THE 'EX OFFICIO' DOCTRINE OF THE CJEU REVISITED: ON THE ACTIVE ROLE OF THE COURTS IN UNFAIR CONTRACT TERMS LAW – CRITICAL REMARKS ON THE *LINTNER* RULING (C-551/17) OF THE CJEU

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Abstract: The article searches for answers to whether the ex officio doctrine as revised in the Lintner ruling[1] of the CJEU in 2019 in response to the difficulties of Member State courts in marrying the requirements of the effective enforcement of Directive 93/13/EEC with the limits set by national civil procedural law may serve as an effective tool in providing justice to consumers. In this context, the paper will analyse the following aspects: a) What policies guide the CJEU in its answers provided to the questions referred to it by Member State courts on the obligation to act of their own motion and why no significant steps have been made in turning the ex officio doctrine into an effective judicial tool? b) Whose job is it to develop procedural rules acknowledging the procedural weakness of the consumer vis-à-vis business entities? c) What type of social justice promotes the ex officio doctrine under the Lintner ruling? d) Can the EU develop procedural rules to enhance the enforcement of Directive 93/13/EEC?

After the presentation in Section 1 of the ex officio doctrine followed by a historical review of the case law of the CJEU on the obligation of the Member State courts to assess the contract term fairness of their own motion, the paper will present in Section 2 the Lintner ruling. In Section 3 the author will assess the Lintner ruling along with the questions presented above and discuss whether the answers provided by the CJEU are as ground breaking as they may seem and whether the 'investigative' powers conferred by this ruling onto Member State judges may enhance in practice the effectiveness of judicial enforcement.

Keywords: EU consumer law, unfair terms law, acting of own motion, ex officio, Member State procedural autonomy, social justice, regulatory gap, C-551/17 Lintner.

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[1] Case C-511/17 *Györgyné Lintner v UniCredit Bank Hungary Zrt* ECLI:EU:C:2019:1141.

1 Introduction

The term *'ex officio'* is used synonymously with the term 'acting of own motion' in unfair contract terms law by the CJEU and the legal literature to describe the obligation of the Member State court to proceed with the unfairness control of standard contract terms in consumer contracts in the case before it, even when the consumer has not asked for such control.

To understand the evolution of the *ex officio* rule in the field of unfair contract terms law and the potential impact of the *Lintner* ruling of the CJEU on more effective enforcement of unfair contract terms law, we need first to understand the function and the limits of the *ex officio* duty of the courts within the continental judicial culture and then the type of consumer policy promoted by the CJEU in the field of unfair contract terms that frame together the right and obligation of the Member State court to proceed of its own motion in enforcing Directive 93/13/EEC. The choice of the CJEU to balance the degree of intervention and passivity of the national judge in guarding the rights of consumers under Directive 93/13/EEC is defined by major theoretical issues of civil procedural law that cannot be ignored.

In civil proceedings, party autonomy and judge passivity define the principle called party disposition.[1] With the application of rules that have not been invoked by the parties, the judge acts outside the ambit of the proceeding and this may generate conflicts between substantive EU law and national civil procedural law, resulting in a high volume of preliminary questions referred to the CJEU in search of guidance on how to handle such situations.

Furthermore, concerning the role of the court in the *ex officio* procedure, it is of central importance whether the court introduces new elements of law or new elements of facts. Although in the majority of the EU Member States the introduction of new elements of law is accepted under the principle of *jura novit curia*,[2] the parties still have control over the facts. However, in practice, it is difficult to treat separately the facts and the law. The main difficulty in preserving the litigants' control over the facts and the court's control over the law is that the facts advanced by the parties define the scope of applicable law.[3] National law may not preclude the court from introducing *ex officio* new elements of law stemming from EU law, but this may be problematic when the court does not have the

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1 Sacha Prechal and Natalya Shelkoplyas, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond' (2004) 5 European Review of Private Law 589, 595.

2 Anna Elisabeth Wallerman, 'Can Two Walk Together, Except They Be Agreed? Preliminary References and (the Erosion of) National Procedural Autonomy' (2019) 2 European Law Review 159.

