lintner* and *Kancelaria Medius* (II.). Thirdly, we address whether the Court's case-law is as ground-breaking as it may at first seem , through a case study of the Belgian approach towards judicial activity/passivity when gathering facts and evidence (III.), before reaching our conclusion (IV.).

[*] Leading author. Fellow of the Research Foundation Flanders and PhD Candidate, Financial Law Institute and Institute for Procedural Law. Any questions or remarks can be sent to Jarich.Werbrouck@UGent.be. The authors want to thank the anonymous reviewers, for their useful remarks and suggestions. Also, special thanks go to Mr Alexander Leaver, for his much appreciated linguistic polishing of the initial draft of this contribution. Responsibility for any remaining faults or inconsistencies remains ours.

[†] Academic assistant and PhD researcher, Institute for Procedural Law.

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The creation and initial development of the obligation to investigate in consumer law cases

After the Court established the principle that the Unfair Contract Terms Directive (UCTD) could (*Océano Grupo*,[1] *Cofidis*[2]) and should (*Mostaza Claro*[3]) be applied ex officio, the question arose: what could trigger this obligation? Were the national courts under an obligation to seek infringements actively, almost inquisitorially, or would the judicial mechanism first have to be fuelled by facts raised by parties to a dispute?

First phase: initial conditionality of ex officio application in Pannon

Facts and judgment

The Court gave the beginnings of an answer to that question in *Pannon*.[4] The case concerned a subscription contract for the provision of mobile telephone services entered into by a consumer. By entering into the contract, the consumer agreed to a clause not individually negotiated, conferring jurisdiction on the court of the place where the professional had its main business. The company subsequently sought an order for payment from the court designated by that clause. Since the consumer opposed the initially granted order for payment, due to which the proceedings became contentious, the national court noted that its territorial jurisdiction was possibly based on an unfair term. However, according to national procedural law, the court could no longer establish and analyse its own territorial jurisdiction, since the consumer had already made a first filing of her defence concerning the substance of the dispute. Consequently, the national court turned to the CJEU, asking whether:

"*[…] the consumer protection provided by the UCTD require[s] the national court of its own motion – irrespective of the type of proceedings in question and of whether or not they are contentious – to determine that the contract before it contains unfair terms, even where no application has been lodged, thereby carrying out, of its own motion, a review of the terms introduced by the seller or supplier in the context of exercising control over its own jurisdiction?*"

After holding that the protection the UCTD confers on consumers extends to cases in which a consumer fails to raise the unfairness of the term, the Court pinpointed the nature and the importance of the public interest underlying that protection, which justify the obligation on the national court to assess of its own motion the unfairness of a contractual term. By doing so, the national court compensates for the imbalance between the consumer and the seller or supplier. In order to ensure the effectiveness of the protection the UCTD intends to confer on consumers, the role attributed to the national court by EU law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term. It also consists of the obligation to examine the issue of its own motion, where it has available to it the legal and factual elements necessary for that task. This is also true when the national court assesses its own territorial jurisdiction.[5]

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[1] *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) and *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) *and Emilio Viñas Feliú* (C-244/98) EU:C:2000:346; [2000] E.C.R. I-4941; [2000] 6 WLUK 711; [2002] 1 C.M.L.R. 43.

[2] *Cofidis SA v Jean-Louis Fredout* (C-473/00) EU:C:2002:705.

[3] *Elisa María Mostaza Claro v Centro Móvil Milenium SL* (C-168/05) EU:C:2006:675; [2007] Bus. L.R. 60; [2006] E.C.R. I-10421; [2006] 10 WLUK 671; [2007] 1 C.M.L.R. 22; [2007] C.E.C. 290.The CJEU, however, indicated that it only saw a clear *obligation* to apply the UCTD ex officio as of the date of the *Pannon* judgment. See *Milena Tomášová v Slovenská republika - Ministerstvo spravodlivosti SR and Pohotovosť s.r.o.* (C-168/15) EU:C:2016:602 at [30]. We submit, however, that the wording used in *Mostaza Claro* three years earlier already unambiguously indicated an obligation to apply the UCTD ex officio.

[4] *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* (C-243/08) EU:C:2009:350; [2010] 1 All E.R. (Comm) 640; [2009] E.C.R. I-4713; [2009] 6 WLUK 57; [2010] All E.R. (EC) 480; [2010] C.E.C. 790.

[5] *Pannon* at [30-32] and [35].

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Remaining questions after *Pannon*

As was apparent from *Pannon*, the UCTD had to be applied of the national court's own motion only if it had available to it the legal and factual elements necessary to do so. This condition has been repeated by the CJEU,[6] also outside the context of the UCTD.[7] As it was clear that national courts were obliged to apply the UCTD[8] ex officio only if they had the necessary information, also the opposite was seemingly clear: national courts were *not* under an obligation to apply the UCTD of their own motion, according to EU law, if they did *not* have all the information necessary.

A remaining question after *Pannon* concerned which elements exactly the national court could consider. A first possibility was that the national court could take into consideration only the elements which parties have specifically put forward to support their claims (so-called *faits générateurs*). This interpretation could be specifically detrimental to consumers, however, since consumers often fail to appear in court. Their fate would then be decided by the elements raised by their professional counterparty. The latter would have greater interest in selectively submitting information to its own advantage. Consequently, this interpretation seems hard to reconcile with the effectiveness of the ex officio obligation pursued by the Court and the high level of consumer protection ex Article 38 of the Charter.[9] Moreover, it does not seem to be supported by the wording in *Pannon*, where the CJEU established the obligation to apply the UCTD as soon as the court has 'available to it the legal and factual elements necessary for that task'. Instead, it seems safe to assume that the national court must consider *all* information at its disposal, and not only the information specifically put forward by parties to support their claims. Besides the national court's general knowledge, information apparent from the case file (other than that relied upon by the parties) (so-called *faits purement adventices*) must also be taken into account, provided that the *audi et alteram partem* principle is observed.[10]

Second phase: recognition of an investigative obligation in Pénzügyi Lízing

Facts and judgment

In *Pannon*, the CJEU found itself faced with the situation in which the national court actually had at its disposal the necessary information to fulfil its obligation to apply the UCTD ex officio.[11] One year later, the Court dealt in Grand Chamber with the opposite scenario.[12] *Pénzügyi Lízing* concerned a consumer who concluded a loan contract to finance the purchase of a car, once again featuring a potentially unfair

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[6] See e.g. *Banco Español de Crédito, SA v Joaquín Calderón Camino* (C-618/10) EU:C:2012:349; [2012] 6 WLUK 273; [2012] 3 C.M.L.R. 25 at [43], *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai* (C-472/11) EU:C:2013:88; [2013] 2 WLUK 606; [2013] 2 C.M.L.R. 42 at [23] and *Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (C-415/11) EU:C:2013:164; [2013] 3 WLUK 372; [2013] 3 C.M.L.R. 5; [2013] All E.R. (EC) 770 at [46].

[7] See e.g. in the context of the Consumer Sales Directive (CSD): *Froukje Faber v Autobedrijf Hazet Ochten BV* (C-497/13) EU:C:2015:357; EU:C:2015:357; [2015] 6 WLUK 101; [2015] 3 C.M.L.R. 43 at [46] and [48], and in the context of the Consumer Credit Directive (CCD): *Ernst Georg Radlinger and Helena Radlingerová v Finway a.s.* (C-377/14) EU:C:2016:283; [2016] Bus. L.R. 886; [2016] 4 WLUK 470; [2016] 3 C.M.L.R. 28 at [70].

[8] As was already mentioned, the Court's case-law concerning the availability of the necessary elements, factual and legal, also encompasses other areas of EU consumer law (see above, footnote 7). Thus, the findings made in this contribution also seem applicable in those areas. However, *Bankia* (*Bankia SA v Juan Carlos Mari Merino and Others* (C-109/17) EU:C:2018:735; [2018] 9 WLUK 201), given in the context of the Unfair Commercial Practices Directive, seems to suggest that there is no general ex officio obligation in consumer cases.

[9] A. Ancery and M. Wissink, "ECJ 4 June 2009, *Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi*" (2010) 18 *European Review of Private Law* 307, 314.

