7.4 (BE)

CHAPTER 7. APPLICATION OF PRIMARY AND SECONDARY EU LAW ON THE NATIONAL COURTS' OWN MOTION

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I. GENERAL APPROACH

Whether national courts are allowed to raise points of law of their own motion is a procedural question that is strongly linked to direct (horizontal) effect. The reason why it becomes relevant in this context is that the functioning in actual practice of rules having direct effect depends amongst other things on the national courts' *ex officio* competences.
The study of this problem is relevant for substantive private law, too. *Ex officio* application of a given EU law provision may lead to the nullity or unenforceability of contracts under national laws; therefore, it may seriously influence private interests.

I.A. THE EU LAW CONTEXT

The CJ has a long-lasting and consistent case law touching upon certain dimensions of national procedural regimes in which it regularly refers to national procedural autonomy. This concept in the first place reflects the recognition that national procedural regimes are inherently diverse, and in the second place that their approximation or harmonization is

simply unnecessary at this stage of integration. So, the structure of judiciary and procedures remain fundamentally in the hands of the Member States. From an institutional perspective this approach implies that the Member States remain free to determine which courts or tribunals are competent to deal with EU law-related claims.

This does not mean, however, that the EU legal order should not establish certain requirements which these regimes must satisfy in order to fully ensure the primacy of EU law. Many landmark rulings of the CJ stress that national procedural regimes must always respect the principles of effectiveness and equivalence since the protection of rights derived from EU law requires it.

In *Rewe*[1], the CJ held that "in the absence of Community [Union] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law"[2] which protect rights emanating from Union law. However, national procedural provisions may neither establish less favourable conditions for EU law-related claims than for similar domestic ones, nor render the exercise of rights arising from EU law "virtually impossible or excessively difficult".[3] The most important consequence of this approach is that national procedural provisions that infringe the principles of effectiveness and equivalence may not be applied because they impede the effective application of EU law.

The national courts' option to raise points of law of their own motion should be regarded to be part of this broader and rather sophisticated context, too. Should national courts have any special powers or even obligations to raise points of EU law of their own motion when they are dealing with cases comprising EU law elements? How does the CJ regard the diversity of national civil procedures when dealing with cases in which national rules restricting the *ex officio* application of legal rules endanger the effectiveness of EU law?

I.B. THE STRUCTURE OF THIS CHAPTER

The following parts of this chapter discuss various aspects of *ex officio* application of EU law. Part II seeks to map the issue in the context of EU law; it discusses the general case law of the CJ, the field of competition law and the broader area of consumer contracts directives. National case law relating to the *ex officio* application of primary and secondary EU law is analyzed in Part III. Lastly, some scholarly and comparative conclusions are drawn in Part IV.

II. SOURCES OF EU LAW

The *ex officio* application of primary and secondary EU law is a multifaceted issue. For a proper understanding, various specific manifestations of *ex officio* application have to be

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[1] CJ, 16 December 1976, Case C-33/76, *Rewe Centralfinanz eG and Rewe Central AG* v *Landwirtschaftskammer für das Saarland*, [1976] ECR-1989.
[2] Ibid.
[3] Cf. Case 68/79 *Hans Just I/S* v *Danish Ministry for Fiscal Affairs* [1980] ECR-501, para 25; Case C-199/82 *Amministrazione delle Finanze dello Stato* v *SpA San Giorgio* [1983] paras 12 and 14.

analyzed in detail.[4] This chapter is devoted to three of them: the so-called *van Schijndel* case law, certain implications of Article 101 TFEU, and the impact of Directive 93/13/EEC on unfair terms in consumer contracts and of other consumer contracts directives.

II.A. THE *VAN SCHIJNDEL* LINE OF CASE LAW

In the early seventies the CJ had already accepted the existence of power of the national courts to request preliminary rulings of their own motion irrespective of both the actual procedural rules and the parties' intents.[5] It did so in the *Reinmühlen* decision, in which the CJ established a brand new power, an "unfettered right" for the national courts to refer problems for a preliminary ruling whenever they deem it necessary, irrespective of the national civil procedural rules or constitutional provisions. EU law lifted restrictions created by national procedural laws.

Almost two decades later the question whether national courts have a general power to raise points of EU law when the parties do not explicitly refer to them came to the forefront in the *Verholen* case. It made its appearance in the context of the effectiveness of secondary anti-discrimination and social security legislation. When answering the question whether a national court may apply certain provisions of a social security directive although the applicants have not invoked them, the CJ recognized a general power of the courts to apply directives of their own motion. It pointed out that "Community [Union] law does not preclude a national court from examining of its own motion whether national rules are in conformity with the precise and unconditional provisions of a directive, the period for whose implementation has elapsed, where the individual has not relied on that directive before the national court".[6]

It should be pointed out that this wording suggests that national courts only have this power with regard to the unconditional provisions of directives. It would be rather illogical, however, to exclude other sources of EU law (i.e. founding Treaties, regulations, decisions). It is more likely that the CJ restricted its ruling to directives because the Dutch court raised the question in the context of a case concerning a directive. However, the validity of this ruling should be extended to other sources of EU law since any other solution would endanger the

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[4] Arthur Hartkamp: *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*. Kluwer, Deventer, 2012. no. 124 ff.; Arthur Hartkamp, Ex officio application in case of unenforceable contracts or contract clauses. EU law and national laws confronted, in Louise Gullifer and Stefan Vogenauer (eds), English and European Perspectives on Contract and Commercial Law, Essays in Honour of Hugh Beale, Hart 2014, p. 467 ff.; Jeroen Chorus: Le relevé d'office de moyens de droit et de fait: l'application de règles du droit européen par le juge national. Étude de droit compare et d'histoire de droit. In: Letizia Vacca (ed.): *Scienza giuridica interpretazione e sviluppo del diritto europeo.* Jovene Editore, Napoli, 2013. 123–165.

[5] Cf. Case C-166/73 *Reinmühlen* [1974] ECR-33.

[6] *CJ, 11 July 1991, Joined Cases C-87/90, C-88/90, C-89/90, A. Verholen et al. v Sociale Verzekeringsbank,* [1991] ECR I-3768.

uniform application of EU law.[7] Another relevant question is whether the *ex officio* application of EU law is merely optional or an obligation for the national courts. In its judgment, the CJ merely ruled that EU law does not preclude national courts from examining of their own motion the conformity of national rules with unconditional rules of directives. The CJ did not impose a general obligation on national courts to apply EU law provisions of their own motion, it solely established the possibility.

In conclusion, the *Verholen* case confirmed the power of national courts to raise EU law provisions of their own motion and to review the relevant national rules for conformity with them where necessary in a given case.

In a further step, the CJ established a framework for handling cases in which national procedural law prohibits the *ex officio* application of law. In its *Van Schijndel* judgment,[8] which concerns the *ex officio* application of EU law provisions by national courts, the CJ distinguished three different approaches. Firstly, applying the criterion of equivalence, it ruled that where national courts are obliged of their own motion to raise points of national law in national cases, they have to do the same in cases touching upon EU law issues. Examples are public policy considerations, third party interests or essential procedural requirements. Secondly, if national procedural law provides for the possibility of *ex officio* application of certain national rules, the national courts are obliged to do so in EU law-related cases. Here, the CJ went further and ruled that the "may is must" rule must be applied in order to provide broader legal protection for rights emanating from EU law.[9] Thirdly, in order to solve the problem of national procedural provisions that explicitly prohibit the ex officio raising of points of national law, the CJ established the following test, usually referred to as the "test of effectiveness".[10] The test is to pay attention to three elements: the role of the given rule in the national procedure; the stage of the procedure; and the special features of the procedure.[11] If the national general prohibition on *ex officio* raising points of law fails to pass this test, EU law precludes its application.

II.B. EX OFFICIO APPLICATION OF EU LAW IN RELATION TO ARTICLE 101 TFEU

7.1 (EU)

[7] Cf. Opinion AG Darmon in Joined Cases C-87/90, C-88/90, C-89/90 *Verholen* [1991] ECR I-3768, para 19. (AG Darmon argues that the primacy of community law "cannot be left to the discretion of national courts without the risk of its uniform application being seriously compromised.")

[8] *CJ, 14 July 1995, Joined Cases C-430/93 and C-431/93, Jeroen van Schijndel et al. v Stichting Pensioenfonds voor Fysiotherapeuten,* [1995] ECR I-04705.

[9] The CJ explicitly upheld this approach in its subsequent case law. Cf. Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, para. 57–58. Moreover, it also further refined it, since in the *van der Weerd* case it emphasized that if the parties had had a genuine opportunity to plead a rule of EU law before the national court, the EU legal order, particularly the principle of effectiveness, did not impose a duty on the national courts to raise of their own motion a rule of law which is not a matterof public policy. Joined Cases C-222/05 to C-225/05 *van der Weerd* [2007] ECR I-4233, para. 31 and 41.

[10] Heukels: *op. cit.* 347. In a more general context, Prechal (*op. cit*. 690–693) speaks of "procedural rule of reason", but she definitely used this term in a broader sense, since she approached the problem from the justification perspective, while the court focused on the functional assessment of the conflicting rule and the given national procedure (the role of the rule, the progress and the features of the procedure). Cf. Prechal: *op. cit.* Thus, Heukels' "test of effectiveness" seems to be a more appropriate denomination.

[11] Joined Cases C-430/93 and C-431/93 *van Schijndel* [1995] ECR I-04705, para 19.; Case C-312/93 *Peterbroeck* [1995] ECR I-04599, para 14.

Article 101 TFEU

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, (…)

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. (…)

Art. 101 TFEU was discussed in detail in Chapter 2. In the present Chapter it will only be taken into consideration in relation to the obligation for the national courts to apply the provisions of their own motion. In *Manfredi*[12] the CJ argued for the first time that "[now Articles 101 and 102 TFEU] are a matter of public policy which must be automatically applied by national courts" (para. 31). Subsequently, the same concept was restated in *T-Mobile*:[13] "Article 81 EC [now Art. 101 TFEU], first, produces direct effects in relations between individuals, creating rights for the persons concerned which the national courts must safeguard and, second, is a matter of public policy, essential for the accomplishment of the tasks entrusted to the Community, which must be automatically applied by national courts" (para. 49).[14] Therefore, the *ex officio* application of Art. 101 is justified by the paramount importance of this provision within EU public policy.

Manfredi and *T-Mobile* should be considered in juxtaposition to *Van Schijndel*, since the latter, too, dealt with the *ex officio* application of Art. 101. In *Van Schijndel* the CJ held that the obligation for the national courts to apply a legal ground based on Art. 101 TFEU did not exist when this would imply going beyond the ambit of the claim or the defence and abandoning the principle of judicial passivity as recognised by the internal law. *Manfredi* and *T-Mobile*, on the contrary, in which the CJ ruled that Art. 101 must be automatically applied by the court, do not envisage any limitation to the *ex officio* application of the article and they seem to imply that the national court has to apply the article even beyond the ambit of the claim or the defence as submitted by the parties.

Nevertheless, the different rulings in these judgments are not in contradiction, as they refer to different situations. In *Van Schijndel* the *ex officio* application of Article 101 TFEU would have entailed an obligation for the national court of appeal to examine the claim on a different

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[12] CJ, 13 July 2006, Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) *and Nicolò Tricarico* (C-297/04) *and Pasqualina Murgolo* (C-298/04) *v Assitalia Spa* [2006] ECR I-6619.

[13] CJ, 4 June 2009, Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529.

[14] Some scholars asserted that para. 31 of *Manfredi* is an *obiter* and *'a slip of the pen'* and should not be interpreted in the sense that Art. 101 is a public policy provision for the purpose of the *ex officio* application (H.J. Snijders, *New Developments In National Rules For Ex Officio Raising Of Points Of Community Law By National Courts, in* in A.S. Hartkamp et al, *The Influence of EU Law on National Private Law*, 2nd edn (The Hague, Kluwer Deventer, 2014) vol I, 95–117 at 107). This position is difficult to maintain, particularly because the CJ reiterated the statement in *T-Mobile*. See Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*, Deventer, 2012, no. 127.

basis from the basis alleged by the claimant.[15] In *Manfredi* and *T-Mobile* the issue was the nullity of a legal act pursuant to Article 101(2) TFEU. In this case the *ex officio* application by the national court concerned a rule imposing nullity even if this meant going beyond the ambit of the claim or the defence. In this respect the position taken by the CJ reflects the laws of a number of Member States that accept that nullity can be established by the court even if it has not been invoked by the parties to the litigation.[16]

As regards the characteristics and the regulation of the nullity pursuant to Article 101 TFEU we refer to Chapter 2, II.A, Nullity. Here it suffices to remark that nullity *ex* Article 101(2) TFEU is absolute nullity[17] (unlike the sanction imposed on terms in consumer contracts that are unfair pursuant to Art. 6 Directive 93/13/EEC, see II.C.1 note 11 below @@@).

II.C. EX OFFICIO APPLICATION IN RELATION TO CONSUMER CONTRACT DIRECTIVES

II.C.1. DIRECTIVE 93/13/EEC ON UNFAIR TERMS IN CONSUMER CONTRACTS

There has been a considerable number of CJ judgments on the power and obligation of national courts to intervene *ex officio* in consumer contract cases. The reason lies in the protective aim of the EU rules in combination with the restrictive attitude towards *ex officio* application of legal grounds in a number of Member State jurisdictions. The predominant part of these judgments concerns Directive 93/13/EEC on unfair terms in consumer contracts.

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Council Directive 93/13/EEC of 5 April 1993

Article 6
1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. (...)
Article 7
1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. (...)