3 Allison Östlund, *Effectiveness versus Procedural Protection. Tensions Triggered by the EU Law Mandate of ex officio Review* (Nomos 2019) 133.

factual elements of an EU-law-based claim.[4]

Various justifications may be advanced for or against the more active role of the judge in unfair contract terms law. The central argument in favour of the more active role of the judge in investigating additional facts and circumstances other than those advanced by the parties of the litigation is that the judge should act in the public interest even at the cost of the litigant's right to direct the litigation as long as this does not affect the rights of the parties to a fair hearing.[5] The principle of party disposition and the requirement of impartiality argue against the active role of the judge.[6] We also find arguments in between, acknowledging that acting in the public interest may not necessarily affect the parties' right to a fair hearing if the judge does this in a transparent way, allowing both parties to comment on new elements introduced by the court of its own motion.[7]

All these concerns also apply to the field of unfair contract terms law and this is why the Member States are reluctant to enact specific procedural rules to overcome the conflict between the requirements of Directive 93/13/EEC and national civil procedural law. However, with the lack of specific competence of the EU in the field of civil procedural law, it seems that the CJEU cannot offer more innovative solutions to Member State courts that would narrow the room for Member State procedural autonomy.

In unfair contract terms law, the *ex officio* obligation of judges to assess the unfairness of standard terms in consumer contracts goes beyond the principle of *iura novit curia*,[8] without undermining the requirement of the principle *audi alteram partem*.[9,10] As the case law reveals, the content and reach of the principle of effectiveness and effective judicial protection differ. Hence, effective judicial protection has a wider reach than the requirement of effectiveness, the rationale of the obligation of courts to act of their own motion shifting from ensuring the effectiveness of EU law to ensuring the integrity of judicial proceedings.[11]

In the name of Member State procedural autonomy, the CJEU has for too long avoided developing solutions on the content of the obligation of the courts to act of their own motion, in terms of investigative powers,

4 ibid 134.

5 ibid 113.

6 See Case C-137/08 *VB Pénzügyi Lízing Zrt v Ferenc Schneider* ECLI:EU:C:2010:401, Opinion of AG Trstenjak, para 110.

7 Östlund (n 4) 116 (the author refers to the principle of due notice in this context).

8 Case C- 618/10 *Banco Español de Crédito, SA v Joaquín Calderón Camino* ECLI:EU:C:2012:349.

9 Case C- 312/14 *Banif Plus Bank Zrt v Csaba Csipai, Viktória Csipai* ECLI:EU:C:2015:794, para 29-30.

10 Stephanie Law, ‚The Transformation of Consumers' Procedural Protection in Times of Crisis: Protection in Mortgage Enforcement Proceedings?' in Alan Uzelac and Cornelis Hendrik van Rhee (eds), *Transformation of Civil Justice. Unity and Diversity* (Springer 2018) 302.

11 Östlund (n 4) 224.

being always ready to answer questions of the referring courts by carefully staying close to what is allowed and possible under national civil procedural law. The lack of innovative judicial solutions from the CJEU has resulted in the delayed finding of solutions in the Member States, negatively impacting on the effectiveness of enforcement at the expense of consumers. The next part of the paper will present how the doctrine evolved in the jurisprudence of the CJEU on unfair contract terms law.

The CJEU developed a rule empowering Member State courts to proceed *ex officio* with the unfairness control of consumer contract terms from the provisions of Article 6(1) and Articles 7(1) of Directive 93/13/EEC, these two provisions being considered of a 'procedural nature'.[12] Later, the CJEU developed the right of the courts to act of their own motion in several steps into an obligation, justified by the policy aims of Directive 93/13/EEC. However, by qualifying in 2008[13] Article 6 as a provision of equal standing to national rules which rank as rules of public policy within the domestic legal system, the CJEU did not solve the conflicts between the implementing rules of Directive 93/13/EEC and civil procedural laws at Member State level.