[10] See inter alia Ancery and Wissink, "ECJ 4 June 2009, *Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi*", 314; G. Straetmans and C. Cauffman, "Legislatures, courts and the Unfair terms Directive" in Ph. Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge: Cambridge University Press, 2012), p. 109; A. Ancery, *Ambtshalve toepassing van EU-recht* (Deventer: Kluwer, 2012), p. 148-149 and p. 161; R. Steennot, "De bescherming van de consument door het Hof van Justitie: een brug te ver?" (2017) 54 *Tijdschrift voor Privaatrecht* 81, 135.

[11] At least, this information was apparent from the case file.

[12] Neither from the submissions made by the parties, nor from the case file, or from the national court's own knowledge.

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jurisdiction clause.[13] Following the consumer's failure to fulfil his contractual obligations, the professional counterparty terminated the contract and brought an action for repayment of the remaining sums. This action was brought before the court appointed by the jurisdiction clause, not before the court within whose jurisdiction the consumer lived. After the consumer brought an appeal – without stating any grounds – against the initial ex parte proceedings, the proceedings became inter partes. The referring court found that the consumer did not live within its jurisdiction and doubted the fairness of the jurisdiction clause at issue. Consequently, it asked the CJEU whether:

"*[i]f the national court itself observes, where the parties to the dispute have made no application to that effect, that a contractual term is potentially unfair, it [may] undertake, of its own motion, an examination with a view to establishing the factual and legal elements necessary to that examination where the national procedural rules permit that only if the parties so request?*"

After recalling the protective purpose of the UCTD and the corresponding EU obligation on the national courts to apply it ex officio, two steps are distinguished. First, the national court has to ascertain whether a case before it falls under the scope of consumer protection law. In the context of the UCTD, the national court has to determine, in all cases and whatever the rules of its domestic law, whether the contested term was individually negotiated between a seller or supplier and a consumer.[14] Once it is clear that the UCTD is applicable, the second stage of ex officio application comprises the substantive review of the dubious clause. As this case concerned a jurisdiction clause, the Court simply referred to *Océano Grupo*, where it held that jurisdiction clauses such as that *in casu* are unfair.[15] The Court concludes that a national court must investigate of its own motion whether a term conferring exclusive jurisdiction in a contract between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of the directive and, if it does, assess of its own motion whether such a term is unfair.[16]

Remaining questions after *Pénzügyi Lízing*

We submit that, with *Pénzügyi Lízing*, the Court entered a second phase. Whereas *Pannon* only touched upon the national courts' task to apply consumer law to facts brought before them, *Pénzügyi Lízing* also concerned their fact-gathering and evidential obligations. In *Pannon*, the Court held that consumer law had to be applied of the national courts' own motion only where they had all the information necessary to that end. The Court did not create an EU obligation to investigate. In *Pénzügyi Lízing*, however, it did.[17] National courts are now also under an obligation to apply the UCTD where they do *not* have all necessary information at their disposal. More precisely, in the first step of ex officio application, national courts have to take investigative measures in order to establish facts and obtain information necessary to verify whether the UCTD applies. Thus, the obligations which EU law imposes on national courts have grown and the procedural autonomy of the Member States has shrunk.[18] This investigative

[13] *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* (C-137/08) EU:C:2010:659; [2010] 11 WLUK 244; [2011] 2 C.M.L.R. 1; [2011] C.E.C. 973.
[14] *VB Pénzügyi Lízing* at [46-51].
[15] *VB Pénzügyi Lízing* at [49] and [52-55].
[16] *VB Pénzügyi Lízing* at [56].
[17] A. Beka, *The Active Role of Courts in Consumer Litigation – Applying EU Law of the National Courts' Own Motion* (Cambridge: Intersentia, 2018), p. 195-197; G. Straetmans, "Enkele recente ontwikkelingen inzake Europees consumentenrecht" in I. Govaere (ed), *Europees recht: moderne interne markt voor de praktijkjurist – XXXVIIIste Postuniversitaire Cyclus Willy Delva* (Mechelen; Wolters Kluwer Belgium, 2012), p. 372; B. Fekete and M. Mancaleoni, "Application of primary and secondary EU law of the national courts' own motion" in A. Hartkamp, C. Sieburgh and W. Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Oxford: Hart Publishing, 2017), p. 429-430; R.H.C. Jongeneel, "Het *Pénzügyi*-arrest: een beperkte onderzoeksplicht in het kader van de ambtshalve toetsing" (2011) 12 *Nederlands tijdschrift voor Europees recht* 33, 36; R. Steennot, "De bescherming van de consument door het Hof van Justitie: een brug te ver?", 135.
[18] G. Straetmans and C. Cauffman, "Legislatures, courts and the Unfair terms Directive", p. 111; V. Trstenjak, "Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU" (2013) 21 *European Review of Private Law* 451, 470; Th. Pfeiffer, "EuGH: Kompetenzen des EuGH bei der Auslegung der Klauselrichtlinie und die Pflicht der nationalen

obligation has been reconfirmed repeatedly and has become settled case-law.[19] Also in the context of the Consumer Sales Directive, the Court recognised both the two-step reasoning and the obligation to take investigative measures.[20] It thus seems safe to assume that in the areas of consumer law where the Court recognised the ex officio obligation for national courts, they are obliged to take investigative measures to determine whether consumer law applies.

Multiple questions remained. First, it was unclear whether the obligation to investigate in order to acquire the necessary information was also applicable in the second step (substantive application). On the one hand, the investigative obligation on national courts can be interpreted narrowly, meaning that there is no (EU) obligation to take investigative measures in the second step.[21] In order to determine whether there is a substantive infringement of the UCTD, national courts could satisfy the EU requirements by relying on the information available to them (*Pannon*).[22] Until recently this seemed to be the legal truth. A textual analysis of the Court's judgment shows that it did not unveil an investigative obligation on national courts in the second step of ex officio application.[23] Multiple policy arguments were made for a broad investigative obligation, however. Some pinpointed the lack of logic in national courts having the EU obligation to seek the necessary information to ascertain the applicability of consumer law (first step), while being able to refrain from doing so when assessing substantive compatibility (second step).[24] The high level of consumer protection under Article 38 Charter also supports a broad interpretation of national courts' investigative obligations. Such interpretation would be welcomed from a consumer viewpoint. However, there are countering considerations: not only would an extensive investigative obligation entail a considerable increase of national courts' workload,[25] but also procedural principles recognised at EU level, such as the right to adjudication within reasonable time and without extensive costs, might be compromised.

Another aspect left in limbo is when the obligation to take investigative measures is triggered. We submit that the national court has to take measures of inquiry to determine whether consumer law applies as soon as the merest indication to that effect is apparent from the information available.[26] The question whether an indication is apparent from the information at the national court's disposal is in a certain sense preliminary to ex officio application. The national court is under an obligation to take investigative measures only if something makes or should have made it suspect that consumer law applies.[27] The facts

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Gerichte zur Amtsermittlung" (2010) 11 *LMK* 311868, 311868; H. Aubry, E. Poillot and N. Sauphanor-Brouillard, "Droit de la consommation" (2011) 13 *Recueil Dalloz* 974, 984.

[19] *Banco Español* at [44]; *Mohamed Aziz* at [47]; *Banif Plus Bank* at [24] and [31]; *Profi Credit Polska S.A. v Bogumiła Włostowska and Others* (C-419/18) *and Profi Credit Polska S.A. v OH* (C-483/18) EU:C:2019:930; [2019] 11 WLUK 76; [2020] 2 C.M.L.R. 8 at [66].

[20] *Faber* at [46].

[21] It remains possible that, under *national* procedural law, courts might also have to take investigative measures for the substantive ex officio application (second step). This was for instance the case in the Netherlands, where the *Hoge Raad* ruled in *Heesakkers/Voets* that Dutch courts also have the obligation to take investigative measures in the phase of actual substantive application of consumer law (*in casu* unfair contract terms).

[22] A. Beka, *The Active Role of Courts in Consumer Litigation – Applying EU Law of the National Courts' Own Motion*, p. 196; A. Ancery and M. Wissink, "ECJ 4 June 2009, *Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi*", 314; V. Trstenjak, "Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU", 471-472; R. Steennot, "Public and Private Enforcement in the Field of Unfair Contract Terms" (2015) 23 *European Review of Private Law* 589, 606.