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[15] A. Hartkamp, *Ex Officio Application in case of Unenforceable Contracts or contract Clauses. EU law and National laws Confronted*, in *Essays in Honour of Hugh Beale,* Gullifer and Vogenauer eds., Oxford, 2014, 470-471; A. Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*, Deventer, 2012, nos. 124-127.

[16] Therefore "the case of enforceability of contracts essentially is not covered by *Van Schijndel*": A. Hartkamp: *Ex Officio Application in case of Unenforceable Contracts or contract Clauses. EU law and National laws Confronted*, in *Essays in Honour of Hugh Beale*, Gullifer and Vogenauer eds., Oxford, 2014, 471.

[17] See Chapter 2.II.A.3@@@ and in particular the reference to *Courage v Crehan*, para. 22: "That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 85(1) are met […] Since the nullity referred to in Article 85(2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties […]"; this paragraph has been reproduced almost word by word in *Manfredi*, para. 57.

In many cases the question of the powers of the national court to intervene of its own motion and assess the unfairness of contractual clauses arose in relation to territorial jurisdiction clauses (*Océano*,[18] *Pannon*,[19] *Pénzügyi*)[20] and arbitration clauses (*Mostaza Claro*,[21] *Asturcom*,[22] *Pohotovost'*[23]). Such clauses can easily cause a significant unbalance between the consumer and the seller or supplier, as they affect the consumer's right to take part in the proceedings and for this reason they pertain to the very core of consumer protection. Furthermore, the unfair nature of these terms can usually be ascertained without further investigation. The "consumer-friendly" attitude developed by the CJ in relation to those clauses has also been maintained by it when it deals with other types of clauses such as penalty clauses[24] and interest on late payment clauses.[25]

In some cases the question arose in the context of special proceedings (e.g.: arbitration proceedings: *Mostaza Claro*, *Asturcom*, *Pohotovost*; order for payment: *Banco Español de Crédito*; mortgage enforcement proceedings: *Banco Popular Español*[26]) as opposed to regular court proceedings, or in the context of appeal proceedings (*Asbeek Brusse*, *Jőrös*[27]). Distinguishing between types of proceedings is important. It must always be taken into consideration that "each case which raises the question whether a national procedural provision renders application of Community [Union] law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. …" (*Van Schijndel*, para. 19). Furthermore, caution is advised in drawing too far-reaching conclusions from a specific CJ decision and applying them to other cases, as cases on *ex officio* application differ widely.[28]

The leading case with regard to the power and obligation of the national courts to intervene of their own motion is the judgment in *Océano*, in which the CJ found that directive 93/13/EEC on unfair terms in consumer contracts allowed the judge *ex officio* to evaluate the unfairness of a territorial competence clause: "The requirement for an interpretation in conformity with

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[18] CJ, 27 June 2000, Joined Cases *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) [2000] ECR I-4941.

[19] CJ, 4 June 2009, Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* [2009] ECR I-4713.

[20] CJ, 9 November 2010, Case C-137/08 VB *Pénzügyi Lízing Zrt. v Ferenc Schneider* [2010] ECR I-10847.

[21] CJ, 26 October 2006, Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421.

[22] CJ, 6 October 2009, Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-9579.

[23] CJ, 27 February 2014, Case C-470/12 *Pohotovosť s. r. o. v Miroslav Vašuta.*

[24] CJ, 30 May 2013, Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*.

[25] CJ, 14 June 2012, Case C-618/10 *Banco Español de Crédito SA v Joaquín Calderón Camino*.

[26] CJ, 14 November 2013, Joined Cases C-537/12 and C-116/13 *Banco Popular Español SA v Maria Teodolinda Rivas Quichimbo and Wilmar Edgar Cun Pérez and Banco de Valencia SA v Joaquín Valldeperas Tortosa and María Ángeles Miret Jaume*.

[27] CJ, 30 May 2013, Case C-397/11 *Erika Jőrös v Aegon Magyarország Hitel Zrt*.

[28] A. Hartkamp, *Ex Officio Application in Case of Unenforceable Contracts or Contract Clauses. EU law and National laws Confronted*, in *Essays in Honour of Hugh Beale*, Gullifer and Vogenauer eds., Oxford, 2014, 482.

the Directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term." The reasoning is focused on the weakness of consumers *vis à vis* the seller and on the need to make the protection provided by the directive effective. When referring to the *status* of the rules at issue, the CJ does not make use of any given category or formula, such as "public policy" or "mandatory" rules (see note 8 below), but directly stresses the need to make the protection effective, having regard to the *rationale* of Art. 6 and 7 of Directive 93/13/EEC. *Océano* does not find that the national court is under an obligation to decline jurisdiction of its own motion, but it holds that a court must be able to do so. The existence of an obligation in this respect has been clearly established by subsequent judgments (*Mostaza Claro, Pannon*).

Shortly after, a similar approach was taken in *Cofidis*,[29] in which the CJ ruled that Directive 93/13/EEC precludes application of a national provision which prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair. The CJ referred to both the effectiveness of the protection conferred by Art. 6 and 7 of Directive 93/13 (paras 34-35, paras 32-33 referring to *Océano*) and the principle of procedural autonomy.

Whereas in *Océano* the CJ gave a ruling only in relation to the court's option to intervene of its own motion, in *Mostaza Claro*[30] it made it clear for the first time that the court had an obligation to assess whether the clause was unfair. In this case the consumer had not contested the validity of the arbitration clause at issue during the arbitration proceedings and then sought annulment of the award before the national court on the ground that the clause was unfair. According to the Spanish rules applicable to the main proceedings, any reliance on the invalidity of the arbitration agreement must be raised at the same time as the parties make their original submissions.[31] The CJ, referring to *Océano* and *Cofidis*, restated that "the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier" (para. 38).

Following *Mostaza Claro*, the CJ dealt with the *ex officio* question in the context of consumer arbitration proceedings in *Asturcom*[32] and in *Pohotovost*[33]. In *Asturcom* it ruled that Directive 93/13/EEC must be interpreted as meaning that a national court or tribunal hearing an action for enforcement of an arbitration award – which has become final and was made in the

[29] CJ, 21 November 2002, Case C-473/00 *Cofidis v Jean-Louis Fredout* [2002] ECR I-10875.
[30] See above footnote 24@@@.
[31] Furthermore according to Spanish law an arbitration award can only be annulled on some specific grounds, including the case in which it infringes "public policy": compare to *Eco Swiss* (CJ, 1 June 1999, C-126/97, Eco Swiss China Time Ltd v Benetton International NV) in which Art. 101 TFEU was at stake: see Chapter 2.II.A.2.@@@
[32] See above footnote 25@@@.
[33] See above footnote 26@@@.

absence of the consumer – is required to assess of its own motion whether the arbitration clause is unfair, "in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature." The judgement is therefore based on the principle of equivalence.[34] The CJ followed the same line of reasoning in *Pohotovost'*, which concerned, *inter alia*, the *ex officio* annulment of an arbitration award issued without the participation of the consumer, on the ground that the credit agreement contract at issue contained an unfair penalty clause.

It is noticeable that the CJ does not qualify the relevant rules that must be applied of the court's own motion as rules of "public policy", but in terms of rules protecting the "public interest". This approach becomes evident particularly in *Asbeek Brusse*,[35] an appeal judgment in a case where the unfairness of a penalty clause was raised only in appeal proceedings. The CJ did not state that the rules at issue were "public policy rules", but considered that they had an "equal standing to national rules which rank, within the domestic legal system, as rules of public policy" (para. 44). In substance, the CJ implied that the rules of Directive 93/13/EEC may be applied *ex officio* even if they are not qualified as "public policy" rules, since they protect the "public interest" and this public interest requires that the national courts must be able to intervene *ex officio* (effectiveness). Furthermore, where a national court has a special power in case of violation of a national public policy rule, it must also exercise that power when dealing with problems related to this directive (equivalence)[36].

One line of cases decided by the CJ concerns the *ex officio* power of the court in relation to the *examination* necessary for the purpose of assessing whether a contractual term is unfair. After ruling that the national court has to examine of its own motion whether a clause is unfair where it has available the legal and factual elements necessary for that task (*Pannon*, para. 32)[37], the CJ went a step further in *Pénzügyi*,[38] by stating that the *ex officio* obligation also requires the court to act of its own motion in order to establish facts to find out whether the directive is applicable.[39] Both *Pannon* and *Pénzügyi* were about a territorial jurisdiction clause, but the same line of reasoning may be extended to cover all other contractual terms.[40]

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[34] See H. Schebesta, *Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom*, *Eur. Rev. Priv. Law*, 2010, 847 ff. and M. Ebers, *Mandatory Consumer Law,* Ex Officio *Application of European Union Law and* Res Judicata*: From* Océano *to* Asturcom, *Eur. Rev. Priv. Law*, 2010, 823 ff., focusing on the relationship between effectiveness and equivalence and on the difficulty in defining public policy.

[35] See above footnote 27@@@.

[36] Furthermore, the use of the different categories to be considered at the national and EU level for the purpose of *ex officio* application may be connected to the problem of the consequences following the *ex officio* assessment whether the contract clause is unfair under Art. 6 of the Directive. See para 11.

[37] See above footnote 22@@@.

[38] See above footnote 23@@@.

[39] In the words of the CJ: the national court "must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair" (operative part).

[40] A. Hartkamp, *Ex officio Application in Case of Unenforceable Contracts or Contract Clauses, EU law and National laws Confronted*, in *Essays in Honour of Hugh Beale*, Gullifer and Vogenauer eds., Oxford, 2014, 479.

The subsequent judgement in *Faber*[41] further qualified the requirement that the national courts must act of their own motion by ruling that the principle of effectiveness requires the national court to determine of its own motion whether the purchaser may be classified as a consumer, not only "as soon as the court has at its disposal the matters of law and fact that are necessary for that purpose", but also when the court "may have them at its disposal simply by making a request for clarification" (para. 46 and operative part).

In assessing the unfairness of a contractual clause the national court must also observe the principle of *audi et alteram partem*, which, "as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure" (*Banif*,[42] *Asbeek Brusse*).[43]

Where the national court considers a contractual term to be unfair, it must not apply it, unless the consumer, after having been informed by the court, opposes the disapplication (see *Pannon*, para. 33 and 35). It follows that the sanction provided for by the national law implementing Article 6 Directive 93/13/EEC[44] cannot be conceived in terms of "absolute" nullity, since then the consumer would not be allowed to oppose disapplication. This is a clear distinction from rules having a public policy character (see on Article 101 TFEU, II.B.4 above @@@). In subsequent judgments, moreover, the CJ has made clear that the consequences of the fact that a contract clause is unfair must be determined on the basis of the domestic law, subject to the conditions laid down by the CJ itself with regard to different types of contractual clauses and depending on the applicable national rules (*Banco Español de Crédito*, *Banif Plus Bank*, *Pannon*, *Jőrös*, *Asbeek Brusse*, *Kásler*).[45]

II.C.2. THE OTHER CONSUMER CONTRACTS DIRECTIVES

A trend can be observed towards an increase in the application to other consumer directives of the principles developed in relation to Directive 93/13/EEC. The CJ has recognized the existence of an obligation for the national courts *ex officio* to raise provisions of directives on consumer protection, such as Directive 87/102/ECC on consumer credit (*Rampion*), Directive 85/577/EEC on contracts negotiated away from business premises (*Eva Martín*), Directive 99/44/EC on consumer sales and associated guarantees (*Duarte*, *Faber*). In all these cases the emphasis is on the need to ensure the protection conferred by the relevant directive (principle of effectiveness).

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[41] CJ, 4 June 2015, Case C-497/13 *Froukje Faber v Autobedrijf Hazet Ochten BV*.
[42] CJ, 21 February 2013, C-472/11, *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*.
[43] See above footnote 27@@@.
[44] On the implementation of Art. 6 Directive 93/13 into the Member States see Ebers, *Unfair Contract Terms Directive 93/13 - Comparative Analysis*, http://www.eu-consumer-law.org/consumerstudy_part2c_en.pdf, 403-406.
[45] CJ, 30 April 2014, Case C-26/13, *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*.

In *Rampion*[46] the CJ held, by analogy with the case law on Directive 93/13/EEC, that Directive 87/102/ECC on consumer credit (repealed by Directive 2008/48/EC) must be interpreted as to allow the national courts to apply of their own motion the provisions transposing Article 11(2) of the directive (establishing a link between the contract for the supply of the good or service and the financial contract in order to allow the consumer, subject to certain conditions, to pursue remedies against the creditor in case of non-performance by the supplier). To justify making the relevant provisions *ex officio* applicable (para. 62), the CJ emphasised the "dual aim" of Directive 87/102/EEC: the directive "was adopted with the dual aim of ensuring both the creation of a common consumer credit market (third to fifth recitals) and the protection of consumers who avail themselves of such credit (sixth, seventh and ninth recitals)" (para. 59). Following the opinion of AG Mengozzi, the CJ itself placed the case in the context of the French legal system, from which the question referred originated (para. 58 ff.). The case law of the *Cour de cassation* used to regard the rules relating to consumer credit as falling within the category of the *règles d'ordre public de protection*, adopted in the interest of a particular category of persons and which may be relied upon only by persons belonging to that category (as opposed to the *règles d'ordre public de direction* adopted in the general interest and which the court may raise of its own motion).[47]

In *Eva Martín*,[48] concerning the interpretation of Directive 85/577/EEC on contracts negotiated away from business premises (repealed by Directive 2011/83/EU on consumer rights), the Spanish appeal judge requested a ruling on the question whether Art. 4 of the Directive – according to which "Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this Article is not supplied" – allows a national court to raise, of its own motion, an infringement of that provision and to declare a contract void on the ground that the consumer was not informed of his right of cancellation. The CJ held that Article 4 of Directive 85/577/EEC does not preclude a national court from declaring, of its own motion, the nullity of the contract, as provided by the national rule implementing Article 4 Directive 85/577/EEC. This conclusion is based on the "public interest" underlying the protection conferred by the Directive (para. 21, 28) and on the consequent need to ensure its effectiveness (para. 27). The "public interest" pursued by the Directive justifies the derogation from the general rule according to which the national court is not allowed to act on its own motion when this would mean going beyond the claim as submitted by the parties (see para. 20 referring to *Van Schijndel*, para. 19).[49]

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[46] CJ, 4 October 2007, Case C-429/05 *Max Rampion, Marie-Jeanne Rampion, née Godard, v Franfinance SA, K par K SAS* [2007] ECR I-8017.