In *Oceano*, the CJEU established that 'effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion'.[14] For a long time, the *Rewe* formula, the duty of sincere cooperation, was mentioned as a legal basis of the *ex officio* power of the courts.[15] The basis of this turn in the approach of the CJEU, without any concrete provision in the text of Directive 93/13/EEC, was the acknowledgement to compensate consumers against power imbalances *vis-à-vis* business entities on the grounds of public policy considerations. The cornerstone decision of the CJEU in *Mostaza Claro* opened a new era in the approach of the CJEU on the procedural autonomy of the Member State by introducing into the landscape the principles of effectiveness and equivalence.[16]

In two subsequent cases, the CJEU elaborated further the requirement of acting of its own motion, drawing at the same time its limits. In *Pannon*, the CJEU established that the national court is obliged to act of its own motion only 'where it has available to it the legal and factual

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[12] Law (n 11) 293 and 299.

[13] Case C-40/08 *Asturcom Telecomunicaciones* ECLI:EU:C:2009:615, para 52.

[14] 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)* ECLI:EU:C:2000:346, para 27.

[15] Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* ECLI:EU:C:2009:615, paras 39-48; Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL* ECLI:EU:C:2013:800, paras 30, 53; Case C-381/14 *Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc SA)* ECLI:EU:C:2016:252, paras 34-41.

[16] Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* ECLI:EU:C:2006:657, para 38.

elements (…)'.[17] However, in *Pannon*, the CJEU did not create an EU obligation for the courts to investigate. Then, in *VB Pénzügyi Lízing*, the CJEU added that the court must make an assessment of the contract terms in light of the requirements of the consumer protection objectives of the Directive[18] and established that a national court must investigate of its own motion whether a term conferring exclusive jurisdiction in a contract between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair.[19] It further clarified that courts are also under the obligation to apply the Directive when they do not have all necessary information at their disposal by taking investigative measures in order to establish facts and obtain the information necessary to verify whether the Directive applies to the case before them. This investigative power of the courts has become settled case law.[20] However, *VB Pénzügyi Lízing* left open four main questions: a) the investigative powers in the unfairness assessment, because the referring Hungarian court did not ask the CJEU to rule on this issue; b) the moment when the obligation to investigate is triggered; c) whether the court must assess only the terms related to the subject matter of the dispute or the whole contract; and d) what kind of investigative measures the courts may take?[21]

In *Aziz*,[22] the CJEU went a step further and introduced the fundamental rights dimension into the policy discourses founding the *ex officio* doctrine in unfair contract terms law. In this case, the CJEU emphasised the social considerations in enforcing Directive 93/13/EEC. In another Hungarian case, in *Banif Plus*, the CJEU reiterated the fundamental rights dimension of the *ex officio* control and established that this rule must comply with Article 47 ECHR.[23]

A new seminal step in the policy of the CJEU was the rule established in *Banco Espaniol*, stating that the national judge must put aside the requirements of national procedural law if these render consumer protection granted under Directive 93/13/EEC impossible or excessively

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[17] Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi* ECLI:EU:C: 2009:35, para 35.

[18] Case C-137/08 *VB Pénzügyi Lízing Zrt v Ferenc Schneider* ECLI:EU:C:2010:659, para 49.

[19] ibid, para 56.

[20] *Banco Español* (n 9) para 44; *Mohamed Aziz*, para 47*; Banif Plus Bank* (n 10) paras 24 and 31; Case C-483/18 *Profi Credit Polska SA v Bogumiła Włostowska and Others* and Profi Credit Polska SA v OH ECLI:EU:C:2019:930, para 66.

[21] Jarich Werbrouck and Elise Dauw, 'The National Courts' Obligation to Gather and Establish the Necessary Information for the Application of Consumer Law: The Endgame?' (2021) 3 European Law Review 325, 330-333.

[22] Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* ECLI:EU:C: 2013:164.