[23] A. Ancery, *Ambtshalve toepassing van EU-recht*, p. 190. This is also apparent from *Faber* at [46]. It should be noted, however, that *Faber* was limited to the first step (applicability). It comes as no surprise that the Court did not recognise a power/obligation to take investigative measures in the second step, since it was not asked to rule on that matter.

[24] G. Straetmans and C. Cauffman, "Legislatures, courts and the Unfair terms Directive", p. 112.

[25] C.J.-A. Seinen and A.G.F. Ancery, "Vorderingen in b2c-verstekken: toetsen of afwijzen?" (2015) 14 *Tijdschrift voor Civiele Rechtspleging* 77, 80; C. Pavillon, *Open normen in het Europees consumentenrecht* (Deventer: Kluwer, 2011), p. 82.

[26] This was also the viewpoint taken by Advocate General Trstenjak in her opinion. See Opinion of Advocate General Trstenjak in *VB Pénzügyi Lízing* (C-137/08) EU:C:2010:401 at [109].

[27] R. Steennot, "De bescherming van de consument door het Hof van Justitie: een brug te ver?", 135. See also A. Ancery and C. Pavillon, "De rechterlijke lijdelijkheid in rook opgegaan? De ambtshalve toepassing van de consumentenkoopregels nader toegelicht" (2015) 14 *Maandblad voor Vermogensrecht* 243, 248, who indicate that a rebuttable presumption exists under Dutch law that consumer law is applicable once there is the merest indication to that effect. Consequently, Dutch courts would

underlying the *Faber* case are illustrative. There, a contract between two parties was headed 'contract of sale to a private individual'.[28] As the CJEU rightly held, this can be seen as an indication that consumer law (the CSD) might apply, which in turn triggers the obligation on the national court to undertake the investigations necessary to decide on the applicability of consumer law.[29] We note that not only something factual may give rise to the necessary doubt. The object of the claim(s) can also provide the necessary indication. The alternative is that national courts would have to apply consumer law without *any* indication. This would amount to an inquisitorial witch hunt for infringements of consumer law. Such an obligation would place an excessive (and often fruitless) burden on the national judiciary. Moreover, from a legal perspective, the court might raise a new point of dispute, since there is nothing causing doubts as to the application or infringement of consumer law. Evidently, this would be contrary to the principles of judicial passivity and party disposition, according to which the parties decide the ambit of the dispute.[30] Consequently, where there is no indication of involvement and/or infringement of consumer law, the national court may not undertake an ex officio investigation.[31]

A third point remains open, regarding the extensiveness of the substantive application of consumer law (second step). Since the first step of ex officio application aims to ascertain whether consumer law applies, the answer is valid for the entire relationship between two parties. Either consumer law applies, or it does not. In the second step, however, the national court has to assess whether consumer law has been substantively complied with. Here, the question of how 'far' the national court has to go in its assessment is of utmost importance, especially concerning unfair contract terms. It comes down to whether the court may/must analyse only the term on which a party based its claims, submit the entire contract to scrutiny, or something in between. Besides policy considerations concerning workload, a broad understanding of the national courts' obligations again entails the risk of raising a new point of dispute. Thus, it would likewise be contrary to the principles of judicial passivity and party disposition for a national court to screen the entire relationship between a consumer and a seller or supplier, where the dispute concerns one specific contractual term. These considerations seem to underpin the doctrinal viewpoint that a national court has to assess only the aspects that are relevant in view of the decision it has to make in the dispute before it.[32] Thus, the court has to determine whether a certain term is relevant in the light of the claims made by the parties. Only if that is the case, the substantive ex officio analysis extends to that term. Otherwise, the court risks going *ultra petita*, in spite of the aforementioned principles.

The last issue we want to address concerns the kinds of measures of inquiry the Court actually had in mind. In the decade after *Pénzügyi Lízing*, the Court did not elaborate much. Only in *Faber*, the Court clarified that a national court is required to assess ex officio whether a party can qualify as a consumer "as soon as that court has at its disposal the matters of law and of fact that are necessary for that purpose *or may have them at its disposal simply by making a request for clarification*" (authors' emphasis).[33] Consequently, a simple request for clarification is possible. This is not much of a clarification, however, as a simple request seems to be the least intrusive measure conceivable. If simple requests would not fall under the concept of 'investigative measures', one wonders what could. More pertinent is the

not have to investigate of their own motion, since it would be the professional party who would have to prove that consumer law is *not* applicable.

[28] *Faber* at [17].

[29] *Faber* at [40].

[30] P. Taelman, "Powers of the Judge in Evidence Proceedings and Evidentiary Agreements" in L.-M. Bujosa Vadell (ed), *En Torno A La Prueba Y Al Proceso* (Granada: Editorial Comares, 2019), p. 2-3.

[31] See also A. Beka, *The Active Role of Courts in Consumer Litigation – Applying EU Law of the National Courts' Own Motion*, p. 192 and A. Ancery and M. Wissink, "ECJ 4 June 2009, *Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi*", 314.

[32] G. Straetmans and C. Cauffman, "Legislatures, courts and the Unfair terms Directive", p. 116; Ph. Hacker, "One Size Fits All? Heterogeneity and the Enforcement of Consumer Rights in the EU after Faber" (2016) 12 *European Review of Contract Law* 167, 170; A. Beka, *The Active Role of Courts in Consumer Litigation – Applying EU Law of the National Courts' Own Motion*, p. 228-229.

[33] *Faber* at [46].

question of the outer limits within which national courts may/must operate, rather than the bottom lines. This is all the more true since the Court's clarification in *Faber* does not help much in the case of non-appearing consumers. In that case, the court cannot direct a simple request to them. Given the frequency of non-appearance by consumers, it is particularly relevant whether the courts may/must take more intrusive measures of investigation, such as ordering the submission of contracts or ex officio hearing of witnesses, taking of evidence by third parties, hearing of experts or inspections.[34] Some have deduced from the Court's more reserved wording in *Faber*, compared to *Pénzügyi Lízing*, that it wanted to take a step back.[35] Without a doubt, the 'investigation' of which the Court spoke in *Pénzügyi Lízing* suggests more intrusive handling than the 'simple request' mentioned in *Faber*.[36] We submit that the Court did not take a step back, however. The tendency in the Court's case-law is that a balance has to be struck between achieving effective consumer protection on the one hand and taking account of procedural economy, the relationship between the State and the individual, and other fundamental legal principles (e.g. legal certainty) on the other. From that viewpoint, it seemed justified that national courts would have to apply consumer law ex officio only to aspects relevant to their forthcoming judgment in the light of the subject matter of the dispute. Hence, there seems to be no reason to abandon that tendency in respect of the measures national courts may take to fulfil their obligation. We submit that, after *Pénzügyi Lízing* and *Faber*, there was definitely room for more far-reaching measures than simple requests for clarification, without however losing sight of other fundamental principles.

Third phase: many answers, more questions

It follows from the analysis above that legal commentators did not leave many stones unturned concerning the ex officio obligation in consumer law cases. Yet, the Court itself remained silent on important aspects. In a recently initiated third phase, however, the Court seems to fill some remaining gaps. Almost a decade after *Pénzügyi Lízing* was delivered, the Court interpreted the national courts' obligations further in *Profi Credit Polska II*, *Bondora*, *Lintner* and, most recently, *Kancelaria Medius*.