[47] Following the CJ case law French law was modified: see below, III.B.1.FR.6@@@.

[48] CJ, 17 December 2009, Case C-227/08 *Eva Martín Martín v EDP Editores, SL* [2009] I-11939.

[49] *van Schijndel*, para. 19: "That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention". Interestingly in *Eva Martín* AG Trstenjak, after giving account of the existence in the Member States of different systems of nullity (absolute/relative; annulment), considers whether the absolute nullity is the appropriate answer, as the case law on directive 93/13/EEC cannot be transposed to the facts at issue (absolute nullity would imply the nullity of the entire contract, whereas according to Art. 6

In *Duarte*,[50] concerning the interpretation of Directive 99/44/EC on consumer sales and associated guarantees, the question referred was whether the national court could of its own motion grant an appropriate price reduction where the consumer was only seeking rescission of the contract in the legal proceedings and such rescission was not available because the lack of conformity was minor. The preliminary ruling reference took place in the context of Spanish procedural law, according to which – as described by the referring court – the consumer cannot modify the claim during the proceedings, or appeal the decision while seeking price reduction, or start new proceedings after the claim for rescission was rejected, as the decision on rescission is regarded as final (*res judicata*) also in relation to the latter action (the claim for rescission covering also the claim on price reduction). The CJ did not give a direct answer to the question as worded by the referring national court and did not state whether the national court must or may of its own motion grant price reduction: the essential point for the CJ was that the effectiveness of the remedy for which the Directive provided (price reduction) must be guaranteed. The national court, for example, could interpret domestic law in conformity with the directive thus that it allowed the consumer to refine his initial claim to include price reduction, or thus that price reduction was excluded from the *res judicata* so that the consumer might bring a fresh action (as suggested by the AG). The question whether the court could ex officio grant a remedy beyond the limit of the claim would be considered only as the *extrema ratio*.

In *Faber*,[51] the CJ extended the line of reasoning with regard to the Directive on unfair terms to Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees. In this case the Dutch court of appeal referred several questions to the CJ, asking in particular – as regards the power of the court to act of its own motion – whether it was required to examine of its own motion whether the purchaser might be classified as a consumer, even though the file contained insufficient information for this purpose and the examination would take place in the context of appeal proceedings.

As to the court's power to examine of its own motion, the CJ ruled that a national court before which an action has been brought relating to a contract which may be covered by the directive, is required to determine of its own motion whether the purchaser may be classified as a consumer. This obligation exists not only "as soon as that court has at its disposal the matters of law and of fact that are necessary for that purpose" but also when it "may have them at its disposal simply by making a request for clarification" (para. 46 and operative part). The CJ stated that in the light of the principle of procedural autonomy it is for the national court, for the purpose of identifying the rules applicable to the dispute, to assign the legal classification to facts and acts on which the parties rely in support of their claim, if necessary by requiring the parties to provide details. Consequently, the same process has to be carried out by the national court for determining whether EU law is applicable (principle of

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directive 93/13/EEC the contract may remain valid for the rest if this is possible after the unfair term is struck down). According to the AG there is no need to categorise the relevant rule of Directive 85/577/EEC as a public policy rule, as it is sufficient to invoke its protective aim (para. 83-84).

[50] CJ, 3 October 2013, Case C-32/12 *Soledad Duarte Hueros v Autociba SA e Automóviles Citroën España SA.*

[51] See above footnote 44@@@.

equivalence). Nevertheless, referring to the case law relating to Directive 93/13/EEC (para. 42), the CJ ruled that the obligation to carry out this process arises also from the principle of effectiveness: the national rules at issue in the main proceedings would not meet the principle of effectiveness, as they would make the protection afforded by Directive 99/44/EC excessively difficult (para. 45).

Furthermore, the CJ held that Article 5(3) of Directive 99/44/EC – pursuant to which the seller "must be liable to the consumer for any lack of conformity which exists at the time the goods were delivered" – must be regarded as a provision of equal standing to a national rule which ranks, within the domestic legal system, as a rule of public policy and that the national court must of its own motion apply any provision which transposes it into domestic law. Therefore the CJ, just as in *Asbeek Brusse* (see above, II.C.1@), did not classify the rule at issue as a rule of public policy, but made it *ex officio* applicable on the ground of equivalence.

The CJ, in answer to a specific question raised by the referring court, stated expressly that the question whether or not the consumer is assisted by a lawyer has no bearing on the interpretation of EU law (para. 47, with reference to *Rampion*, para. 65).

III. NATIONAL CASES

III.A. COMPARATIVE BACKGROUND

The question whether courts may raise a new point of law not included in the parties' claims or defences has no uniform solution in the national civil procedures of the European Union. Apart from the nature of the specific point of law at hand, each national solution is dependent on both the role of the courts and the principles of civil procedure, with special regard to the basic principle that a court is bound by the parties' claims (e.g. "*Dispositionsmaxime*"). Before discussing national cases in detail, a brief comparative introduction to various national procedural solutions seems to be necessary.

The first dividing line should be drawn between common law and continental law jurisdictions. In the United Kingdom, the problem of *ex officio* application of law does not exist in a practical sense. Because of the historical formation of the role of common law judges, *ex officio* application of legal points not submitted by the parties is handled in a different way compared to the continental systems. In essence, as Lord Diplock explained in *Bremer Vulkan v. South India Shipping* (1981), "the court had jurisdiction to grant an injunction for the enforcement or protection of legal or equitable right when it was just or convenient to do so."[52] This also implies, for example and as Whittaker emphasizes, that "where a contract is on its face illegal the court will not enforce it, whether the illegality is pleaded or not"[53] which means that the courts must of their own motion examine whether a

[52] *Bremer Vulkan Schiffbau und Maschinenfabrik* v *South India Shipping Corporation Ltd* [1981] AC 909, 980.
[53] S. Whittaker, Who Determines What Civil Courts Decide? Private Rights, Public Policy and EU Law, in D. Leczykiewicz and S. Weatherill (eds), The Involvement of EU Law in Private Relationships (Richard Hart 2013), p. 96.

contract is illegal. In other words, in common law the question whether courts may raise new points of law is determined by the priority of protecting rights. This approach enables the courts to grant the injunctions they deem necessary in the given case on any legal basis, independent of the parties' claims. In sum, if it is necessary for the protection of a given right, the courts may of their own motion raise new points of law not submitted by the parties.

When discussing continental law, a basic procedural question has to be touched upon first. Rules of civil procedure usually provide for a well-defined possibility for courts to raise either basic and general procedural requirements[54] or points of public order[55] autonomously, that is, without examining whether or not the parties relied on these points of law or not. Thus, when courts have to deal with legal issues of a fundamental procedural, public policy or public interest nature, they generally have power to raise these points of their own motion. This feature of national civil procedure regimes was also recognized by the CJ in *van Schijndel* where it required national courts to raise EU law provisions if the same courts must of their own motion raise similar provisions of national law.[56]

The second dividing line has to do with differences between the continental legal systems. Two models can be identified. In the first, the principle of judicial passivity and the binding nature of the parties' claim play a crucial role; there are, however, several exceptions to this general principle. It is the model used, for example, in Italy, Hungary and Switzerland. The second model is based on a general power of the courts to apply legal grounds *ex officio*; they may only do so, however, on strict conditions with special regard to the requirements of fair trial. The civil procedures of France, Germany, Belgium or Austria follow this approach.

In the first model one can always find a general procedural provision emphasizing the party-driven nature of civil proceedings. The Italian Civil Code of procedure provides, for instance, that the "court shall decide upon all the claims and within its limits",[57] and the Hungarian Code provides, in the same vein, that courts are generally bound by the parties' claims and submissions.[58] Alternatively, a procedural code may require the courts not to award more or less than, or different from that which the parties have requested, as it is the case in Swiss civil procedure.[59] All in all, courts in jurisdictions that follow this model must strictly respect both the scope of the claims and the parties' will in general.

However, these legal systems have harmonizing mechanisms in order to soften the rigidity of the general prohibition. These exceptions can be broad or narrow and can be grouped around various patterns. Firstly, some of them explicitly authorize the courts to deviate from the

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[54] For example: Art. 139 (3) of the German Code of Civil Procedure (*Zivilprozessordnung*) provides that the court must call the parties' attention to those points, mostly prerequisites to suit, that may be raised by the court's own motion.

[55] For example: Art. 3:40(1) Dutch Civil Code.

[56] *CJ, 14 July 1995, Joined Cases C-430/93 and C-431/93, Jeroen van Schijndel et al. v Stichting Pensioenfond voor Fysiotherapeuten,* [1995] ECR I-04705. para 13.

[57] Article 112 Italian Code of Civil Procedure (Codice di procedura civile).

[58] Article 3 (2) Hungarian Code of Civil Procedure (1952. évi III. törvény a polgári perrendtartásról).

[59] Article 58 (1) Swiss code of civil procedure.

general rule in special cases. Typical examples are child issues in family law or matrimonial law.[60] A second set of exceptions arises from the case law of the national courts. In Hungarian law, for example, courts are not bound by the parties' claims when deciding about the type of damages to award.[61] Finally, courts may exempt themselves from the general prohibition by taking an interpretative approach. Italian civil procedure allows the courts to interpret claims according to their legal substance, and not, therefore, according to their precise formulation.[62] This means that the legal content of a claim has to be determined by its substance, not by its literal wording.

The second model represents an alternative view. The starting point is the same, namely the principle of party autonomy. In this model, however, one can always find a provision expressly granting the courts power to apply the law *ex officio* subject to strict procedural safeguards. This means that the legislator has solved the *ex officio* issue is solved in a general sense. The French Code of Civil Procedure provides that the courts can base their decision on a point raised of its own motion, but they must first invite the parties to comment on the matter ("*principe de la contradiction*").[63] In German law, the legislator formulated this rule in a different way, but the underlying logic is very similar. Article 139 (2) ZPO warns the courts that they can only base their decisions "on a point of fact and law which a party has apparently overlooked or considered insignificant"[64] if they call the parties' attention to this point and invite them to comment thereon. Moreover, German courts have the same obligation if they intend to assess a certain legal or factual point in a way fundamentally different from the assessment by the parties.[65] This approach is subject to the restriction that the subject matter of a case (the "goal of the case"), may not be altered in this way.[66]

In conclusion, there are in fact three distinct basic approaches to the *ex officio* application of law in civil procedure in the legal systems of the European Union. The English approach puts particular emphasis on the protection of rights and on making procedural principles secondary to this aim. On the continent, certain procedural regimes are based on the principle of judicial passivity, while others provide for a general power of *ex officio* application subject to strict procedural safeguards. Even though the diversity is apparent, there is a common point in all of them: the courts are always allowed either broad or narrow leeway to base their decisions on

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[60] These points can be found in Swiss and Hungarian law.

[61] Cf. 1/2014 PJE Határozat (Uniformity decision) with reference to an earlier opinion of the Supreme Court (Legfelsőbb Bíróság, PK 44.)

[62] In Italy, case law created this exception, see for example, Corte di Casszione, Sezione Lavoro Civile, Sentenza 11 gennaio 2011, n. 455. Compare S. Grossi and M.C. Pagni, Commentary on the Italian Code of Civil Procedure, p. 158-159. In Hungarian law, the legislator made it explicit in the second sentence of Article 3 (2) Hungarian Code of Civil Procedure.

[63] Art. 16 paragraph 3 NCPC. For an English translation see: N. Brooke (ed.): The French Code of Civil Procedure in English. Oxford University Press, Oxford, 2008. 4.

[64] For the English translation see: P. L. Murray and R. Stürner: German Civil Justice. Carolina Academic Press, 2005. 168.

[65] Art. 139 (2) second sentence.

[66] Murray and Stürner: op. cit. 172.

points of law raised of their own motion. However this may be, EU law may require the national courts to find a possibility for ex officio application in its national procedural law.

III.B. NATIONAL CASES: MAJOR PATTERNS

The national cases are classified by the following criterion: decisions in which the reference to EU law was decisive (III.B.1), and decisions in which both national and EU law played a considerable role (III.B.2). A third type of situation occurred in a case dealt with under III.B.3, in which the national court on questionable grounds did not refer a question to the CJ for a preliminary ruling (III.B.3).

III.B.1. DECISIVE REFERENCES TO EU LAW

This section considers five cases from various jurisdictions – Dutch, Belgian, French, and Spanish. Four of these cases have in common that the court was faced with the legal problem of *ex officio* classifying certain contractual terms in the light of EU law, mostly Directive 93/13/EEC. In doing so, the courts referred extensively to both primary or secondary EU law and the case law of the CJ. Since most Member States – Italy being an exception – did not, in their implementation of Directive 93/13/EEC, explicitly provide for the possibility of *ex officio* examination whether contract clauses are unfair, the equivalent rule was based on CJ case law. In certain cases – the Dutch and the French – national courts even had to overstep former practice of Supreme Courts in order to ensure conformity of their decisions with EU law. There is also a Belgian case in which the national court applied Article 101 TFEU of its own motion.