[23] Case C-472/11 *Banif Plus Bank Zrt v Csaba Csipai, Viktória Csipai* ECLI:EU:C:2013:88, paras 28-30.

difficult.[24]

The rule was further elaborated in *Bondora*[25] when the referring courts asked the CJEU whether the Directive allows the court to ask the creditor for additional information relating to the terms of the agreement relied on in support of the claim, in order to carry out an *ex officio* unfairness review of those terms.[26] The CJEU answered the question affirmatively by considering that the national court requiring the applicant to produce the documents on which its application is based forms part of the evidential framework of the proceedings, and thus such a request does not infringe the principle that the subject matter of an action is defined by the parties.[27]

In *Lintner*,[28] the referring Hungarian court asked the CJEU to establish the limits of the obligation to act *ex officio* both in substantive terms (by asking whether each contractual term, meaning the whole contract, needs to be assessed of its own motion) and procedural terms (by touching the very heart of the doctrine of own motion – the investigative role of the judge stemming from Directive 93/13/EEC). In this case, the question arose whether Article 6 of Directive 93/13/EEC must be interpreted as meaning that a national court, hearing an action brought by a consumer seeking a declaration of unfairness of terms included in a contract between that consumer and a professional, is required to examine of its own motion and individually all the other contractual terms which were not challenged by that consumer in order to ascertain whether they can be considered unfair.[29] After ruling that only the terms which, although not challenged by the consumer's action, are connected to the subject matter of the dispute have to be examined ex officio,[30] the CJEU elaborated on the elements which the national court should take into consideration. Accordingly, the Member State court should not confine itself exclusively to the elements of law and fact provided by the parties in order to limit its examination to those terms.[31] Besides the obligation to investigate of its own motion whether a case before it comes within the scope of the Directive, the court must take measures of investigation to assess the substantive unfairness of certain clauses.[32] For this purpose, the court is required to take *ex officio* investigative measures in order to complete the case file, by asking the parties to provide it with clarifica-

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[24] Case C- 618/10 *Banco Español de Crédito SA v Joaquín Calderón Camino* ECLI:EU:C:2012:349.

[25] Case C- 453/18 *Bondora AS v Carlos VC* and Case C-494/18 *XY* ECLI: EU:C:2019:1118.

[26] ibid, para 32(1).

[27] ibid, para 52.

[28] Case C-511/17 *Györgyné Lintner v UniCredit Bank Hungary Zrt* ECLI:EU:C:2019:1141.

[29] ibid, para 20(1).

[30] ibid, para 44.

[31] ibid.

[32] ibid.

tions or documents, without altering the principle *audi alteram partem*.[33] The court should exercise its investigative power if the elements of law and fact contained in the case file raise serious doubts as to the unfairness of certain terms which, despite not having been challenged by the consumer, are connected to the subject matter of the dispute.[34]

In a subsequent ruling, *Kancelaria Medius*,[35] the CJEU had the chance to provide more clarifications to the Member States courts and could have further elaborated on the investigative role of judges. However, the CJEU remained vague on this matter. The CJEU established in this case by referring to *Lintner* (paras 36 and 37) that in the absence of legal and factual elements the court must be entitled to adopt of its own motion the measures of inquiry needed to establish whether a term in the contract which gave rise to the dispute before it comes within the scope of that directive and whether it is unfair, even when the consumer fails to appear in court.[36] The CJEU confirmed again that the principles of *party disposition* and *ne ultra petita* would be disregarded if national courts were required to ignore or exceed the limitations of the subject matter of the dispute as established by the forms of order sought and the pleas in law of the parties. It also established that the two principles, however, do not preclude the national court from requiring the applicant to produce the content of the document(s) on which its application is based, since such a request simply forms part of the evidential framework of the proceedings.[37] Although the CJEU seems to go further in clarifying what should be understood by 'serious doubt' that would justify own motion action by courts, it ultimately has not provided concrete guidance to Member State courts on this issue.[38] Concerning the actual possibilities of the courts, the CJEU is vague, stating that courts can take the necessary measures.[39]

2 The reasoning of the CJEU in *Lintner*

On 13 December 2007, Mrs Ggörgyné Lintner concluded with the Unicredit Bank Hungary Zrt a mortgage loan agreement denominated in CHF, but granted and repayable in HUF (the Hungarian national currency). On 18 July 2012, Györgyné Lintner sued Unicredit Bank Hungary, asking the Budapest High Court to declare the loan agreements void and non-binding by challenging the fairness of two contract terms giving the bank the right to amend unilaterally the agreement. When the Budapest High Court dismissed the action, Mrs Györgyné Lintner appealed this

[33] ibid, para 37.