Profi Credit Polska II *and* Bondora*: Hop…*

Facts and judgments

Profi Credit Polska II concerned consumer credit agreements under which the repayment of debts was secured by so-called blank promissory notes.[37] Since the consumers failed to comply with their contractual obligations, their professional counterparty completed these notes by entering an amount on them. Subsequently, various applications were brought before the referring courts seeking payment of the sums indicated on the promissory notes solely on the basis of the latter (i.e. without any further supporting evidence, including the underlying contract). The national courts had doubts concerning the merits of the professional party's claims, though.[38] More precisely, they had a strong and justified belief that the credit contract underlying the contractual relationship between the parties was at least partially invalid. However, since some of the consumers had not taken a position, those contracts initially remained outside of those proceedings. Due to uncertainty as to their own obligations, the national courts asked the CJEU whether, in circumstances such as those at issue, the UCTD and the CCD had to be

[34] Opinion of Advocate General Tanchev in *Lintner* (C-511/17) EU:C:2019:1141 at [60].
[35] S. Vandemaele, "Hoedanigheid consument en vermoeden aanwezigheid gebrek aan overeenstemming verplicht ambtshalve op te werpen door nationale rechter" (2016) 15 *Droit de la consommation/Consumentenrecht* 32, 38; L. Traest, "Ambtshalve opwerpen van de hoedanigheid van consument: een nieuw hoofdstuk in de rechtspraak van het Hof van Justitie" (2016) 34 *Revue de droit commercial belge/Tijdschrift voor Belgisch Handelsrecht* 356, 361 (nuanced).
[36] Compare *VB Pénzügyi Lízing* at [45-46] with *Faber* at [46].
[37] *Profi Credit Polska S.A. v Bogumiła Włostowska and Others* (C-419/18) *and Profi Credit Polska S.A. v OH* (C-483/18) EU:C:2019:930; [2019] 11 WLUK 76; [2020] 2 C.M.L.R. 8 ('*Profi Credit Polska II*').
[38] It appeared that there was a significant difference between the amount borrowed and the amount to be repaid (*Profi Credit Polska II* at [37]).

interpreted as meaning that national courts must examine of their own motion whether the provisions agreed between the parties are unfair and, in that respect, may require the seller or supplier to produce the document recording those provisions, so that the national courts would be able to verify that the rights consumers derive from those directives are observed.[39]

According to the Court, without effective review of whether the contracts' terms are unfair, observance of the rights conferred by the UCTD cannot be guaranteed. Hence, it is for the national court to investigate of its own motion whether a term in the consumer contract which is the subject of a dispute before it falls within the scope of the UCTD and, if so, to assess whether such a term is unfair. It follows that Articles 6(1) and 7(1) of that directive require that that court be able to demand the production of the documents on which an application is based, *in casu* the promissory note agreement which constitutes under national law a precondition for the issuance of a blank promissory note. These considerations do not contravene the principle that the subject matter of an action is to be defined by the parties, according to the Court. The national court's requirement that the content of the document on which a party bases its application be produced by that party simply forms part of the evidential framework of the proceedings, since the purpose of such a request is merely to verify the basis of that party's action.[40] Consequently, it must be possible for national courts to ask for the submission of documents upon which parties base their claims.

The facts underlying *Bondora* were very similar to those of *Profi Credit Polska II*, provided that the professional party applied for a *European* order for payment for sums due under a loan agreement.[41] As in *Profi Credit Polska II*, the referring courts noted that the professional party did not produce the agreement upon which it based its application. Neither did it do so after the referring courts had made requests to that end, since according to the lender the European Order for Payment Regulation (EOPR) did not refer to the submission of any documents for the issuance of such order for payment. Moreover, national (Spanish) legislation stated that it was not mandatory to produce any documents for the application. Should documents nonetheless be provided, they would be inadmissible. Consequently, the referring courts asked the CJEU whether the UCTD must be interpreted as meaning that a 'court' seized of an application for a European order for payment is allowed to request from the creditor additional information relating to the terms of the agreement relied on in support of the claim at issue, in order to carry out an ex officio review of the possible unfairness of those terms.[42]

After balancing the rapidity and uniformity pursued by the EOPR on the one hand and the high level of consumer protection aimed at in the Court's case-law on the other,[43] the Court rules that its case-law concerning the ex officio application of the UCTD also applies to 'courts' in the sense of the EOPR.[44] Subsequently, the Court confirms that the national courts' power to request additional information from the creditor concerning the terms relied on, such as the reproduction of the entire agreement or the production of a copy thereof, follows from both the UCTD and the EOPR.[45] According to the Court, the fact that a national court requires the applicant to produce the content of the document(s) on which its application is based simply forms part of the evidential framework of the proceedings. The purpose of such a request is merely to verify the basis of the action, so it does not infringe the principle that the subject matter of an action is defined by the parties.[46]

[39] *Profi Credit Polska II* at [61].
[40] *Profi Credit Polska II* at [66-68].
[41] *Bondora AS v Carlos V. C.* (C-453/18) *and XY* (C-494/18) EU:C:2019:1118.
[42] *Bondora* at [23], [29] and [34].
[43] See also Opinion of Advocate General Sharpston in *Bondora* (Joined Cases C-453/18 and C-494/18) at [3-4], where she claims that the seemingly contradictory objectives of both instruments can be reconciled by means of a combined interpretation.
[44] *Bondora* at [46].
[45] *Bondora* at [50].
[46] *Bondora* at [52], referring to *Profi Credit Polska II*.

Remaining questions after *Profi Credit Polska II* and *Bondora*

As is apparent from both *Profi Credit Polska II* and *Bondora*, the national court's ex officio obligation does not end where it does not dispose of the necessary information to assess the fairness of the contractual term under scrutiny. National courts *may* take investigative measures in order to acquire the necessary elements to conduct the substantive review of a term upon which a claim before it is based. By so ruling, the Court favours a broad investigative mandate for national courts. Also, it added another possible measure to the 'EU arsenal' of measures of inquiry. Next to the simple request for clarifications (*Faber*), it is now clear that ordering the submission of the contract or other documents is a possibility. This is in line with the Court again using stronger wording to describe the national courts' investigative mandate ("the measures of inquiry undertaken by the court of its own motion"[47]), thus affirming that it did not take a step back in *Faber*.

A remaining issue concerns the compatibility of this case-law with the principles of judicial passivity and party disposition. By taking investigative measures, the court actually seeks to establish facts which were not proven by the parties to the proceedings, which it will later take into consideration before giving judgment. This gave rise to concerns about potential infringement of the aforementioned principles.[48] However, it is important to bear in mind that the national courts have a different role to play regarding the ambit of the dispute, on the one hand, and the gathering of facts and evidence, on the other. As the Court rightly holds, the request for production of documents simply forms part of the evidential framework of the proceedings, in which a national court may and must play a more active role.[49] The principles of judicial passivity and party disposition do not dominate the national courts' evidential task. Their role on that matter is rather indirect and more remote. Instead, it are the principles of impartiality and procedural economy that directly guide those courts' evidential task.[50] Concerning the national courts' role in determining the ambit of the dispute, however, the principles of judicial passivity and party disposition do play the governing role. Thus, although the ambit of the dispute is to be defined by the parties and national courts in principle have to stay passive in that regard, it is also up to those courts to verify, within the ambit of the dispute as defined by the parties, whether the allegations upon which the latter's claims are based are true. In that regard, it should be noted that Member States' courts are generally provided as a matter of national law with powers to instruct the parties to submit additional evidence and to ask them questions of clarification, whereas 'hard' measures of investigation (ex officio hearing of witnesses, hearing of experts,…) are more divergent.[51]

Lintner*: … Step…*

Facts and judgment

As was apparent from *Profi Credit Polska II* and *Bondora*, the national courts *may* take measures of inquiry ex officio, in order to substantively review the unfairness of a term falling within the ambit of the dispute. The question remained, however, whether they *must* do so. In its *Lintner* judgment, the Court provided more clarity.[52] At issue was a mortgage loan contract which contained terms giving the

[47] *Profi Credit Polska II* at [70].
[48] *Profi Credit Polska II* at [68].
[49] B. Allemeersch, *Taakverdeling in het burgerlijk proces* (Antwerp: Intersentia, 2007), p. 401-402 and 423.
[50] P. Taelman, "Powers of the Judge in Evidence Proceedings and Evidentiary Agreements", p. 6 and 11.
[51] See also Opinion of Advocate General Tanchev in *Lintner* (C-511/17) EU:C:2019:1141 at [60] and footnote 46, under reference to Report prepared by a Consortium of European universities led by the Max Planck Institute Luxembourg for Procedural Law as commissioned by the European Commission, 'An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judges and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law', JUST/2014/RCON/PR/CIVI/0082, Strand 2, Procedural Protection for Consumers, June 2017 ('Evaluation Study') at [390-395].
[52] *Györgyné Lintner v UniCredit Bank Hungary Zrt* (C-511/17) EU:C:2020:188; [2020] Bus. L.R. 1570; [2020] 3 WLUK 142; [2020] 3 C.M.L.R. 21.

bank the right to make unilateral amendments to that contract. Moreover, it contained terms relating to the notarial certificate, the grounds for termination and certain fees payable by the consumer. The latter went to the national court seeking a declaration of invalidity of the terms concerning the right to unilaterally amend the contract. The consumer raised no arguments which indicated the unfairness of the other clauses, nor did he seek a declaration of their invalidity. The question arose whether Article 6 of the UCTD must be interpreted as meaning that a national court, hearing an action brought by a consumer seeking a declaration of unfairness of terms included in a contract between that consumer and a professional, is required to examine of its own motion and individually, all the other contractual terms, which were not challenged by that consumer, in order to ascertain whether they can be considered unfair.