7.3 (NL)

Hoge Raad der Nederlanden (Supreme Court of The Netherlands), 13 September 2013[67]

UNFAIR TERMS

2 per cent overdue rate

The lower court has to examine of its own motion whether or not Directive 93/13 applies to an agreement and whether a given term is unfair.

Facts: The respondent undertook to refurbish the home of the applicant. Within the terms of the service contract there was an article providing that in the event of overdue payment the applicant had to pay interest at a rate of 2 per cent per month. A dispute arose and the respondent claimed an amount increased by the contractually stipulated rate of 2 per cent per month. The main legal issue was whether the court should have assessed of its own motion whether the disputed contractual term was binding pursuant to Article 6 Directive 93/13/EEC.

[67] ECLI:NL:HR:2013:691, NJ 2014/274.

Held: The court of appeal should have raised the presumption that the term at issue might be an unfair term and it should have examined of its own motion in order to assess whether or not the term was unfair.

Judgment: "3.5.2 Furthermore in ECJ 9 November 2010, C-137/08 ECLI:NL:XX:2010:BO5516, NJ 2011/41 (*VB Pénzügyi Lízing*) the ECJ held in relation to Directive 93/13:

"49 Thus, in the exercise of the functions incumbent upon it under the provisions of the Directive, the national court must ascertain whether a contractual term which is the subject of the dispute before it falls within the scope of that Directive. If it does, that court must assess that term, if necessary, of its own motion, in the light of the requirements of consumer protection laid down by that Directive." (…)

3.5.3 The national court is therefore required to assess of its own motion whether a contractual term falls within the scope of Directive 93/13, and if it does, the national court must assess whether or not this term is unfair, if the court has access to the necessary required information, both factual and legal. (…)

3.6.1 According to ECJ case law, such assessment regards rules which are equivalent to national rules of public policy. In ECJ 30 May 2013, C-488/11 (*Asbeek Brusse and De Man Garabito*), ECJ held:

"45 It follows that, where the national court has the power, under internal procedural rules, to examine of its own motion the validity of a legal measure in the light of national rules of public policy, which, according to the information provided in the order for reference, is the case in the Netherlands judicial system for a court ruling in appeal proceedings, it must also exercise that power for the purpose of assessing of its own motion, in the light of the criteria laid down in the directive, whether a contractual term coming within the scope of that directive may be unfair. (…)"

3.6.3 The foregoing implies for Dutch law that the court of appeal is required to assess of its own motion whether a contractual term is unfair according to the criteria of Directive 93/13, also if this means that the court of appeal has to go beyond the limits set by the grounds of appeal. Under the Dutch law on appeal procedure the national court must in principle apply public policy rules also beyond the limits set by the grounds of appeal, with the proviso that the national court must respect the ambit of the parties' legal dispute. The national court is therefore not required to make this assessment when the parties did not appeal the award or the rejection of the relevant claim, in which case a court of appeal is not competent to give a decision on that claim.

3.7.1 Directive 93/13 is not directly applicable in the Dutch legal system. However, interpretation of Dutch law in conformity with the Directive has the result that the national court is obliged pursuant to article 6:233 of the Dutch Civil Code to make the assessment referred to above of its own motion if the Directive 93/13 entails such obligation.

3.7.2 In this connection it is important that under article 6(1) of Directive 93/13 the Member States are obliged to consider an unfair term non-binding. The ECJ has interpreted this provision to mean that a national court which has established that a term in an agreement between a seller and a consumer is unfair, is automatically

obliged to disapply that term vis-à-vis the consumer (ECJ 30 May 2013, C-488/11 (*Asbeek Brusse and De Man Garabito*), paragraph 55-60).

3.7.3 For Dutch law the foregoing means that, if the national court has ascertained that a term is unfair within the meaing of Directive 93/13, it is obliged to annul the term.

3.8 By way of exception, the considerations set out in paragraphs 3.5.1-3.7.3 do not apply if the consumer opposes the non-application of a contractual term which the court holds to be unfair (ECJ 30 May 2013, C-488/11 (*Asbeek Brusse and De Man Garabito*), paragraph 49).

3.9.1. With regard to the obligation of *ex officio* assessment, the Supreme Court finds the following. If the court has the necessary factual and legal information to suspect that an agreement falls within the scope of Directive 93/13 and contains a clause which is unfair within the above meaning, it should examine the matter , even if the claim or the defence have not been based on allegations aimed at such examination. This applies in both the first instance and the appeal, the latter with due regard to the above considerations in 3.6.3. If not all the relevant facts have been established, the court will have to take the necessary measures of inquiry to ensure the full effect of Directive 93/13, both as regards the applicability of the directive, as the possible unfairness of the clause. The court must respect the principle of hearing both parties. It must give the parties the opportunity to express their views on the matter and, if necessary, to adjust their allegations accordingly.

3.9.2 The court will also have to perform this assessment of its own motion in default proceedings, in that case on the basis of article 139 Dutch Civil Procedure Code (*Wetboek van Burgerlijke Rechtsvordering*), since it involves law that is equivalent to national public policy rules (see: ECJ 14 June 2012, C-618/10, ECLI:NL:XX:2012:BW9433, NJ 2012/512 (*Banco Español de Crédito*) paragraph 48), quoted above in 3.5.1. The assessment must be done on the basis of the writ of summons. In that case, too, the court will have to take the necessary measures of inquiry to ensure the full effect of Directive 93/13.And in that case too, moreover, the court must observe the principle of *audi et alteram partem* and give the claimant an opportunity to make further comments and, if necessary, to adjust his arguments.

3.9.3 With regard to the cassation proceedings the foregoing considerations mean that a complaint that the lower court has failed to make the assessment referred to above will be successful, if it is incomprehensible that the facts that emerged in the proceedings did not give the court cause for the suspicion referred to in paragraph 3.9.1.

3.10 Against the background of the above considerations the complaints are successful. The facts stated in the complaints are such that they should have given the court cause for the presumption that the agreement for services at issue falls within the scope of Directive 93/13, that no negotiations as meant in article 3 (1) Directive have taken place about the term in question, that the term is not a core term within the meaning of article 4 (2) Directive, and that the term is unfair within the meaning of the Directive, also having regard to the amount of the contractual interest of two per cent per month, which is well above the statutory interest rate of article 119 Book 6 Dutch Civil Code and above the commercial interest rate of article 119a of Book 6 Dutch Civil Code. Consequently, although the claimant has not contested the

stipulated rate, the national court should have examined of its own motion whether or not Directive 93/13 applies to the agreement between the parties and whether the term on which the [defendant's] claim for interest is based is unfair within the meaning of the Directive. (…)"

Notes:

(1) An excerpt of this decision is also reported in Chapter 6.I.B.2.c.ii@. It is a landmark judgment, as the Dutch Supreme Court – unlike lower courts[68] – had previously been hesitant to follow the case law of the CJ. It was uncertain on which provision of national law the power of the courts to intervene *ex officio* could be based (whether Article 6:233 sub a,[69] Article 6:248(2), [70] or Article 3:40(2) Dutch CC[71]).[72] The *Hoge Raad* interpreted Article 6:233 Dutch CC, concerning general contract terms, in conformity with the Directive and held that the court of appeal should have assessed of its own motion whether the contract clause was unfair. In doing so, it referred extensively to CJ case law (*Pénzügyi*, *Banco Español de Crédito*, *Asbeek Brusse*). The Supreme Court not only ruled that there is an obligation for the lower court to intervene of its own motion, but also that the lower court must examine of its own motion both whether a term falls within the scope of Directive 93/13/EEC (*Pénzügyi*) and whether the term is unfair. The Dutch Supreme Court thus accorded a wide scope to the obligation to examine, even beyond what the CJ itself required in *Pénzügyi*. Moreover, the Supreme Court ruled that if the court finds that a clause unfair, it must annul it unless the consumer opposes the non-application of the clause (*Pannon*).

(2) The fact that rules of consumer law have to be applied *ex officio* does not mean that the rules have a public policy nature. See II.C.1.11@@@above. The CJ has ruled in ordinary first instance proceedings that they must be applied *ex officio* because of the public interest pursued by consumer directives. In other procedures the CJ reviewed the issue on a case to case basis against the principles of effectiveness and equivalence. The latter principle plays a role in the present case, as in *Asbeek Brusse* and *Faber* (see II.C.2.5). In conformity with the

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[68] See for example District Court of Arnhem, 27 April 2009, ECLI:NL:RBARN:2009:BJ1729, NJF 2009, 337, referring to *Océano* and *Mostaza Claro.*

[69] Art. 6:233 BW: "A stipulation in general conditions may be annulled: a) if it is unreasonably onerous to the other party, taking into consideration the nature and the further content of the contract, the manner in which the conditions have arisen, the mutually apparent interests of the parties and the other circumstances of the case; or b) if the user has not afforded the other party a reasonable opportunity to take cognizance of the general conditions".

[70] Art. 6:248 BW: 1. An agreement not only has the legal effects agreed upon by the parties , but also those which, according to the nature of the agreement, apply by virtue of law, usage (common practice) or the standards of reasonableness and fairness.
2. A rule that is binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to the standards of reasonableness and fairness".

[71] Art. 3:40(2) BW: "Violation of a mandatory statutory provision leads to nullity of the juridical act; if, however, the provision is intended solely for the protection of one of the parties to a multilateral juridical act, it leads to nullification only; in both cases this applies to the extent that it does not follow otherwise from the purport of the provision".

[72] Another problem that hase arisen is how to make the sanction on unfairness pursuant to internal law (in particular the "annulment" provided by Art. 6: 233 BW) compatible with Art. 6 Directive 93/13, as interpreted by the CJ itself in relation to the possible consequences of unfairness. See Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*, Deventer, 2012, nos. 188, 252.

CJ decision in *Asbeek Brusse*, the Supreme Court stated in the decision quoted above that the EU rules at issue also apply in appeal proceedings, as Article 6 has to be considered as having equal standing to the national rules of public policy which, as explained by the referring court (the Amsterdam Court of Appeal), have to be applied *ex officio* in appeal proceedings (principle of equivalence). In cassation, parties may therefore raise the complaint that the lower court has failed to carry out the examination of its own motion if the nature of relevant facts before the court is such that the court should have presumed that the directive might be applicable. The question of the *status* of the rules on consumer contracts – whether merely mandatory or of public policy – has been a significant issue particularly in Dutch law which traditionally allows *ex officio* application only for public policy rules, not for mandatory rules (irrespective of whether or not they 'only' have a protective purpose). The question has also been raised in the context of competition law: see II.B.1 above and III.B.7.NETH.12 below@@@@@.

Hof van Beroep (Court of Appeal) at Gent, 4 January 2012[73]

UNFAIR TERMS

Hospital invoice

The court is obliged to examine whether a contract term is unfair if the necessary legal and factual elements are available.

Facts: A hospital seeks payment due under a liquidated damages clause and a default interest clause included in the contract. The first instance court had *ex officio* raised the issue whether these clauses were in conformity with consumer law legislation.

Held*:* EU law requires the national court to assess of its own motion whether a contractual clause is unfair where it has available to it the legal and factual elements necessary for that task. If it considers such a term to be unfair, it must not apply it, except if the consumer opposes the non-application (*Pannon Gsm* and *VB Pénzügyi Lizing*).

Judgment: 4.3 (...) Article 74, 17 WMPC – formerly article 32, 15 WHPC – is not a public policy rule. The prohibition contained in that provision protects private interests and does not concern essential interests of society. This does not, however, prevent the court from assessing of its own motion whether the clauses in a contract between a seller or enterprise and a consumer are in accordance with the relevant provisions and by doing so the court does not infringe the 'principe dispositive'. The court seized of the action is required to ensure the effectiveness of the protection which the Directive is intended to provide. Consequently, the role thus attributed by Community law to the national courts in this area is not limited to the mere power to rule on the possible unfairness of a contractual term, but also comprises the obligation to examine that issue of its own motion where it has available to it the legal and factual elements necessary for that task. When it considers such a term to be unfair, it must

[73] Nieuw Juridisch Weekblad 2012, 255.

not apply it, except if the consumer opposes that non-application (reference the *Pannon Gsm* and *VB Pénzügyi Lizing*). (…)

4.4. (…) The aim of the Directive is to ensure that unfair terms used in contracts concluded between a seller and a consumer are not binding on the consumer and that the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair term (Article 6(1) Directive 93/13). That aim would not be achieved if the consumer were obliged to raise the unfairness of a contractual term himself. Effective protection of the consumer can only be attained if the national court acknowledges that it has power to evaluate terms of this kind of its own motion. The protection which the Directive confers on consumers thus extends to cases in which a consumer who has concluded a contract with a seller or supplier that contains an unfair term, fails to raise the unfair nature of the term (reference to *Cofidis*).

Notes:

(1) The decision serves as a typical example of the impact of CJ case law on Belgian law with regards to the *ex officio* assessment of the unfairness of contractual clauses in consumer contracts. On this issue a convergence of results has been reached following both internal case law and the case law of the CJ. In a landmark decision of 2005, the Belgian court of cassation[74] ruled that the court is obliged to give a different qualification to facts and to raise different grounds when this possibility arises out of the facts "*spécialement invoqués*" (expressly alleged) in the debate; if the facts have not been expressly alleged (they are only "*adventices*"), the court merely has the option to exercise this power. The court must in any case respect the right to defense, that is, it has to inform the parties when it re-qualifies facts and must give them the opportunity to express their views on the matter.