[34] ibid, para 38.

[35] Case C-495/19 *Kancelaria Medius SA v RN* ECLI:EU.C:2020:431.

[36] ibid, para 38.

[37] ibid, para 45.

[38] ibid, para 46.

[39] ibid, para 46.

judgement at the Budapest Regional Court of Appeal, which ordered the court of first instance to reopen the procedure and adopt a new judgment. The Budapest High Court at this point asked guidance from the CJEU on three essential aspects of its obligation to act of its own motion:[40]

> Must Article 6(1) of [Directive 93/13] — having regard also to the national legislation requiring legal representation — be interpreted as meaning that it is necessary to examine each of the clauses of a contract individually in the light of whether it may be regarded as unfair, irrespective of whether an examination of all the terms of the contract is actually necessary in order to rule on the claim made in the action?
>
> If not, is it necessary, contrary to the suggestion in Question 1, to interpret Article 6(1) of [Directive 93/13] as meaning that, in order to find that the clause on which the claim is based is unfair, all the other terms of the contract must also be examined?
>
> If the answer to Question 2 is affirmative, does this mean that it is in order to be able to establish that the clause at issue is unfair that it is necessary to examine the entire contract, that is to say, that it is not necessary to examine each part of the contract individually for unfairness, independently of the clause disputed in the action?

Concerning the first question referred by the Hungarian court, the CJEU concluded that under Article 6(1) of Directive 93/13/EEC a national court is not required to examine of its own motion and individually all the other contractual terms, which were not challenged by that consumer, but must examine only those terms which are connected to the subject matter of the dispute, as delimited by the parties, where it has the legal and factual elements necessary for that task, as supplemented, where necessary, by measures of inquiry.[41] If the court does not have available to it all those elements, it will not be in a position to carry out that examination (Case C176/17 *Profi Credit Polska*, paras 46 and 47[42]).[43]

The CJEU further clarified that 'such examination must respect the limitations of the subject matter of the dispute, understood as being the result that a party pursues by its claims, in the light of the heads of claim and pleas in law put forward to that end'.[44] In support of this approach, the CJEU recalled that although the consumer protection aimed at by Directive 93/13/EEC requires positive intervention from the national court hearing the case, it is necessary for that protection to be granted that one of the parties to the contract to have brought court proceedings (Case

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[40] *Lintner* (n 29) para 20.

[41] ibid, para 44.

[42] Case C-176/17 *Profi Credit Polska SA w Bielsku Białej v Mariusz Wawrzosek* ECLI:EU:C:2018:711.

[43] *Lintner* (n 29) paras 26-27.

[44] ibid, para 28.

C32/14 *ERSTE Bank Hungary* para 63[45]). In the CJEU's view, the protection to be granted to the consumer of its own motion cannot go so far as to ignore or exceed the limitations of the subject matter of the dispute, as defined by the parties by their claims, in the light of their pleas, the national court not being required to extend that dispute beyond the forms of order sought and the pleas in law submitted to it, by analysing individually for unfairness all the other terms of a contract.[46] The CJEU argues in this regard that the principle of *ne ultra petita* would be disregarded if national courts were required under Directive 93/13/EEC to ignore or exceed the limitations of the subject matter of the dispute established by the forms of order sought and the pleas in law of the parties.[47] Nevertheless, the CJEU stressed that the national court must not interpret the claims in a formalistic manner, but must interpret their content in the light of the pleas of law relied on in support of them.[48]

Thus, in the CJEU's view, if the elements of law and fact in the file before the national court give rise to serious doubts as to the unfair nature of certain clauses, which were not invoked by the consumer, then it is for the national court to take, when necessary of its own motion, investigative measures in order to complete that case file, by asking the parties, in observance of the principle of *audi alteram partem*, to provide clarifications or documents necessary for that purpose.[49] Based on the above line of reasoning, the CJEU established in the case before it that such interpretation of the national court's obligation to act of its own motion should not prejudice the consumer's right under the applicable national law to bring a new court action if necessary concerning the unfairness of other terms of the contract, which were not the subject matter of an initial action or extend the subject matter of the dispute before the referring court (based on the initiative of the court or on the plaintiff's own initiative).[50]