After ruling that only the terms which, although not challenged by the consumer's action, are connected to the subject matter of the dispute have to be examined ex officio, the Court elaborates on the elements which the national court should take into consideration. It should not confine itself exclusively to the elements of law and fact provided by the parties in order to limit its examination to the terms whose unfairness can be definitively assessed on the basis of only those elements. Besides the obligation of a national court to investigate of its own motion whether a case before it comes within the scope of the UCTD, a national court must take measures of investigation in order to assess the substantive unfairness of certain clauses. Thus, the national court is required to take ex officio investigative measures in order to complete the case file, by asking the parties to provide it with clarifications or documents necessary for that purpose, in observance of *audi alteram partem*. That is the case in so far as the elements of law and fact already contained in the case file raise serious doubts as to the unfairness of certain terms which, despite not having been challenged by the consumer, are connected to the subject matter of the dispute, without it being possible to make definitive assessments in that regard on the basis of the case file.[53]

Remaining questions after *Lintner*

Lintner seems to provide the missing piece concerning several aspects of ex officio application of consumer law. First of all, it shows that also the second step of the ex officio application of the UCTD entails the EU *obligation* on national courts to take measures of investigation in order to perform the substantive unfairness review. Secondly, *Lintner* clarifies when exactly the ex officio obligation is triggered. The Court holds that the obligatory examination is limited to those terms whose unfairness can be established on the basis of the elements available in the file before the national court. If it does not have the necessary elements available to it, the court will not be in a position to carry out that examination.[54] Although it does not explicitly refer to the need for the merest indication apparent from the file, this seems to be the only logical reading of the judgment.[55] The only somewhat defendable alternative, in the light of the wording in *Lintner*, is that national courts would have to be able to pull *all* necessary elements from the file before the obligation to apply the UCTD ex officio is triggered. From a logical viewpoint this makes no sense, however. If the national courts' ex officio obligation would be triggered only in so far as they have from the file *all* elements necessary for a complete examination, the investigative obligations developed by the CJEU would no longer make much sense. One could wonder what would still have to be established by means of investigative measures if everything were already apparent from the case file. Consequently, the only correct reading seems to be that the national court must find the merest indication in the case file that consumer law is applicable and/or has been infringed before the ex officio obligation is triggered. Thirdly and lastly, as regards the scope of the ex officio obligation, the Court explicitly states that the national courts must respect the limitations of the subject matter of the dispute. The latter must be understood as the result that a party pursues by its claims, in the light of the heads of claim and pleas in law put forward to that end.[56] The effectiveness of

[53] *Lintner* at [34-38].
[54] *Lintner* at [26-27].
[55] See to that effect also Opinion of Advocate General Kokott in *Margarit Panicello* (C-503/15) EU:C:2016:696 at [142].
[56] *Lintner* at [28].

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consumer protection envisaged by the UCTD cannot go so far as to ignore or exceed those limitations. Thus, the national court is not required to extend that dispute beyond the forms of order sought and the pleas in law submitted to it, by analysing individually all the other terms of a contract of which only some terms concern the subject matter of the action brought before it. According to the Court, ruling otherwise would result in the risk of disregarding the principles of party disposition and *ne ultra petita*.[57] Thus, the national court is not only 'not obliged' to go beyond the ambit of the subject matter of the dispute, but it is also forbidden to do so. Conversely, the obligation to act ex officio extends to terms which were not explicitly included in a claim, but which are connected to the subject matter of the dispute as delineated by the parties. Hence, the national court may not interpret the claims made by the parties formalistically, but has to comprehend their content in the light of the pleas of law relied on in support of those claims (i.e. purposive interpretation).[58] In order to assess the unfairness of those terms, the court must take measures of investigation of its own motion in order to acquire the necessary information to that end. This is in line with what was held above concerning the national courts' role in deciding the ambit of the dispute.

Lintner raised a new question, however, and left an old one unanswered. First, the new question concerned the conditional description of the investigative obligation in the second step. The Court held that this obligation applies only when there is "serious doubt as to the unfair nature of certain clauses which were not invoked by the consumer but which are related to the subject matter of the dispute".[59] It can be argued that this sets another, higher threshold than the one triggering the obligation to investigate the applicability of the UCTD (first step). As argued above, the latter would apply once there is the merest indication in the case file that consumer law may apply. It remained to be seen whether the Court indeed wished to introduce two different thresholds and, if so, what exactly the difference would be between 'serious doubts' and 'normal' or 'ordinary doubts' concerning the unfairness of a term. In any event, there would be a logical mismatch in the event that national courts would have the EU obligation to seek the necessary information in order to ascertain the applicability of consumer law once there is the merest indication in the file giving rise to doubt as regards its applicability, while they could refrain from doing so when assessing the substantive compatibility with consumer law in case of non-serious doubts. Second, *Lintner* confirms that the submission of documents is another measure of inquiry available to national courts to fulfil their ex officio obligation, alongside simple requests for clarification. This still leaves open the question concerning the outer limits of investigative measures, however. Just because the Court did not (yet) recognise an EU obligation of ex officio hearing of witnesses or experts does not mean it cannot exist. As Advocate General Tanchev rightly observed, this has everything to do with the fact that no arguments have been presented to the Court that more extensive ex officio measures of inquiry would be necessary for ensuring effective consumer protection for the purposes of the UCTD.[60] Until that time, it is the Member States' national procedural law which is decisive for other investigative measures, in accordance with the principle of procedural autonomy. Should the Court be confronted with questions pertaining to the exploration of the outer limits of ex officio measures of investigation, a continued application of the balancing approach described above seems appropriate. Under such an approach, it is conceivable, at least in some situations, to acknowledge the EU power and even obligation of ex officio hearing of witnesses (in case of orally concluded contracts) and experts (in case of disclosure of information), or even ex officio inspections.[61]

[57] *Lintner* at [30-31].
[58] *Lintner* at [33].
[59] *Lintner* at [37].
[60] Opinion of Advocate General Tanchev in *Lintner* (C-511/17) EU:C:2019:1141 at [64].
[61] See in that regard Opinion of Advocate General Kokott in *Margarit Panicello* at [143-144], where she rightly holds that in case of orally concluded contracts the hearing of witnesses might be necessary. Also, the forwarding of a case file for further examination could be thought of.

Kancelaria Medius*: … Jump?*

Facts and judgment

It appears from the frequency of the Court's striking judgments concerning national courts' obligations in consumer law cases that the Court is approaching the matter with renewed energy. The latest development is the recent judgment in *Kancelaria Medius.*[62] The facts concerned a debt collecting company which brought a claim against a consumer based on an alleged consumer credit agreement. The only documents put forward by the professional party were a copy of a pro forma contract without the consumer's signature and documents confirming the conclusion of an agreement on assignment of claims with the credit-providing bank. Due to the consumer not appearing in person, the first court dealing with the case issued a default judgment. Since it held that the existence of the claim was not established by the evidence put forward by the professional party, it dismissed the latter's claim. According to national law concerning default proceedings, however, the assertions of facts made in the complaint or pleadings of the party appearing before the court dealing with a default case had to be considered true, unless these assertions raised reasonable doubts or were referred to for the purpose of circumventing the law. Hence, the debt collecting company brought an appeal before the referring court, stating that the first court should have relied solely on the documents initially disclosed to it. The latter court had doubts, however, concerning the consistency of a national provision such as that at issue with the standard of consumer protection required by the UCTD. More precisely, it was uncertain whether the fact that the national court had no opportunity to examine of its own motion the fairness of contractual terms was consistent with the right to an effective remedy ex Article 47 of the Charter. In order to find out what exactly its powers and obligations were on the matter, it referred a question for a preliminary ruling.