(2) However, in light of the decision of the cassation court and of CJ case law, the opposition between mandatory rules ("*normes impératives*") and public policy rules ("*normes d'ordre public*") – the former pertaining to the protection of private interests, the latter to fundamental values of society – has definitely been blurred. Previously, it was deemed that the courts could only *ex officio* raise the unfairness of a contractual clause by implying that consumer protection rules had to be characterized as *ordre publique* rules.[75] In the aforementioned decision the Court of Appeal made it clear that the court is required to act of its own motion whether or not the consumer contract rules at issue are qualified as public policy rules.

Formázott: Betűtípus: Dőlt

7.5 (ES)

Audiencia Provincial de Madrid (Court of Appeal), 4 March 2013, n. 906/2012[76]

[74] Cour de cassation, 14 February 2005, *Jurisprudence de Liege, Mons et Bruxelles*, 2005, 856.

[75] Delforge, *Clauses abusives, office du juge et renunciation*, *Jurisprudence de Liege, Mons et Bruxelles*, 2008/3, 93 ff., comment to *Cour d'appel de Liège* (3*e chambre*), 6 February 2006: having considered that the clauses at issue might be unfair, the court opened the debate on the issue of unfairness. See on the position that rules on unfair terms are rules of public policy: *Justice de paix de Charleroi* (3e *canton*), 4 July 2008, *Jurisprudence de Liege, Mons et Bruxelles*, 2008/37, 1658; *Justice de paix de Charleroi* (3e *canton*), 25 October 2006, *Jurisprudence de Liege, Mons et Bruxelles*, 2007/5, 199, obs. P. Wéry.

[76] xxxxx

El Corte Inglés, E.F.C., S.A.

UNFAIR TERMS

Order for payment procedure (*Banco Español de Crédito*)

The Spanish rules regarding the order for payment procedure must be interpreted in conformity with Directive 93/13/EEC and the case law of the CJ. Consequently, the court is allowed to assess whether a contractual clause is unfair at the first stage of the procedure.

Facts: The claimant based his application for an order for payment on a consumer credit contract. The court considered that the contract contained an unfair term. but according to the Spanish rules it would not be allowed to assess the unfairness issue of its own motion.

Held: The appeal court reversed the decision, stating that in light of the CJ judgment in *Banco Español de Crédito*, Spanish law can be interpreted to the effect that the court may assess whether or not a contractual clause is unfair at the first stage of the order for payment procedure.

Judgment: "Therefore if one assumes, contrary to the position previously taken by the *Audiencia Provincial de Barcelona* in its reference for a preliminary ruling, that the court may assess of its own motion whether contractual terms stipulated to the detriment the consumer are unfair during the first stage of the Spanish order for payment procedure in which it decides on admissibility, the problem will cease to exist as a result of the consequences if the terms are declared unfair and therefore void. (…) We interpret the national regulation on order for payment procedure in the light of the literal wording and the aim of Directive 93/13, as required by the judgment of 27 June 2010, *Murciano Quintero*-; and we preserve the Spanish rules regarding the order for payment procedure, whose stability would otherwise be seriously compromised while also taking into consideration that a different position would affect the application of EC Regulation CE 1896/2006 of 12 December 2006 creating a European order for payment procedure.

The judgment of 14 June 2012 is the outcome of the approach taken by the *Audiencia Provincial de Barcelona* to the Spanish rules regarding the order for payment procedure in its reference of the question to the ECJ and cannot be considered more than that and, moreover, it cannot constitute a limit to the interpretation of the Spanish order for payment procedure in conformity with Directive 93/13/EEC of the Council of 5 April 1993 and with the ECJ case law.

SIXTH.-In light of the foregoing, according to the criterion established by this *Audiencia Provincial*, in its broadest composition [*pleno*], the appeal must be allowed and the decision appealed must be annulled, in order to allow the *a quo* court to assess *ex officio* the unfairness of contractual clauses in the credit contract causing a detriment to the consumer and to declare them null and void with the consequences this will have according to the court for the contract and for the order for payment procedure".

Notes:

(1) The main issue decided by the Spanish court of appeal was whether the courts may assess in the context of an order for payment procedure whether a contractual clause is unfair. Due to the importance of the issue, the court of appeal decided it sitting in full court ("pleno": 53 judges, of whom only 5 wrote a dissenting opinion). In its decision the Spanish court of appeal dwells on the case law of the CJ relating to the *ex officio* assessment of the unfairness of contractual clauses and it is an illustration of the line of reasoning and the style that

characterize the Spanish decisions dealing with this issue (extensive references to CJ case law).[77]

(2) Spanish legislation does not empower courts before which an application for an order for payment has been brought to find, of their own motion and *in limine litis*, that unfair contract terms are void. This means that the lawfulness of such terms can be assessed in the ordinary judicial procedure, which will only be initiated only if the debtor lodges an objection to the application. It follows that if the debtor does not lodge an objection, the protection afforded by Directive 93/13/EEC cannot be enforced. Following a reference for a preliminary ruling made by a Spanish court, the CJ ruled in *Banco Español de Crédito* that Directive 93/13/EEC must be interpreted as precluding national legislation which, in cases where the consumer concerned has not lodged an objection, does not allow the court before which an application for an order for payment has been brought to assess of its own motion, *in limine litis* or at any other stage during the proceedings, whether a contractual term is unfair – even though it already has the legal and factual elements necessary for that task available to it. In the case discussed above the Spanish first instance court, following the CJ ruling, had rejected the application made by the claimant on the grounds that the Spanish law on the order for payment procedure did not allow the court to assess whether the contractual clause was unfair. The decision of the *Audiencia Provincial de Madrid* discussed above gives a different interpretation of the national law in the light of *Banco Español de Crédito*,[78] which, unlike the interpretation by the first instance court, takes credit for ensuring the functioning of the Spanish order for payment procedure whilst making it compatible with EU law.

(3) The Spanish legislation implementing Directive 93/13/EC (*Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación*) does not specify whether the *nullidad* of the unfair terms can be declared *ex officio*, but only states that the consumer can claim such nullity under the general rules on nullity of contracts (Art. 9). Recent national judgments on this matter have followed the CJ case law.

(4) When evaluating the impact of EU case law on the Spanish rules on consumer contracts, it must be mentioned that important legislative changes have been introduced in internal law following the CJ judgment in *Aziz.*[79] The reform (*Ley 1/2013 de 14 de Mayo, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social*) has amended the *Ley de Enjuiciamiento Civil* (*LEC*) in order to allow the courts, either on a party's request or *ex officio*, to assess the unfairness of contractual terms

[77]See in particular *Tribunal Supremo, Sala de lo Civil*, 9 May 2013, n. 241/2013, concerning injunctions for the protection of consumer interests: this decision, even if incidentally, dedicates many paragraphs to the role of the courts in the assessment of the unfairness of the contractual clauses, with extensive references to CJ case law (paras. 110-130); AP Castellón, sec. 3, 24 July 2013.

[78]CJ, 14June 2012, C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*.

[79]CJ, 14 March 2013, C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*: Directive 93/13/EEC precludes legislation of a Member State which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not allow the court before which declaratory proceedings have been brought to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision.

during the enforcement proceedings.[80] The *Ley Hipotecaria* was amended, too, to the effect that the notary must stay the extrajudicial auction when he has knowledge from the parties that the unfair terms of the mortgage credit contract at issue have been challenged before the civil court.[81]

7.6 (FR)

Tribunal d'instance de Roubaix (First Instance Court), 16 October 2003[82]

DÉLAI DE FORCLUSION

Cofidis

The court may assess whether a term in a consumer contract is unfair even if the two-year prescription period provided for by Art. L-311-37 code de la consommation has elapsed.

Facts: The creditor claims payment of principal, interest and costs due by the debtor under a consumer credit contract.

Held: On the basis of the CJ judgment in *Cofidis* the tribunal may *ex officio* assess whether the clause is unfair even if the two year prescription period provided for by internal law has expired.

Judgment: "On the power of the court *ex officio* to raise the unfairness of a clause in a credit contract.

It is laid down by law that the court of first instance may raise the unfairness of a contractual clause included in a credit contract, either *ex officio* or following a defence raised by the consumer, even when the time limit [*délai de forclusion*] provided for by Article L-311-37 of *Code de la consommation* has elapsed, in order to achieve the aim pursued by Art. 6 of Directive 93/13/CEE of the Council on unfair terms in consumer contracts and to ensure that unfair clauses are not binding on the consumer (CJCE, 21 Nov. 2002, COFIDIS SA ci Jean-Louis Fredout, C-473/00, Contrats, conc., consom., fév. 2003, no. 31 obs. G. Raymond).

One should bear in mind in this context that the solution envisaged by the European Court of Justice is binding on all the national jurisdictions (Cass. ch.mixte, 24 mai 1975, Jacques Vabre, AJDA 1975, 567, note J. Boulouis et CJCE 9 mars 1978, Simmenthal, 106/77, Rec. p. 629) and that consequently the limits on the power of the courts to intervene *ex officio* in the field of consumer credit, as previously established by the *Cour de cassation* (Civ 1ère, 15 fév. 2000, Bull. civ. 1 no49; 10 juin. 2002, Bull. civ. 1 nO195) no longer exist.

In the case under consideration, the contract concluded between the parties on the 18th of June 2001, is a consumer credit contract to which the public policy rules of the *code de la consommation* apply. Even though the two year prescription period [*délai de forclusion*] had expired on the 19th of June 2003, the first instance court could assess the unfairness of the clauses in the consumer credit contract by its provisional judgment [*par jugement avant dire droit*] rendered on 3 July 2003 properly and in accordance with Articles 12 and 16 of *NCPC* [new code of civil procedure] since the

[80] See Articles 552, 557, 561 LEC, as amended.

[81] Art. 129, para. 2, (f), *Ley Hipotecaria, Texto Refundido según Decreto de 8 de febrero de 1946* , as amended.

[82] TI Roubaix, 16 October 2003, SA SOFINCO c/ époux D.

parties had had the opportunity to discuss the unfairness issue and it was irrelevant that the contract clause at issue was stipulated before the MURCEF law of 12 December 2001, since this solution is based on the wording of Article L. 311-37 of the *code de la consommation* interpreted in the light of Directive 93/13".

Notes:

(1) The decision discussed above is one of numerous cases in which the courts did not follow the case law of the *Cour de cassation* as developed from 2002 to 2009.[83] This case law did not allow the courts *ex officio* to raise the issue of violation of consumer contract rules, a problem which was perceived as relevant above all in the field of consumer credit, from which the major part of this case law originates. In 2009 the *Cour de cassation*[84] has changed its position by recognizing that the *ordre public* provisions of the *code de la consommation* can be applied *ex officio*, in so doing substantially aligning with the view expressed by the lower courts deciding on factual issues and the CJ.

(2) Art. 141-4 *code de la consommation* currently provides the following: "Le juge peut soulever d'office toutes les dispositions du présent code dans les litiges nés de son application. Il écarte d'office, après avoir recueilli les observations des parties, l'application d'une clause dont le caractère abusive ressort des éléments du débat." The first sentence was introduced by the *loi n° 2008-3* (*Loi Chatel*), in order to put an end to the case law of the *Cassation* as developed until 2009. The provision does not provide for an obligation, but only for an optional power. The second sentence was introduced by the *loi n° 2014-344* to adapt the *ex officio* rule to CJ case law and especially to the judgment in *Rampion* (see above, II.C.2.2). Previously, it was maintained that the aim of consumer protection rules was to protect the interest of a specific individual or group (rules of *ordre public de protection*), which had the consequence that the courts were not allowed to raise the infringement of these rules *ex officio*. It may be noted that Art. L. 141-4 (1), providing that the courts may *ex officio* apply the rules of the *code de la consommation*, does not refer to *ordre public* provisions only (and therefore does not distinguish between *ordre public de protection* and *ordre public de direction*).

(3) The possibility of an *ex officio* application of legal grounds based on EU law has never been questioned by the *Cour de cassation*.[85] The general principle of the power of the courts

[83]See also: TI Vienne, 19 October 2001, *CCC*, 2001, 21 (preliminary reference to the CJ); TI Niort, 15 May 2002, *CCC*, 2002, 21; TI Saintes, 16 November 2005, *CCC*, 2006, comm. 37, Raymond (*Rampion* case). See Poissonnier, *Mode d'emploi du relevé d'office en droit de la consummation*, *CCC*, 2009, *étude* 5; Paisant, *L'obligation de relever d'office du juge national*, *JCP, EG*, 12 October 2012, n. 42, 336; Moracchini-Zeidenberg, *Le rélevé d'office en droit de la consommation interne et communautaire*, *CCC*, 2013, n. 7, July, étude 9; Institut national de la consommation (INC), *Le relevé d'office par le juge national des dispositions du code de la consommation*, November 2012.

[84]*Cour de cassation, civile, Ch. civile* 1, 22 January 2009, 05-20.176, *CCC*, 2009, comm. 86, note Raymond; *RTD com*., 2009, 608, obs. Bouloc.

[85]See *Cour de cassation*, *Rapport* 2006, "1.2. Application du droit communautaire, La pratique de la function jurisdictionnelle", 1.2.2.1: "La pratique, par la Cour de cassation, du relevé d'office de moyens tirés du droit communautaire, qui remonte ainsi bien avant que la Cour de justice ne se prononce sur le role incombant au juge

to decide of their own motion can be inferred from Art. 12 CPC, which provides that it is for the courts to apply the rules that are applicable to the case.[86] It is generally recognized that the courts can of their own motion apply the nullity of a legal act, on the condition that the nullity has its basis in facts that have come to light in the debate and that the principle of the right to defence is respected. According to some opinions, the courts are obliged to apply the nullity *ex officio*.[87]

7.7 (BE)

Hof Van Beroep Brussel (Court of Appeal), 10 October 2008[88]

Bima NV/Sodrepe NV

NULLITY *EX* ART. 101 TFEU

Breweries waste @ reference in Chapter 2

An agreement falling under Article 101 TFEU is automatically void and cannot be invoked by the parties as a basis for their claim.