Furthermore, the CJEU clarified that whether the consumer is represented by a lawyer does not affect the *ex officio* duty of the national court, hence an *ex officio* examination must be settled independently of the specific circumstances of each case (Case C429/05 *Rampion and Godard*, paras 62 and 65)[51] and added that when the court finds that the term is unfair, it is required, as a general rule, to inform the parties to the dispute of that fact and to invite each of them to set out their 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 re-

[45] Case C-32/*14 ERSTE Bank Hungary Zrt v Attila Sugár* ECLI:EU:C:2015:637.

[46] Lintner, para 30.

[47] ibid, para 31.

[48] ibid, para 33.

[49] ibid, para 37.

[50] ibid, para 39.

[51] Case C-429/05 *Max Rampion and Marie-Jeanne Godard v Ranfinance SA and K par K SAS* ECLI:EU:C:2007:575, para 40.

gard by the national rules of procedure (Case C472/11 *Banif Plus Bank*, paras 31 and 32,[52] and Cases C419/18 and C483/18 *Profi Credit Polska*, para 70), and that Directive 93/13/EEC does not exclude the possibility that such contractual terms may be applicable if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status (Case C243/08 *Pannon GSM*, para 33).[53]

Nevertheless, the CJEU did not refer to an important point raised by AG Tanchev concerning the room of Member States regarding the *ne ultra petita* principles in the context of unfair contract terms litigation:

> the Court's case-law on the national court's *ex officio examination of unfair terms under Articles 6(1) and 7(1) of Directive 93/13 affects the operation of the principle that the subject matter of an action is delimited by the parties, in the sense that the national court is required to play an active role in raising ex officio the unfairness of terms in consumer contracts, even if this would have the result that under the national procedural law the court would go beyond the ambit of the dispute defined by the parties.* [54]

It is important to note that the CJEU does not raise the issue of the procedural weakness of the consumer, and AG Tanchev also remains cautious in this respect. AG Tanchev outlines the policy developed by the CJEU in its earlier case law on the obligation of the national courts arising out of Article 6(1) of Directive 93/13/EEC read in conjunction with its recital 24 and recalls that the system of protection introduced by Directive 93/13/EEC is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier. In order to guarantee the protection of the consumer intended by Directive 93/13/EEC, the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the parties to the contract. It is in the light of these considerations that this obligation for the national court is regarded as necessary for ensuring that the consumer enjoys effective protection in view of the not insignificant risk that he is unaware of his rights or encounters difficulties in enforcing them.[55]

In response to the second and third questions of the referring Hungarian court, examined together, the CJEU established that:

> Article 4(1) and Article 6(1) of Directive 93/13 must be interpreted as meaning that, while all the other terms of the contract concluded between a professional and that consumer should be taken into consideration in order to assess whether the contractual term forming the basis of a consumer's claim is unfair, taking such terms into account does not entail, as such, an obligation on the national court

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[52] Case C472/11 *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipa* ECLI: EU:C:2013:88.

[53] *Lintner* (n 29) para 42.

[54] ibid, para 47.

[55] ibid, paras 45-47.

hearing the case to examine of its own motion whether all those terms are unfair.[56]

The CJEU started its reasoning by recalling the test of unfairness defined in Article 4(1) of Directive 93/13/EEC, which requires the national courts when assessing a term, of which fairness is challenged by the consumer, to take into account all other terms of the contract (Case C472/11 *Banif Plus Bank*, para 41) that may be relevant for understanding that term in context, in so far as it may be necessary, for assessing whether that term is unfair (Case C377/14 *Radlinger and Radlingerová*, para 95[57]).[58] This, however, does not imply in the CJEU's view that the national court would be required to examine of its own motion those other terms individually for unfairness, as part of the assessment it makes under Article 6(1) of Directive 93/13/EEC.[59]