In respect of the requirement of effective judicial protection ex Article 47, the Court repeats that in order to guarantee the protection intended by the UCTD, the imbalance which exists between consumers and sellers or suppliers may be corrected only by positive action unconnected with the actual parties to the contract. Therefore, the national court is in the first place required to assess of its own motion whether a term coming within the scope of the UCTD is unfair, where it has available to it the legal and factual elements necessary for that task. In the second place, in absence of those elements, the national court must be entitled to adopt of its own motion the measures of inquiry needed to establish whether a term in the contract which gave rise to the dispute before it comes within the scope of that directive and whether it is unfair. This is so, even when the consumer fails to appear in court.[63] It is true, according to the Court, that the principles of party disposition and *ne ultra petita* would risk being disregarded if national courts were required to ignore or exceed the limitations of the subject matter of the dispute as established by the forms of order sought and the pleas in law of the parties. However, in the present case it is not a question of examining other contractual terms than those on which the party who brought the action based its claim, and which are therefore the subject of the dispute. Thus, the principles of party disposition and *ne ultra petita* do not preclude the national court from requiring that the applicant produce the content of the document(s) on which its application is based, since such a request simply forms part of the evidential framework of the proceedings.[64] A national provision such as that at issue might thus compromise effective judicial protection of the consumer. It is for the national court, however, to interpret national law so far as possible in conformity with EU law. It is for that court to assess whether an interpretation of the exceptions to the national rule, such as 'reasonable doubts' or 'circumventing the law', in conformity with EU law is possible. Only when this is not possible, the

[62] *Kancelaria Medius SA v RN* (C-495/19) EU:C:2020:431.
[63] *Kancelaria Medius* at [36-38].
[64] *Kancelaria Medius* at [41-42] and [45].

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national legislation or case-law precluding the ex officio examination has to be left disapplied in favour of the EU obligation to act ex officio.[65]

Significance of *Kancelaria Medius*

Kancelaria Medius confirms the Court's recent case-law, elaborating more on the national courts' ex officio investigative obligations when applying the UCTD in default proceedings. Although the judgment at some point seems to indicate a mere *power* to take measures of inquiry in order to assess the (un)fairness of contractual terms (*Profi Credit Polska II* and *Bondora*),[66] the Court later makes it clear that there is an *obligation* to do so (*Lintner*).[67] Also, the Court removed doubts that could arise after *Lintner* concerning the conditionality of the obligation to take measures of inquiry ex officio when assessing the substantive unfairness of terms. As indicated above, the Court held in *Lintner* that in case of 'serious doubts' as to the unfairness of certain clauses, investigative measures had to be taken of the courts' own motion. In *Kancelaria Medius*, however, the Court rules that strict application of a national provision according to which a national court may take measures only in case of 'reasonable doubts' might be contrary to EU law. Moreover, the Court explicitly states that the concept of reasonable doubt should be interpreted in conformity with EU law, seemingly rather flexibly, thus enabling the national court to act of its own motion according to its national law. Consequently, it is submitted that the Court does not envisage a higher threshold and that the trigger for the obligation to take measures of inquiry ex officio is the same for both steps. More precisely, the national court has to take measures of inquiry of its own motion once there is an indication in the file raising the merest doubts concerning the applicability of and/or conformity with the UCTD.

A first remaining issue concerns the kinds of possible measures. As it already did in both *Profi Credit Polska II* and *Bondora* (see above), the Court highlights the conformity of the obligation to take measures of inquiry such as those at hand with the principles of judicial passivity and party disposition.[68] Concerning the actual possibilities, however, the Court repeats its rather vague statement that national courts can take *the* necessary measures. Consequently, the balancing approach recommended above still seems suitable for the assessment of what can and cannot be done. It is noteworthy, however, that paragraph 51 of the Dutch version of the judgment states that national courts are under an obligation to take "*alle* noodzakelijke onderzoeksmaatregelen" (literally translated: *all* necessary measures). A puritan lawyer might thus find an additional textual argument in the Court's case-law in favour of more intrusive measures of investigation. Second, the reference made by the Court to the *Egenberger* judgment is remarkable. In that judgment, the Court held for the first time that Article 47 of the Charter "is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such".[69] The precise meaning of this consideration has yet to become completely clear, though it might indicate that the Court has fully recognised and embraced the opportunities given to it by Article 47 to introduce new remedies in national procedural law and to modify the latter.[70] The Court did not refer to this specific consideration of the *Egenberger* judgment, however, but to the obligation of interpretation in conformity with EU law. Still, the reference cannot go unnoticed. There were dozens of other cases to which the Court could have referred concerning the obligation of consistent interpretation in the context of consumer law. *Egenberger*, however, concerned discrimination based on religion or belief. Could this reference thus

[65] *Kancelaria Medius* at [47-51].
[66] *Kancelaria Medius* at [38] ("[…] must be *entitled* to adopt of its own motion […]" (authors' emphasis)).
[67] *Kancelaria Medius* at [51] ("[…] national courts are *obliged* to examine of their own motion […]" (authors' emphasis)).
[68] *Kancelaria Medius* at [41-45].
[69] *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V* (C-414/16) EU:C:2018:257; [2018] 4 WLUK 204; [2019] 1 C.M.L.R. 9; [2019] C.E.C. 235; [2018] I.R.L.R. 762 at [78], confirmed on multiple occasions.
[70] As is also apparent from *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* (C-556/17) EU:C:2019:626, where the Court established the power for Hungarian courts to revise the decisions of the national asylum authority after a second failure of the latter to conform to the national court's guidelines.

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be the harbinger of (even) more EU interference in national procedures in the context of consumer law? A final, more general, remark concerns the transposition of the Court's most recent case-law to other areas of consumer law. Since there is no reason to limit the Court's findings to the context of the UCTD, it seems theoretically safe to assume that they also apply in other areas of consumer law in which the Court recognised the ex officio obligation (e.g. the CSD and the CCD). However, from a practical viewpoint, questions may arise. In the context of contract terms, it is often clear when a term is connected to the subject matter of the dispute, thus falling under the ex officio obligation. Where a consumer seeks relief for inflated sums due based on an interest term, it seems fairly evident that such a term would also fall under the national court's scrutiny. But how would the criterion of connectedness have to be applied in the context of pre-contractual obligations in the case of distance contracts? And when is an aspect in a consumer sales case connected enough to fall under the national court's ex officio obligation to investigate and apply? It is submitted that also here, the Court will eventually have to provide more guidance.

How ground-breaking is the Court's latest phase from a Belgian perspective?

It is clear that major steps have been taken at EU level. The question arises, however, whether these developments are that innovative from a Belgian perspective. First, this section provides a brief overview of the state of affairs in Belgium regarding ex officio application of substantive law, for example consumer law.[71] The second part examines the power/obligation for Belgian courts to take investigative measures ex officio, considering two important questions: (1) when and under what conditions are Belgian courts allowed or obliged to take investigative measures, and (2) what types of measures can be taken?

The choice for a Belgian case study is evident in the light of the authors' own legal backgrounds and expertise. Moreover, a comprehensive, well-founded analysis of multiple legal systems would go beyond the scope and objectives of this contribution. The narrowness of the case study does not mean that it is without any relevance for other systems, however. There are to our knowledge no reasons to assume that the Belgian stance towards courts' investigative powers and obligations deviates in a particular direction from the stance taken by other Member States. Instead, the Belgian law of civil procedure seems to have evolved in the same direction since the late 80's/early 90's as most of the other Member States' law of civil procedure has.[72] Consequently, any discrepancies between Belgian law on investigative measures and the CJEU's case-law might equally arise if another Member State's system were tested against that case-law. Lastly, the Belgian provisions on investigative powers and obligations seem to function fairly well. Thus, legal systems where that is not the case might find some inspiration in them.

Belgian courts' power/obligation to apply substantive law ex officio

Procedural law prescribes arrangements for the enforcement of substantive law and for redress in case the latter is infringed.[73] Belgian courts do not have a leading role in determining the ambit of the dispute. The principle of party disposition (party autonomy/principle of free disposition) means that only the parties decide if and against whom they initiate proceedings. They also determine the subject matter of the action and the facts they submit to the court. Nonetheless, the courts may still intervene in the debate

[71] We do not touch upon the situation where the court has to apply procedural law of its own motion. The methods established by the *Cour de cassation* do not cover procedural means, because of their specific purpose. B. Wylleman, "De verplichting van de burgerlijke rechter om ambtshalve rechtsgronden op te werpen" (2017) 16 *Jaarverslag Hof van Cassatie* 172, 175.