Facts: The claimant Bima is a firm that buys waste from breweries and sells it in the form of animal feed to farmers. Sodrepe works for Bima as a collector of the waste, and has signed an agreement with Bima under which they engage in the "beer waste" trade in both Belgium and the Netherlands. Subsequently, Bima finds out that Sodrepe has been engaging in anti-competitive practices, it suspends payment to Sodrepe for its collecting activities and sues Sodrepe, claiming compensation for damage suffered as a result of Sodrepe's anti-competitive practices.

Held: The agreement between Bima and Sodrepe is contrary to Art. 81 EC Treaty and therefore void, with the consequence that no claim based on that contract can be brought.

Judgment: *"*35. The contract between Bima and Sodrepe – which includes the preamble mentioned as well as the management contract – is an agreement that could negatively affect trade between Member States and which has as its object or effect the prevention, restriction or distortion of competition within the common market, and more specifically is an agreement that fixes purchase and selling prices, controls production, divides the markets, and consequently is *ab initio* void within the meaning of article 81(1) EC Treaty. (…)

39. This nullity has the result that Bima cannot found any claims on alleged breach of contract (and specifically not termination of the contract against Sodrepe…) and that Sodrepe, too, cannot found any claims on alleged breach of contract by Bima (and specifically not a claim for payment of outstanding and invoiced honoraria on the one hand, and payment of a conventional termination fee on the other hand)".

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national en la matière, continue à se développer, de manière constante, en même temps que le développement de la réglementation et de la jurisprudence communautaires".

[86] The debate ensuing from the interpretation of this article also refers to the distinction between "moyens de pur droit" and "moyens mélangés de fait et de droit": in the former, the court has an obligation to intervene *ex officio*, in the latter this is optional. The *Cour de Cassation* cannot apply of its own motion a *moyen mélangé de fait et de droit,* as it is not a court deciding on facts. See Normand, *Principes directeurs du procès – Office du juge – Fondement des pretentions litigieuses*, *Juris Classeur Procédure civile*, Fasc. 152 (*mise à jour* 21-1-2014).

[87] Picod, *Nullité*, *Rép. Civ. Dalloz*, March 2013, n. 35, 9.

[88] *Hof Van Beroep Brussel*, 10 October 2008, Bima NV/Sodrepe NV, T.B.H. 2009/5, May 2009, 487.

Notes:

(1) The Belgian Court of appeal applied Article 101 *ex officio* and declared the contract void. In Belgian law the competition rules are considered public policy rules, regardless of whether they have their origin in internal law or in EU law.[89] See also, in the context of this debate: *Cour de cassation*, 15 May 2009, (*Brouwerij*) *Haacht*, reported in Chapter I.B.4@@@, which also refers to *van Schijndel*.[90]

(2) The general rule in Belgian law is that the courts can apply the nullity of a legal act of their own motion. Parties can make a procedural agreement to limit the object of the claim and to bind the court to pronouncing only on a specific point of law or fact, but, so the Supreme Court has ruled, this agreement cannot prevent the court from applying rules of public policy.[91]

III.B.2. REFERENCES TO BOTH NATIONAL LAW AND EU LAW

Most of these cases illustrate the different ways in which EU law sources make their appearance in decisions of the national courts. In the various jurisdictions – Hungarian, Polish, Italian and Dutch – the problems that arose in specific cases could be properly solved on the basis of national provisions (relevant Codes and Acts). However, the courts at the same time decided to refer to EU law of their own motion, mostly to case law of the CJ. In most of these cases the references are extensive and aimed mainly at giving a broader perspective to judicial argumentation . In this way the references to EU law strengthen the argumentation in the *obiter* parts of the judgments. There is also a German case which is based exclusively on national law and which does not contain any reference to EU law.

7.8 (HU)

Fővárosi Ítélőtábla (Regional Court of Appeal), 14 February 2014[92]

Pf. 5. 21.599/2013/6 @??

UNFAIR TERMS

Mortgage debt in Swiss francs

[89] Taton, *L'office du juge et la nullité en droit de la concurrence*, R.D.C., 2009/5, 492-493.
[90] *Brouwerij Haacht NV v B.M.* [2009] Cass. (1e k.) 15 May 2009, C.08.0029.N. Some doubts have arisen as to the meaning of this decision: see Taton, Franchoo, Baeten, Rooms, Chronique de jurisprudence (2004-2010), Pr. Partie, *Les actions civiles pour infraction au droit de la concurrence*, T.B.H. 2013/1, January 2013, nos. 42-43, 23-25 (the rationale of the decision may be linked to the lack of proof of the conditions of exemption and then the decision may not be interpreted to the effect that para. 3 of Art. 101, unlike para. 1, cannot be applied *ex officio*).
[91] Cour de Cassation, 28 September 2012, C.12.0049.N/1.
[92] Not reported yet.

National courts shall secure the conformity of national law with EU law by interpretation, consequently, Directive 93/13/EEC has to be taken into account when dealing with a consumer contract.

Facts: One of two applicants borrowed just under 100.000 EUR from a financial service provider, and the second applicant agreed to mortgage his house to secure repayment of this loan. Due to payment delay the lender terminated the loan agreement and it wanted to validate the mortgage debt, but not at the price agreed in the contract, but at a much lower amount provided by an independent expert appointed unilaterally by the lender. Furthermore, the lender wanted to take possession of the house within five days. Both the right to appoint an independent expert to reconsider the value of the house and the five-day deadline to take possession were provided for by various articles of the loan agreement. The applicants challenged these articles as well as several others on various grounds, including their questionable fairness.

Held: The Regional Court of Appeal partially accepted the claims of the applicants. Referring to Directive 93/13/EEC, it took the ground that it might have the option of setting aside certain national rules in order to guarantee the coherence between EU law and national law. On the basis of a provision of the Hungarian Civil Code and Article 3(1) of the Directive, it declared that the disputed provisions of the loan agreement caused a significant imbalance between the parties, which it therefore held to be clearly unfair. In sum, the Regional Court of Appeal set aside these provisions (the other parts of the loan agreement were declared binding).

Judgment: "When analysing the agreements in this case one must start from the fact that these agreements are to be classified as consumer contracts containing provisions not negotiated individually. On the basis of the declaration of the first respondent Article 7 of the agreement, which provides that an option to purchase the house constitutes a security for the loan, can be regarded as a general term. Consequently, Directive 93/13/EEC on unfair terms in consumer contracts (hereafter: Directive) must be taken into account in deciding this dispute. (…)

The main aim of this Directive, so its preamble shows, is to create a regulatory framework that provides uniform protection against unfair terms and unambiguously defines consumer rights in the field of consumer protection, which has great relevance in the Member States of the European Union. The Member States may only adopt or retain provisions that are stricter than those of the Directive to ensure a maximum degree of protection for consumers (Article 8).

The national courts have an obligation arising from the substance of the Directive and the case law of European Court of Justice to examine the conformity of national law with European Union law in cases requiring the application of European Law. If necessary, national courts must ensure conformity by either harmoniously interpreting or setting aside the relevant national provisions. The fact that the national legislator has declared its intention to harmonize national law and European Union law does not exempt the courts from this obligation. On the contrary, the examination of conformity is based on this intention. Thus, because of the primacy of European Union law (see *Costa-Enel* C-6/64) provisions of national law are to be applied in conformity with both the Directive and those decisions of the European Court of Justice that interpret the Directive even following its successful implementation. (…)

The Regional Court of Appeal finds that Article 7 of the contract offers the respondent a unilateral option to change the purchase price and this will be declared unfair pursuant to both Article 209(1) of the Civil Code and Article 3(1) of the Directive. This article of the contract is unfair since it is unfoundedly and unilaterally detrimental to the obligor in that it goes against the requirements of *bona fide* and fairness; furthermore, it also makes the relationship of the parties unbalanced. In examining the unfairness of this article the Regional Court of Appeal also refers to the operative part of the judgment of the European Court of Justice in C-415/11 *Aziz* which states that significant imbalance to the detriment of the consumer – as mentioned in Article

3(1) of the Directive – exists if a contract term puts the consumer into a situation which is a less favourable legal situation than that provided for by the national law. It must be examined whether the imbalance was caused by disregard of the requirement of *bona fide* during the contract-making process. The main question is whether the party making the contract with a consumer in a fair and equitable process could also have expected acceptance of the term in question if it had been negotiated individually. The Court concludes that the article at issue created significant imbalance in the relationship of the parties since it makes it possible for the obligee to unilaterally influence the purchase price in its favour; changing the purchase price, however, should only be possible by mutual agreement of the parties; and it can also be held that reasonably speaking a consumer will not accept such a contract term if negotiated individually. Therefore, Article 7 of the contract is unfair and does not bind the first applicant.

The Regional Court of Appeal also finds that Article 5.3. and 5.4. of the loan contract are invalid."

Notes:

(1) The decision of the Hungarian court of appeal is not focused on the possibility for the courts to apply *ex officio* a legal ground not invoked by the parties, but it is nevertheless relevant to this issue since the court interpreted national law in the light of Art. 3(1) Directive 93/13/EC on unfair terms in consumer contracts and in the light of related case law (*Aziz*)[93] in order to reach the conclusion that the term at issue was unfair (harmonious interpretation). The Hungarian courts may be expected to follow the CJ case law on the obligation of *ex officio* application as well.

(2) This judgment may shed light on an important general development in Hungarian civil justice. Although the case could be properly solved on the basis of national law, the court felt it necessary when it decided the case on the merits to turn to EU law of its own motion, namely to Directive 93/13/EEC. This argumentation strategy is intended to strengthen the authority of the decision and also indicates that over the past decade judges have become increasingly familiar with EU law in general.[94]

7.9 (PL)

Sąd Najwyższy (Polish Supreme Court), 19 April 2007[95]

Centrum Leasingu i Finansow SA in C. v Aleksandra P.

PROOF OF UNFAIRNESS

Expensive car

The court must f its own motion assess the value of the car and, therefore, the unfairness of the contractual clause providing for transfer of title to the car.

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[93] CJ, 14 March 2013, C-415/11, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa).*

[94] For a detailed analysis and discussion of the Hungarian courts' application of EU law provisions see: András Osztovits (ed.), A magyar bírósági gyakorlat az előzetes döntéshozatali eljárások kezdeményezésének tükrében 2004-2014. Budapest, HVG-ORAC, 2014.

[95] Orzecznictwo Sądu Najwyższego Izba Cywilna (OSNC) Zbiór Dodatkowy 2008, No. A, item 25.

Facts: On April 2001 the parties negotiated a sales contract for the sale of an Alfa Romeo car and a related consumer credit contract. As a security for the loan, the parties also concluded a contract providing for the transfer of title from the defendant – *Aleksandra P* – to the plaintiff – *Centrum Leasingu i Finansów S.A. w C*. On December 2001 the plaintiff terminated the consumer credit contract and claimed restitution of the car. The car was returned in 2002 and in 2003 the plaintiff sold it for 27 000 PLN. The plaintiff claimed payment of the difference between the amount of the loan and the (lower) proceeds of the sale of the car. The Regional Court dismissed the claim, while the Appellate Court awarded the amount claimed, holding that the burden of proof as to the value of the car was on the defendant (the defendant had submitted an expert's opinion, which showed that at the time of its restitution the car was worth 52 000 PLN; however, she did not file a motion for admission to provide evidence by expert witness testimony and a mere expert's opinion did not constitute evidence in the case).

Held: The Supreme Court set aside the ruling and ordered the court deciding on the merits to take evidence as to the value of the car and to assess whether the terms of the contract providing for the transfer of title as security for the creditor were unfair.

Judgment: "If therefore the case falls under the rules of the Civil Code relating to standardised consumer contracts, the court of first instance and the court of second instance must of their own motion apply these rules to a dispute between the entrepreneur and the consumer (…). – for instance rules concerning interpretation of ambiguous terms of standard contracts and constituting a basis for the incidental ex officio examination of terms of standard contracts from the perspective of unfairness. An opinion expressed in academic legal literature that the courts lack this power (…) is misconceived. The legal position presented above, according to which courts apply substantive law of their own motion, including rules of the Civil Code concerning standard contracts used in legal relationships involving consumers, is in harmony with the view expressed in the Judgment of the European Court of Justice of 27 June 2000 in joined cases *Océano Grupo Editorial SA v. Rocio Murciano Quintero*, C-240/98 and *Salvat Editore SA v. Jose M. Sanchez Alcon Prades et al*, C-241-244/98 ([2000] ECR I-4941). In this judgment, the European Court of Justice accepted the power of a court seized of a case to ex officio declare a contract term unfair (see also Resolution of a panel of seven judges of the Supreme Court of 31 March 2004, III CZP 110/03, OSNC 2004, No. 9, item 133, and Resolution of the Supreme Court of 13 July 2006, III SZP 3/06, OSNP 2007, No. 1-2, item 35).