Based on the above reasoning the CJEU concluded that: a)

Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court, hearing an action brought by a consumer seeking to establish the unfair nature of certain terms in a contract that that consumer concluded with a professional, is not required to examine of its own motion and individually all the other contractual terms, which were not challenged by that consumer, in order to ascertain whether they can be considered unfair, but must examine only those terms which are connected to the subject matter of the dispute, as delimited by the parties, where that court has available to it the legal and factual elements necessary for that task, as supplemented, where necessary, by measures of inquiry[60]

and that b)

Article 4(1) and Article 6(1) of Directive 93/13/EEC must be interpreted as meaning that, while all the other terms of the contract concluded between a professional and that consumer should be taken into consideration in order to assess whether the contractual term forming the basis of a consumer's claim is unfair, taking such terms into account does not entail, as such, an obligation on the national court hearing the case to examine of its own motion whether all those terms are unfair.[61]

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[56] ibid, para 49.

[57] Case C-377/14 *Ernst Georg Radlinger and Helena Radlingerová v. Finway as* ECLI:EU:C:2016:283.

[58] *Lintner* (n 29) paras 46 and 47.

[59] ibid, para 48.

[60] ibid, para 44.

[61] ibid, para 49.

3 Assessment

The ruling of the CJEU in *Lintner* may be qualified as a 'restatement' of its earlier case law, rather than a revolutionary or evolutionary step in terms of policy with its approach to the active role of private law courts in enforcing unfair contract terms law by providing more powers to the courts or more protection to consumers. Limiting the courts' obligation to assess unfairness of their own motion on the subject matter of the litigation while not referring to the public policy foundation of the own motion doctrine is a clear sign that the *Linter* ruling is a step back compared to the earlier case law of the CJEU.

In short, the CJEU established that Directive 93/13/EEC does not impose on the national courts a general, open-ended duty to police the fairness of a consumer contract beyond the subject matter of the dispute before it.[62] However, the CJEU refines the rule established in its settled case law that national courts are only obliged to carry out an *ex officio* assessment of unfairness if this can be determined upon existing elements of law and fact available to it, in the sense that the court should not be confined exclusively to the elements of law and fact provided by the parties,[63] but it can take (without being obliged) investigative measures if the existing elements of law and fact give rise to serious doubts as to the unfair nature of certain clauses not invoked by the consumer but related to the subject matter of the dispute[64] and calls for a non-formalistic (functional) interpretation of the consumer claims.[65] The CJEU does not provide further guidance to courts on what is understood under 'serious doubt' concerning the unfairness of a term. In addition, the CJEU reiterates that the fairness assessment must remain contextualised in order to assess the unfairness of a contractual term (on which the claim is based),[66] without this meaning that the *ex officio* obligation would imply the unfairness control of all terms in a contract.[67] In addition, the CJEU still leaves open the question concerning the limits of an investigative measure. As has been raised in the legal literature, the fact that the CJEU has not yet recognised the obligation of an *ex officio* hearing of witnesses or experts does not mean that such an obligation cannot exist.[68]

The limitation of the obligation of courts to act of their own motion with the unfairness assessment regarding the subject matter of the litigation enhances the status of the consumer seen under unfair contract terms law as an active market player, having available the possibility to sue the business entity using unfair contract terms in a civil law suit un-

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62 ibid, para 28.

63 ibid, paras 36 and 37.

64 ibid, para 33.

65 ibid, para 47.

66 ibid, para 47.

67 ibid, para 48.

68 Werbrouck and Dauw (n 22) 335.

der the traditional principles of civil procedural law. Not surprisingly, we do not find in the ruling any reference to the public policy[69] foundation of the doctrine of own motion considering consumer protection a public interest that would justify a more active role of the courts. By not referring to this cardinal issue in the ruling, the CJEU may reinforce the policy approach of those jurisdictions that have so far avoided considering the public policy foundation of the own motion doctrine.[70] Only in rare cases have Member States such as Portugal imposed on the judiciary the duty to apply consumer protection law based on the CJEU approach to public policy rules.[71] One may ask what justice or market consideration guided the CJEU when adopting this approach and when and by whom this gap will be clarified or supplemented.