[72] I.e. a 'mixed system', in which the principle of party disposition plays the leading role (accusatorial system), but inquisitorial elements can be found. See in that regard B. Allemeersch, *Taakverdeling in het burgerlijk proces*, p. 57-58, under reference to a.o. M. CAPPELLETTI, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1987), p. 23 and 31.

[73] P. Dauw and E.Dauw, *Burgerlijk procesrecht. Basis met schema's*, 5th edn (Antwerp: Intersentia, 2020), p. 8.

and apply law ex officio. As will be shown below, the courts have the power (sometimes even the obligation) to act ex officio, subject to certain conditions.

Unlike French[74] and Dutch[75] law, there is no Belgian legislation that generally lays down the national courts' role in applying substantive law of their own motion. Consequently, the Court of Cassation (*Cour de cassation*) developed the Belgian ex officio doctrine. The *Cour de cassation*'s case-law clarifies (1) when the court is *allowed* to intervene in the debate, and (2) when it is *obliged* to do so. The *Cour de cassation* also sets limits to courts' interventions. The following two paragraphs describe the two applicable methods in adversarial proceedings.[76] The method prescribing the *power* for the court to apply law of its own motion is handled first.

According to the *Cour de cassation*'s case-law, the courts need to resolve the dispute in accordance with the applicable legal provisions. The courts must examine the legal nature of the elements that are put forward by the parties. Irrespective of the legal qualification provided by the parties, the court *may* supplement the grounds of the parties of its own motion on the condition that (1) the court does not raise a dispute which parties excluded in a written pleading, (2) the court only relies on elements which have been properly submitted, (3) the court does not change the subject matter of the action, and (4) the court respects the rights of the defence.[77] As long as these four conditions are respected, the court is allowed to apply law of its own motion and hence has a lot of power to guide the proceedings, without disregarding the fundamental principle of party autonomy.

The *Cour de cassation*'s second method prescribes the *obligation* for the court to apply law of its own motion. Accordingly, the elements which parties have specifically put forward to support their claims delineate the obligation for the court to apply law ex officio. Concerning those elements, the court is obliged to apply the relevant provisions of its own motion. The method further states that the elements put forward by the court are equal to the elements that the parties have specifically put forward to support their claims.[78] Thus, the court's obligation to apply law ex officio applies both to the elements which parties have specifically put forward to support their claims and to the elements pulled forward by the court.

It follows from the foregoing that the court may, and sometimes must, approach a case from a different (legal) perspective than the parties did. The methods show that the distinction between the power and the obligation to apply law ex officio is not determined by the nature of the provision at issue. What matters is the specificity with which elements are put forward.[79] The court is *allowed* to take into account all information and apply the relevant law ex officio (*faits purement adventices)*.[80] Concerning the elements which parties have specifically put forward to support their claims (*faits générateurs*), however, the court is actually *obliged* to apply the relevant law of its own motion.

Irrespective of whether there is a mere power or an obligation to apply the law ex officio, the aforementioned four conditions must be complied with.

The first condition prohibits the court to raise a dispute which parties have excluded in a written pleading (so-called 'procedural agreements'). The possibility of making procedural agreements follows from the

[74] Articles 6-8 and 12-13 French Code of Civil Procedure (*Code de procédure civile*).
[75] Articles 23-25 Dutch Code of Civil Procedure (*Nederlands Wetboek Burgerlijke Rechtsvordering*).
[76] The application of law of the courts' own motion during default proceedings is dealt with at the end of this section.
[77] Cass. 9 January 2017, AR C.16.0135.N; Cass. 6 May 2016, AR C.15.0365.F; Cass. 17 April 2015, AR C.13.0550.N-C.13.0636.N; Cass. 14 December 2012, AR C.12.0018.N.
[78] Cass 5 September 2013, AR C.12.0599.N; Cass 2 April 2010, AR C.09.0204.F; Cass 9 May 2008, AR C.06.0641.F; Cass 14 April 2005, AR C.03.0148.F.
[79] B. Wylleman, "De verplichting van de burgerlijke rechter om ambtshalve rechtsgronden op te werpen", 210-211; F. Peeraer, "De taak van de rechter bij de toepassing van normen van openbare orde minder vanzelfsprekend dan het lijkt" (2017) 31 *Tijdschrift voor Belgisch Burgerlijk Recht* 361, 362.
[80] J. Van Drooghenbroeck, "Chronique de l'office du juge" (2013) 15 *JLMB* 1310, 1310.

principle of party disposition.[81] The *Cour de cassation* requires the procedural agreement to be explicit.[82] Not relying upon a legal provision does not mean that the parties excluded the application of that provision in a written pleading. [83] A different approach would completely exclude ex officio application.[84]

Secondly, the court may only rely on elements which have been properly submitted by the parties. The court must stick to the information in the case file. A judgment based on elements that were not part of the debate is forbidden.[85] Nevertheless, the court is allowed to consider the *faits purement adventices*. The *Cour de cassation* accepts that the court dismisses a claim by referring to a submitted agreement, even when none of the parties explicitly relied on it.[86] It is not allowed to introduce new elements of its own motion, however.

Thirdly, the court must always respect the rights of the defence throughout the proceedings. The court must therefore give the parties the opportunity to counter all factual and legal elements that could influence its decision.[87]

Finally, the court is not allowed to change the subject matter of the action.[88] Consequently, it cannot award something more than or different to what the parties asked for.[89] It is the very essence of the principle of party autonomy that the court must adhere to the parties' claims. The subject matter of the claim is the factual result the claimant pursues with his claim.[90] However, the prohibition on changing the subject matter of the action is not absolute. There are some exceptions.[91] The most important exception for the purpose of this contribution is the power to order investigative measures ex officio, which brings us to the next section.

Before examining the courts' power to take measures of inquiry ex officio, some insight into the courts' task during default proceedings should be provided, given the frequent occurrence of non-appearance by consumers.[92] With regard to default proceedings, Article 806 of the Judicial Code (JC) is applicable. According to that provision, the court grants the claims of the appearing party, unless they conflict with public order, including legal provisions the court can apply ex officio. In the light of the CJEU's case-law and the principle of equivalence on the one hand,[93, 94] and the Belgian *Cour de cassation*[95] and

[81] B. Allemeersch, *Taakverdeling in het burgerlijk proces*, p. 297.
[82] Cass 9 May 2008, AR C.06.0641.F.
[83] Cass 25 March 2013, AR C.12.0037.N; Cass 29 September 2011, AR C.10.0349.N; Cass 24 December 2009, AR C.09.0055.N; Cass 20 April 2009, AR S.08.0015.N; Cass 6 December 2007, AR C.06.0092.N.
[84] B. Wylleman, "De verplichting van de burgerlijke rechter om ambtshalve rechtsgronden op te werpen", 210-211.
[85] B. Allemeersch, *Taakverdeling in het burgerlijk proces*, p. 284-285.
[86] Cass 24 September 1982, AR 3476; B. Van den Bergh, "Over de taak van de rechter, het recht van verdediging en het ambtshalve toepassen van rechtsregels: geldt dit ook voor de bewijsregels?" (2017-2018) 81 *Rechtskundig Weekblad* 175, 177.
[87] Opinion Advocate General Vandewal for Cass 29 September 2011, AR C.10.0349.N.
[88] See Article 1138, 2° JC.
[89] F. Peeraer, *Nietigheid en aanverwante rechtsfiguren in het vermogensrecht* (Antwerp: Intersentia, 2019), p. 375.
[90] Cass 14 December 2017, AR C.16.0296.N. See also Cass 9 March 2018, AR C.17.0517.F. The Belgian description thus coincides with the description provided by the CJEU.
[91] See more elaborate B. Allemeersch, *Taakverdeling in het burgerlijk proces*, p. 241-242.
[92] Some argue that the central idea should be that the task of the court during default proceedings aligns as much as possible with the court's task during adversarial proceedings. See S. Mosselmans, P. Taelman and K. Broeckx, "Geen blinde inwilligingsprocedure voor de rechter bij verstek" (2016-2017) 80 *Rechtskundig Weekblad* 1090, 1094.
[93] See in particular *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen VZW v Susan Romy Jozef Kuijpers* (C-147/16) EU:C:2018:320; [2018] 5 WLUK 320; [2019] C.E.C. 562, in the context of Article 806 JC (courts' task in case of default proceedings).
[94] R. Steennot, "De bescherming van de consument door het Hof van Justitie: een brug te ver?", 123.
[95] Cass 13 December 2016, AR P.16.0421.N. Granting a manifestly unfounded claim or defence is, according to this case-law, contrary to public order.