(…)

The court may also, however, of its own motion admit as evidence facts covered by the allegations of the defendant. This follows from article 232 2nd sentence of the Code of Civil Procedure (hereinafter: C.C.P.). With the exception of evidence falling under an explicit statutory prohibition (e.g. prohibitions following from Articles 247 and 259 C.C.P.), the aforementioned possibility covers all evidence, including evidence by expert witness testimony; it is not restricted either by provisions establishing a so-called time-barring of evidence (see particularly article 495 §3 C.C.P.). In exceptional, special cases where this is justified by the circumstances, the courts may even be obliged to apply the second sentence of article 232 C.C.P., in which case failure of the court of second instance to comply with this obligation may constitute a basis for an appeal in cassation [the Supreme Court referred to its previous case law – author].

That is what happened in this case. One must agree with the allegation made in the appeal in cassation that the Court of Appeals had violated article 232 2nd sentence in conjunction with article 278 § 1 of the C. C. P. by failing of its own motion to allow evidence by expert witness testimony of the value of the car at the moment of its surrender to the claimant, taking into consideration its condition, market prices of comparable cars and selling possibilities at that time. In a case like this where the defendant, relying on a privately obtained expert opinion, disputed the amount of the claim against her and argued that the value of the car had been arbitrarily fixed at a much lower sum than the market price and where the Court of Appeals had doubts about this claim even though the claimant had not submitted evidence to the contrary, the obligation of the court of its own motion to allow evidence by expert

witness testimony on the matter did not only arise from the status of the defendant (a consumer), but also from the fact that the disputed sale of the car was made in connection with its transfer for security purposes (…). The satisfaction of a creditor by way of enforcement proceedings protects not only the interests of other creditors but also the interest of the owner of the good serving as collateral – in particular the owner's interest in obtaining a high price. A creditor's means to obtain satisfaction provided for in a contract of title transfer for security purposes do not include comparable guarantees of the aforementioned interests, including the interest of the transferor. (…) because of the aforementioned doubts the courts should in particular closely examine the provisions in a contract of title transfer for security purposes that relate to the creditor's means of obtaining satisfaction and their enforcement. In fact, such examination serves as a minimum requirement for obtaining leave to enforce transfer of title for security purposes in a legal system. Especially when the transferor contests the appropriateness of the creditor's obtaining satisfaction by selling the good transferred, the court should of its own motion allow evidence byexpert witness testimony of this fact, even though the burden of proof rests on the transferor – as in the present case - , if the evidence presented so far is insufficient for the court to make a firm decision on the matter and if the failure of the transferor to submit a motion for such evidence may be considered excusable under the circumstances of the case. In this case the absence of such a motion in the appellate proceedings may be considered excusable since the first instance judgment was in the defendant's favour and she could assume that her first instance allegations based on a privately obtained expert opinion would also be sufficient in the appellate proceedings".

Note:

(1) In the above case the Polish Supreme Court interpreted national law in conformity with CJ case law (*Océano*) in order to reinforce the argument that the court is allowed to apply legislation on unfair terms of its own motion. Furthermore, it ordered the lower court deciding on the merits to take evidence – by hearing an expert witness – as to the value of the car, to enable it to assess whether the price obtained for the car was too low compared to its value and the creditor might therefore have abused his right. This latter decision is based on national law, as (pursuant to Article 232, second sentence, of the Polish Code on Civil Procedure) the court is allowed to take evidence of its own motion.

7.10 (IT)

Trib. Genova (First Instance Court), 14 February 2013[96]

S.R. v. P. S.P.A.

UNFAIR TERMS

Luxury furniture

The court must of its own motion assess the unfairness of terms in consumer contracts.

[96] *Nuova giur. civ. comm*., 2013, I, 1059. See also *Cassazione*, sez. II, 21 March 2014, n. 6748, *Nuova giur. civ. comm*., 2014, I, p. 727 ss., also referring to the CJ case law relating to the *ex officio* assessment of unfairness.

Facts: Following an opposition lodged by the consumer in an order for payment procedure, the fairness of several contract clauses in a consumer credit contract for the sale of furniture was at issue.

Held: The court is obliged to assess on the basis of the CJ case law relating to Directive 93/13/EEC whether the contractual terms are unfair.

Judgment: "When assessing the unfairness of the terms at issue, one must first of all bear in mind that the system of consumer protection was introduced by European Directive 93/13 and that it 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 and this leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms (ECJ judgments 27 June 2000, Oc. and Sa., from C - 240/98 to C - 244/98, Rep. P. I - 4941, point 25; 26 October 2006, Mo., C - 168/05, Rep. P. I - 10421, point 25, and 6 October 2009, As., 040/08, Rep. pag. I - 9579, point 29).

Because of this position of weakness, Article 6(1) of the directive provides that unfair terms shall not be binding on consumers.

It follows from ECJ case law that Art. 6 is a mandatory provision aiming to replace the formal balance between rights and obligations reciprocally arising from the contract by a substantive balance, in order to re-establish equality between the parties (judgments M., quoted, para. 36; A., quoted, para. 30; 9 November 2010, Vb., C-137/08, not yet published in the Rep., point 47, and 15 March 2012, P. e P., C-453/10, para. 28).

The ECJ has underlined on several occasions that in order to ensure the effectiveness of the protection afforded by Directive 93/13, the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract (see O. e S., para. 27; M.C., para. 26; As., para. 31, and V., para. 48, already quoted).

On the basis of these principles the Court has ruled that the national courts are required to assess of their own motion the contractual terms falling within the scope of Directive 93/13, thus compensating for the imbalance existing between the consumer and the seller or supplier (see to this effect, judgments M., quoted, para. 38; 4 June 2009, P., C - 243/08, A., quoted, para. 32, and V., quoted, para. 49). Consequently, the role thus attributed by Community law to the national courts in this area is not limited to the mere power to rule on the possible unfairness of contractual terms, but also comprises the obligation to examine this issue of their own motion where it has available to it the legal and factual elements necessary for that task (v. *Pannon*, quoted, para. 32)."

Notes:

(1) In the above decision the national court declared the nullity of several terms in a consumer credit contract. It should be noted that the court refers extensively to CJ case law to find that there is an obligation for the national court to assess of its own motion the unfairness of contractual clauses in consumer contracts even if the question of unfairness was explicitly raised by the consumer on the basis of national rules. Furthermore, it can be observed that pursuant to the Italian legislation implementing Directive 93/13/EEC the sanction on unfairness provided by the national law is labelled in terms of "*nullità di protezione*" (protective nullity; Art. 36(3) *Codice del Consumo*) and is a peculiarity of the Italian rules on unfair terms as compared to the rules applying in other EU Member States: the contract is void and it is specified that the courts may *ex officio* apply the nullity, subject to the condition, however, that this application is not detrimental for the consumer. Since 1996 Italy has therefore, unlike most Member States, introduced a pattern of rules into its national legislation

implementing Directive 93/13/EEC that is similar to that which has subsequently been developed by the CJ.[97]

(2) References to the case law of the CJ in general and especially to *Pannon* are made in a complex breakthrough decision of the *Cassazione, Sezioni Unite*, dealing with the question of the *ex officio* application of the nullity of a claim based on other grounds (in particular on annulment, termination or other grounds for nullity), and with the related issue of *res judicata*. In its rulings on the issues submitted to it the Italian Supreme Court laid down a general framework encompassing all the types of nullity for which the legal system provided, including "nullità di protezione" under the rules on unfair terms in consumer contracts as well as the other types of nullity introduced into the legal system in recent times ("nullità speciali"), which constitute derogations from the notion of nullity as originally conceived. As the rules on these types of nullity were not always clear or complete, the problem of determining which rules apply had arisen, including the option or the obligation of the court to intervene of its own motion when the nullity is "protective" and relative. In particluar the *Corte di cassazione* made clear that all the types of nullity, including protective nullity, are aimed at protecting a general interest and may or must therefore be applied *ex officio*. The references to case law of the CJ serves to reinforce and enlarge the power and the duty of the national court to intervene of its own motion. The judgment in *Pannon* serves to demonstrate that there is no incompatibility between the *ex officio* application of nullity pursuant to the rules on unfair terms in consumer contracts (unless the consumer opposes the non-application of the unfair terms) and the fact that the nullity has a protective function. According to the *Corte di cassazione* the same line of reasoning must be extended to the other cases of protective and relative nullity provided by the legal system even in the absence of a specific provision regarding the power of the courts to intervene of their own motion.[98]

(3) The power of the court to raise grounds based on EU law *ex officio* is generally recognised and several decisions – even though concerning vertical relationships – refer to the relevant CJ judgments, particularly in relation to cassation proceedings (*van Schijndel*, *Peterbroek*).[99]

7.12 (NL)

[97] It is a matter of debate whether the same rules can be applied in other cases in which legislation provides for the sanction of nullity for the infringement of rights of consumers or weak parties without further specifying the characteristics of the nullity.

[98]Cass., Sez. Un., 12 December 2014, n. 26242. For a critical opinion see also R. Alessi, "Nullità di protezione" *e poteri del giudice tra Corte di giustizia e sezioni unite della Corte di cassazione*, *Europa e diritto privato*, 2014, 1141 ff.

[99]Cass., Sez. V, 09-06-2000, n. 7909, Ministero delle Finanze c. L. Piemonte; Cass., sez. trib., 10 December 2002, n. 17564; Cass., sez. III, 5 December 2003, n. 18642; Cass.civ., sez. trib., 16 July 2004, n. 13225; Cass., sez. II, 15 March 2010, n. 6231. There are also judgments of the administrative jurisdiction referring to *van Schijndel*: see for example Cons. Stato, sez. V., 5 December 2002, n. 6657.

Hoge Raad der Nederlanden (Supreme Court of The Netherlands), 3 December 2004[100]

Vreugdenhil v BVH

ANTI-COMPETITIVE AGREEMENTS

Spanish flowers

The nullity of a legal act that is contrary to EU competition law must be applied by the court of appeal of its own motion.

Facts: *Vreugdenhil* and *BVH* have concluded an agreement for the handling of Spanish flowers (*Dianthus*) for BVH. Art. 1 of the agreement provides: "Vreugdenhil shall handles the Dianthus flowers which are delivered (...) from Spain to (BVH)". *Vreugdenhil* finds out that another company handles part of the Spanish flowers for *BVH*. It claims damages from BVH for breach of contract, alleging that the contractual provision (art. 1) entails an exclusive right to handle *all* Dianthus flowers from Spain. BVH argues that it cannot oblige its suppliers to have their Dianthus flowers handled by *Vreugdenhil*; the contractual obligation vis-à-vis *Vreugdenhil* only applies to cases in which the suppliers instruct BVH to handle the flowers.

Held: Assuming that *Vreugdenhil*'s interpretation of (Art. 1 of) the contract is correct, the Court of Appeal *ex officio* declares the contract (partially void). The Supreme Court confirms the judgment of the Court of Appeal.

Judgment: "The appeal court took the ground – rightly not challenged in cassation – that, insofar as necessary, it must *ex officio* establish the nullity of the contractual clause if the allegations made by the parties do not imply reliance on such nullity."

Notes:

(1) The issue of the *ex officio* application and *status* of competition law rules has been controversial in Dutch law in particular, as is also demonstrated by two seminal CJ judgments regarding those fields, *Van Schijndel* and *Eco Swiss*[101], which originated from a reference made by a Dutch court.[102] The problem arose on the one hand from the fact that under Dutch internal law the courts may *ex officio* apply public policy rules even beyond the ambit of the contentions of the parties, while the *ex officio* application of mandatory rules not relating to public policy (even if the rule entails absolute nullity) is not allowed. On the other hand, the qualification of both national and EU competition rules as public policy rules, and hence the power (or duty) of the courts to apply such rules of their own motion, is subject to debate. The

[100] ECLI:NL:HR:2004:AR0285, NJ 2005, 118.

[101] CJ, 1 June 1997, Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV*, concerning the *ex officio* application of a national rule requiring the court to annul an arbitral award violating EU competition law (referred to in Chapter II.A.2). A similar problem was dealt with by the CJ in the two Spanish cases *Mostaza Claro* and *Asturcom* concerning the power of the national court to annul an arbitral award and to deny enforcement of a final arbitral award, respectively, on the ground that the arbitration clause was unfair. See above, II.C.1.6,7@@@.

[102] Nevertheless and interestingly, neither the Court nor AG Jacobs paid much attention to the issue of the classification of the Dutch competition rules as rules of public policy in the procedure before the Court of Justice. See S. Prechal and N. Shelkopylas, *National Procedures, Public Policy and EC Law. From* van Schijndel *to* Eco Swiss *and Beyond*, *Eur. Rev. Priv. Law*., 2010, 596.

above decision preceded the CJ's decision in *Manfredi* and found that nullity of Article 101 TFEU must be applied *ex officio*[103].

(2) According to an academic opinion[104] along the lines of the above decision, the courts should also have power to declare a legal act null and void of their own motion if the violated rule is a mandatory rule entailing absolute nullity even if it does not concern public order. This is not, however, the prevailing view and the contrary opinion is supported by a decision of the Supreme Court restricting the obligation of the court to intervene of its own motion with regard to rules of public policy by declaring that Art. 6 Mw (the national provision equivalent to Art. 101 TFEU) is not a provision of public policy and, as a consequence, may not be applied *ex officio*.[105]

(3) Interestingly, in a (vertical) case outside the field of competition law the Dutch Supreme Court did not apply the traditional national criterion based on the rule at issue being classified in terms of public policy, but endorsed the CJ line of reasoning by directly referring to the ranking of the interest protected by the EU rule. Reviewing compatibility with EU law of a national measure connected with EC Decision 2000/766 (concerning certain protection measures with regard to transmissible spongiform encephalopathies and the feeding of animal protein), in particular the measure's date of entry into force prior to the EC Decision, it ruled that the European Union interest at stake was not of such fundamental importance as to require the court of appeal to apply EU law of its own motion.[106]

III.B.3. MISCELLANEOUS

THE LAST CASE IS FROM THE UK AND IT PRESENTS A DIFFERENT ATTITUDE TO EU LAW. HERE, THE JUDGES OF THE SUPREME COURT WERE RELUCTANT TO REFER A QUESTION REGARDING THE NATIONAL LEGISLATION IMPLEMENTING DIRECTIVE 93/13/EEC TO THE CJ FOR A PRELIMINARY RULING.

7.13 (UK)

UK Supreme Court, The Office of Fair Trading v Abbey National plc & Others, 25 November 2009[107]

ACTE CLAIRE

Core terms

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[103] For a description of the Dutch procedural framework see J. Chorus, *Le relevé d'office de moyens de droit et de fait: l'application de règles du droit européen par le juge nationale: étude de droit compare et d'histoire de droit*, in *Scienza giuridica e interpretazione e sviluppo del diritto europeo*, a cura di Vacca, Napoli, 2013, 139-145.

[104] A. Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*. Kluwer, Deventer, 2012, no. 128.

[105] HR, 16 January 2009, ECLI:NL:HR:2009:BG3582, NJ 2009/54 (De gemeente Heerlen / Whizz Croissanterie). See A. Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*. Kluwer, Deventer, 2012, no. 127-128.

[106] HR 11 September 2009, ECLI:NL:HR:2009:BI7145, NJ 2010/369 (Cagemax Holland B.V. v State of The Netherlands).

[107] [2009] UKSC 6. See Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*, Deventer, 2012, n. 128.

There is no need to refer the question of the definition of "core terms" to the CJ for a preliminary ruling, as the matter is acte claire.

Facts: The appellants are seven of the largest banks in the United Kingdom and one building society. The issue is whether the contractual term providing for the fees charged to the banks' customers for unauthorized overdrafts may be considered unfair or whether it has to be excluded from assessment of fairness on the basis of R. 6(2) of the Unfair Terms in Consumer Contracts Regulations, implementing Directive 93/13/EEC, insofar as this term is a "core term".

Held: Both the High Court and the Court of Appeal unanimously held that the term was not a core term and that it could therefore be assessed for fairness. The UK Supreme Court reversed the Court of Appeal's decision, holding that the term at issue could not be assessed for fairness by the OFT or the courts since overdraft fees relate to a bank's remuneration and therefore fall under R. 6(2) UTCCR. The Supreme Court unanimously denied any reference for a preliminary ruling to the CJ.

Judgment: Lord Walker: 49. If (as I understand to be the case) the Court is unanimous that the appeal should be allowed, then in my opinion we should treat the point as *acte clair*, and decide against making a reference. It may seem paradoxical for a court of last resort to conclude that a point is clear when it is differing from the carefully-considered judgments of the very experienced judges who have ruled on it in lower courts. But sometimes a court of last resort does conclude, without any disrespect, that the lower courts were clearly wrong, and in my respectful opinion this is such a case.

50. Even if some or all of the Court feel that the point is not *acte clair*, I would still propose that we ought not to incur the delay involved in a reference under Article 234, since a decision on the correct construction of Article 4(2) of the Directive is not essential for the determination of this appeal. The correct construction of Article 4(2) is a question of Community law, but the application of the Article, properly construed, to the facts is a question for national law. Even if the Court of Appeal was not clearly wrong on the issue of construction, it was in my respectful opinion clearly wrong in applying its construction to the facts. In other circumstances it might be regarded as rather unprincipled to take that means of avoiding an important issue of Community law, but in the special circumstances of this case I would regard it as the lesser of two evils. There is a strong public interest in resolving the matter without further delay.

(...)

Lord Phillips: 91. I have not found this an easy case and I do not find the resolution of the narrow issue before the court to be *acte clair*. I agree, however, that it would not be appropriate to refer the issue to the European Court under Article 234. I do not believe any challenge to the fairness of the Relevant Terms has been made on the basis that they cause the overall package of remuneration paid by those in debit to be excessive having regard to the package of services received in exchange. In these circumstances the basis on which I have answered the narrow issue would seem to render that issue academic. It may be that, if and when the OFT challenges the fairness of the Relevant Terms, issues will be raised that ought to be referred to Luxembourg. That stage has not yet been reached.

(…)

Lord Mance: 116. However, if one takes a different view on whether the position is *acte clair*, there remains the question of relevance. Eliminating the Court of Appeal's clear error in introducing as part of the test whether the relevant term had been "directly negotiated", and assuming that the Court of Appeal was generally right in adopting as a test whether the term was "not . . . ancillary to the main bargain", the question would be whether the Court was right to treat the terms of the package contracts relating to the Relevant Charges as ancillary terms, rather than as part of the agreed price or remuneration in exchange for which the banks undertook to

provide their whole package of services. That question would involve the application of the Directive and Regulations, which is, as I have said, a matter for domestic, not European, law. ….

117. …… In these circumstances, it would be unnecessary to make a reference, even if the view were to be taken that the meaning of price and remuneration in Article 4(2) of the Directive is not *acte clair*."

Notes:

(1) This decision has great importance for the banking sector, since the clause under consideration is commonly used in contractual practice and since the decision was given in an action brought by the *Office of Fair Trading* under R. 6(2) UTCCR, on the basis of art. 7(2) of Directive 93/13/EEC, and therefore concerned all contracts concluded by the bank. The issue of classifying a specific contractual clause as a core term under Art. 4 of Directive 93/13/EEC is particularly crucial in the case of bank, credit, insurance and investment contracts, which may contain clauses that are difficult to define as "core" or "ancillary" due to the complexity of the transaction as a whole.[108] Nevertheless and although the first instance court and the appeal court took an opposite stand, all the judges of the Supreme Court agreed that reference was not required, a position they based on various and overlapping considerations: the matter is *acte claire*; reference would cause delay; lack of relevance.

(2) Without discussing the merits of the matter, this reluctance of the Supreme Court to refer the case to the CJ[109] can be set against the more proactive approach shown by other national courts, such as, in particular, the Spanish courts, which do not seem to hesitate to seek guidance from the CJ when they are in doubt as to the interpretation of EU law nor to follow the CJ rulings. The possibility of referring the question regarding the unfair terms regulations to the CJ was also considered, though less extensively, in *Director General of Fair Trading v. First National Bank*,[110] in which Lord Bingham excluded the need for a preliminary ruling as the language was, in his opinion, "clear and not reasonably capable of differing interpretations" (para. 17). The UK Court of Appeal referred to the CJ some questions relating to the interpretation of the *Unfair Commercial Practices Directive* (EC Directive 2005/29) in the *Purely Creative* case.[111]

IV. CONCLUSION AND COMPARATIVE REMARKS

1. In *Van Schijndel* the CJ accepted that the courts may in principle raise points of EU law of their own motion.

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[108] The CJ rendered a significant decision on the interpretation of Art. 4 of Directive 93/13 in *Kásler* (concerning both the definition of "core terms" and the notion of transparency), while also dealing with the *ex officio* issue. See above II.C.1.11@@@.

[109] The same reluctance can be inferred from the UK Supreme Court decision in *Stott v Thomas Cook* [2014] UKSC 15. See J. Prassl, *Montreal Convention Exclusivity and EU passenger rights:* "exposing grave injustice", (2014) 130 L.Q.R., 538 ff.

[110] [2001] UKHL 52 (25th October, 2001).

[111] CJ, 18 October 2012, C-428/11, *Purely Creative Ltd et al. v Office of Fair Trading*.

2. Subsequent case law dealing with the *ex officio* application of grounds based on EU law has been focused mainly on the field of consumer contracts. In this context the procedural autonomy of Member States – however it may be interpreted[112] – has been remarkably limited, as the CJ tends to tilt the balance towards effectiveness. This finds expression in the leading cases of *Océano* and *Mostaza Claro* and in a series of subsequent cases. The principle of equivalence plays a role as well. This principle is applied when the national procedural rules that limit the possibilities for the courts to intervene of their own motion are not applied in ordinary first instance proceedings but in other procedures and when the national law offers a general point of reference for *ex officio* application in those procedures; e.g. procedures for the enforcement of a final arbitration award (*Asturcom*, *Pohotovost'*) or appeal proceedings (*Asbeek Brusse*, *Faber*). In these cases the CJ seems to take a more deferential approach to the national procedural systems.

3. The trend observed in the context of consumer contracts can be described as incremental. The rules introduced by the CJ with respect to specific cases tend to be extended to other cases. In particular, where Directive 93/13/EEC is concerned, the rules introduced with respect to jurisdiction clauses have been applied to all contractual clauses falling under the Directive. The line of reasoning developed in relation to Directive 93/13/EEC has also been applied in relation to Directive 87/102/EEC, Directive 85/577/EEC and Directive 99/44/EC. There seems to be room for further extension, particularly regarding the obligation for the national courts to examine of their own motion, since the CJ has provided only limited guidance on this point.

4. Furthermore, there has been an increase in the number of rules that are recognized by the CJ as rules of public policy or as equivalent to rules which the national legal systems qualify as public policy rules: Articles 101 and 102 TFEU, Article 6 Directive 93/13/EC, Article 11(2) Directive 87/102/EEC, Article 4 Directive 85/577/EEC, Article 5(3) Directive 99/44/EC.[113] This has resulted in broader opportunities for EU law to influence the traditional course of national civil procedures.

5. Six grounds can be identified in the discussion on the *ex officio* application of EU law provisions by the national courts. There is no conceptual connection between these six grounds, but occasional overlaps may occur depending on the specific context. These grounds are the following:

"(1) The first ground is any express provision of law requiring the courts to automatically apply a rule of EU law. (…)

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[112] S. Prechal, *Community Law in National Courts: the Lessons from van Schijndel*, *Common Market LR*, 1998, 682, including further references to the debate.

[113] For the debate on the classification of national and EU law as public policy rules and its implications see in particular M. Ebers, *Mandatory Consumer Law*, *Ex Officio Application of European Law and Res Judicata: From* Océano *to* Asturcom, *Eur. Rev. Priv. Law*., 2010, 823 ff.; H. Schebesta, *Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom, Eur. Rev. Priv. Law*., 2010, 847 ff.; S. Prechal and N. Shelkopylas, *National Procedures, Public Policy and EC Law. From* van Schijndel *to* Eco Swiss *and Beyond*, *Eur. Rev. Priv. Law*., 2010, 589 ff.; T. Corthaut, *EU* ordre public, Alphen aan den Rijn, 2012, 200 ff.

(2) The second ground is an interpretation given by the Court of Justice to a rule of (written or unwritten) EU law to the effect that the rule must be automatically applied. (…)

(3) The third ground is a provision or judicial interpretation from which it can be deduced that a rule of EU law is a rule of public policy. (…)

(4) and (5) The fourth and the fifth grounds are the well-known principles of (4) effectiveness and (5) equivalence. (…)

(6) The principle of equivalence is further tightened by what is known as the 'may as must' rule: if the national courts may apply a rule of national law of their own motion, they must of their own motion apply the corresponding rule of EU law. (…)".[114]

It may be concluded that EU law provisions have certainly pierced the veil of national civil procedures at many points, so that primary and secondary EU law currently has a much wider scope for influencing private relationships in Member States than was the case in the first decades of European integration.

6. Since the most significant examples of *ex officio* application of EU law are found in the fields of competition law and consumer contracts, it is difficult to present a general assessment. However, some considerations and conclusions can be formulated. In some legal systems, such as that of The Netherlands, the power of the courts to raise points of law of their own motion is subject to stricter requirements and made dependent on the characterisation of the rule at issue as rule of the highest ranking, i.e. a rule of public policy. In other legal systems on the contrary, such as Italy and Spain, this characterisation does not play a role in the *ex officio* application of points of law. This distinction has been blurred in the field of consumer contracts, due to the impact of the case law of CJ. As a result, the Dutch national courts have recognized the existence of an obligation to raise *ex officio* the unfairness of a contractual terms in consumer contracts.

7.In France, the case law of the CJ likewise forced the Supreme Court to change its previous approach and it also led to subsequent legislative reform, to the effect that the distinction between *ordre public de protection* and *ordre public de direction* ceased to hamper the *ex officio* assessment of unfairness in consumer cases. In Spain, too, the case law of the CJ has been invoked by national courts as a legal foundation for their *ex officio* assessment, likewise leading to legislative reforms in specific sectors of consumer law. In Italy the influence of EU law has gone beyond the fields covered by the EU directives, leading to significant changes in the traditional concept of nullity in general. Some other national courts – such as the Dutch and the Polish Supreme Courts – have recognized the obligation of *ex officio* examining factual elements of a case for the purpose of assessing the unfairness of consumer contract clauses in general, whereas so far the CJ has only had occasion to issue rulings on a court's

[114] Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*, Deventer, 2012, no. 130; Hartkamp, Ex Officio *Application in Case of Unenforceable Contracts or Contract Clauses. EU and National Laws Confronted,* in *Essays in Honour of Hugh Beale*, Gullifer and Vogenauer eds., Oxford, 2014, 483-484.

power to examine whether a contract falls within the scope of application of a Directive (*Pénzügyi* and *Faber*). This is a significant development, since in the matter of distributing proof between the parties and the court the national legal systems generally apply the principle that it is for the parties to furnish facts while the duty of a court to investigate elements of fact of its own motion is conceived as an exception to the rule.

8. There is one more development that can be mentioned. National courts refer to the case law of the CJ by way of illustration of their reasoning. Even though a case can be decided solely on the basis of national law, some courts include references to relevant primary and secondary EU law provisions and to CJ case law.