Constitutional Court's[96] case-law on the other, it seems safe to assume that also in default proceedings consumer law has to be applied ex officio.

Belgian courts' power to take measures of inquiry ex officio

As mentioned above, the prohibition on changing the subject matter of the action recognises some exceptions, including the power to order measures of inquiry of the courts' own motion. Ordering investigative measures ex officio is a far-reaching form of the investigative role of the court.[97] As these measures are not an end in themselves, they are generally mentioned separately. Investigative measures contribute to the proper conduct of proceedings and are part of the evidential framework thereof.[98]

In Belgium, it is up to the courts to take an active role in the evidential framework in order to gain a good insight into the case.[99] However, the principle remains that the parties submit the evidence they possess. Nevertheless, parties often do not spontaneously provide the relevant documents.[100] Therefore courts have the *power* to order investigative measures ex officio when they believe important elements are missing.[101] It is at the courts' discretion to decide whether an investigative measure is appropriate.

Some requirements must be met should a court decide to take an investigative measure. First, the subject matter of the investigative measure must be described precisely. Furthermore, the measure must always be effective and proportionate.[102] Finally, the principle of subsidiarity, which can be found in Article *875bis* JC and which codifies the idea of procedural economy, must be observed. The latter applies to the choice and the content of the investigative measure. Thus, the court must always prefer the simplest, fastest, and cheapest investigative measure.[103]

Although courts have an active role in the gathering and assessment of evidence, under Belgian law they are *not directly obliged* to take investigative measures ex officio.[104] However, the power to take investigative measures must be viewed together with the court's obligation to apply the relevant law ex officio to the elements which parties have specifically put forward or which were pulled forward by the court itself. If a claimant based its claim upon a contract or a contractual term, this contractual relationship should be regarded as a *fait générateur*. Consequently, the court would be obliged to apply consumer law ex officio, irrespective of whether the proceedings are by default or adversarial. Hence, the contract or the contractual terms upon which a claimant bases its claim must be added to the case file if they are not yet part of it. During the hearing, the court can ask the party to submit the contract or contractual terms. If the oral part of the procedure is already closed, the court should reopen it for the purpose of submitting and debating the contract or the contractual terms relied upon. Should an unwilling party still not submit the contract or the contractual terms after being requested to do so, an

[96] Constitutional Court 7 June 2018, nr. 72/2018. The Constitutional Court held that Article 806 JC is in accordance with the principles of non-discrimination and equal treatment.
[97] Other, less far-reaching examples are (1) reliance on information deduced from the facts presented by the parties, even though the parties did not mention this information explicitly, and (2) asking appropriate questions (P. Taelman, "Powers of the Judge in Evidence Proceedings and Evidentiary Agreements", p. 4-15).
[98] B. Allemeersch, *Taakverdeling in het burgerlijk proces*, p. 242.
[99] B. Allemeersch, *Taakverdeling in het burgerlijk proces*, p. 351.
[100] B. Allemeersch, *Taakverdeling in het burgerlijk proces*, p. 402.
[101] The court's discretion is limited, however, by the so-called right to evidence. The latter implies (1) that each party may submit the evidence they possess and (2) that each party may request that evidence can be gathered by means of measures of inquiry. This right is not unlimited, though. See, in further detail, B. Allemeersch, *Taakverdeling in het burgerlijk proces*, p. 410-412 and case-law cited.
[102] B. Allemeersch and A-S. Houtmeyers, "De onderzoeksmaatregelen in het nieuwe burgerlijk bewijsrecht" in P. Taelman and B. Allemeersch (eds), *Het burgerlijk proces opnieuw hervormd* (Antwerp: Intersentia, 2019), p. 121-122.
[103] Article 875*bis* JC. See also K. Devolder, "Het gerechtelijk deskundigenonderzoek na de Wet van 15 mei 2007" (2008) 14 *Tijdschrift voor Procesrecht en Bewijsrecht* 74, 74.
[104] Cass 11 September 2008, AR C.06.0666.F. See also S. Mosselmans, "Taak van de rechter bij verstek" (2016-2017) 80 *Rechtskundig Weekblad* 3, 21.

investigative measure should be ordered by the court. Hence, one could speak of an *indirect obligation* to take investigative measures.

Lastly, we briefly want to address the types of investigative measures the court is allowed to take ex officio. The simple request for clarification and the submission of documents recognised by the CJEU at EU level are also available to Belgian courts based on Belgian law. Moreover, the Belgian Judicial Code indicates that the following measures can also be taken ex officio: hearing of witnesses (Article 916 JC), personal appearance before the court (Article 992 JC), inspections (Article 1007 JC), submission of documents (Articles 871 and 877 JC) and expert's report (Article 962 JC).[105] It is important to bear in mind that the measures of inquiry must always fulfil the requirements mentioned above (e.g. principle of subsidiarity).

In conclusion, we submit that the CJEU's latest phase is not really ground-breaking from a Belgian perspective. Contrary to the CJEU's case-law, Belgian law does not as such force courts to take investigative measures ex officio. However, the courts' obligation to apply the relevant law ex officio concerning the elements specifically put forward by parties or brought forward by the court can result in an indirect obligation to take investigative measures ex officio. As regards the types of investigative measures, Belgian law recognises more intrusive measures than those recognised so far by the CJEU. Time will tell if the same types of measures may or must also be taken as a matter of EU law.

Conclusion

It is apparent from the Court's recent case-law that it is trying to balance the needs of consumers as weaker litigants, on the one hand, and procedural safeguards of their professional counterparts, on the other. As the Court's case-law currently stands, it is submitted that momentum is in favour of consumers, without however exceeding the limitations which are traditionally accepted in the Member States' enforcement law. Concerning the power and obligation to take measures of inquiry in order to assess both the applicability of and compatibility with substantive consumer law, the Court has recently made an effort to tie loose ends. It did so without neglecting the principles of judicial passivity and party disposition, according to which it is up to the parties to decide the scope of proceedings by presenting alleged facts and making claims based on them. Nevertheless, the Court seems to fully endorse the rather active role of national courts in establishing facts and gathering evidence of alleged facts, which is in line with the – in principle – active role courts have to play under most of the Member States' national law. Put bluntly, the Court thus seems to recognise distinct roles for national courts regarding the delineation of the ambit of the dispute, the application of the law or the establishment of alleged facts. The doctrine's development at EU level thus seems to be reaching an endpoint.

Concerning the impact of the described developments from the Member States' national perspective, we submit that – at least from a Belgian viewpoint – things are less ground-breaking than they may at first seem. Whereas doubt could arise as to the types of measures that could be taken as a matter of EU law, Belgian enforcement law lays down measures which are far more intrusive than the rather prudent possibilities recognised so far by the CJEU. The same goes for the power/obligation to take measures of inquiry. Though there is as such no formal obligation on Belgian courts to take investigative measures, the obligation to apply the relevant law to facts specifically put forward in support of a claim might indirectly trigger an obligation on the courts to take measures of inquiry. Thus, the result is the same, at least with regard to facts specifically relied on by parties in support of their claims. Concerning facts not specifically relied on, the Court's case-law might have important added value, however. Since Belgian courts do not have the obligation to investigate these elements further as a matter of Belgian law, it could be that an infringement of consumer law 'in the margins' of the subject matter of the dispute goes

[105] B. Allemeersch, *Taakverdeling in het burgerlijk proces*, p. 407; S. Mosselmans, "Taak van de rechter bij verstek", 21.

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unnoticed. Even if it were noticed, there would still be but a mere power (not an obligation) to act upon it. Having regard to the Court's latest case-law, however, there now seems to be an *EU* obligation on Belgian courts to take investigative measures in such circumstances.

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