The impact of *Lintner* in practice is less than envisaged at the time of its adoption. There have been no significant developments in subsequent case law on the issue of the investigative role of the judge, and the legal literature has not devoted too much space to the ruling so far. The debate seems to have calmed in terms of preliminary rulings on the issue of own motion after the CJEU clearly framed the message that consumer protection in the field of unfair contract terms is an issue of private law, a matter between the contracting parties, and hence is bound to the subject matter of the litigation between the consumer and the business entity.

The referring Hungarian court got from the CJEU what it wanted – the limits of its investigative role, and similarly courts in other Member States may welcome the conservative approach of the CJEU considering the long-lasting tension between national civil procedural law and the requirements arising from Directive 93/13/EEC in terms of the investigative obligations of national civil law courts.

The ruling of the CJEU in *Lintner* put the courts back in their traditional private law roles, according to which the task of the judge is limited to providing justice on the subject matter of the litigation, based on the evidence and arguments referred to it by the litigant parties. This is reasonable, and hence courts should not take the place of market surveillance authorities in monitoring unfair contract terms. More market regulations are needed rather than more investigative powers conferred on civil law courts.

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[69] Case C-227/08 *Martín Martín* ECLI:EU:C:2009:792, paras 19 and 20. With respect to the public policy argument, see Case C-168/05 *Mostaza Claro* ECLI:EU:C:2006:675, para 38 and Case C-40/08 *Asturcom Telecomunicaciones* ECLI:EU:C:2009:615, para 52.

[70] On the abandonment of the public policy consideration, see also Rita Simon, 'Consumer Protection and Public Interest' in Luboš Tichý, Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021) 288; Emilia Miscenic, 'Currency Clauses in CHF Credit Agreements: A "Small Wheel" in the Swiss Loans' Mechanism' (2020) 6 Journal of European Consumer and Market Law 226; Emilia Miscenic, 'The Constant Change of EU Consumer Law: The Real Deal or Just an Illusion?' (2022) 70(3) Anali Pravnog Fakulteta u Beogradu 679, 696.

[71] Jacolien Barmard and Emilia Miscenic, 'The Role of the Courts in the Application of Consumer Protection Law: A Comparative Perspective' (2019) 44(1) Journal for Juridical Science 111, 129.

Without doubt, the ruling may be disappointing to consumers who tend to see in private law courts a kind of public authority, falsely expecting paternalism from the civil law judge, whereas Member State civil procedural law has never challenged its traditional principles under the impact of the doctrine of own motion developed by the CJEU. Under the *Lintner* case, it is clear that is not the task of the civil law judge to check of his or her own motion the fairness of the whole contract. The ruling is a clear and correct message to Member States that market surveillance in the field of unfair contract terms law should not be the task of civil law courts. But then whose job is it to police the market?

The policy message of the CJEU to the Member States is much stronger than the problem-solving potential of its interpretation on the questions referred to it by the Hungarian court. The refusal of the CJEU to turn the duty of 'own motion' into an effective tool for judges is a clear statement of position from it to the Member States that it does not want to intervene more in national civil procedural law. In this context, it is important to note that the CJEU reminds the Member States about the room under Article 8 of Directive 93/13/EEC to adopt or retain more stringent provisions compatible with the Treaty in the area covered by it in order to ensure a maximum degree of protection for consumers. It stresses that:

> Member States remain free to make provision in their national law, for a more extensive *ex officio* examination which their courts must carry out under the directive, in accordance with the reasoning set out in its judgment in paras 28 to 38.[72]

This may be qualified as an invitation to Member States to exercise their legislative power in this matter.

The questions remain: why do Member States consider that the time has not yet come to solve by legislation the conflicts between the requirements stemming from Directive 93/13/EEC and the national civil procedural law; why do Member States continue to ignore, despite the high economic, social and political costs connected to the weak enforcement of the directive within the context of national law, that the procedural weakness of the consumer demands specific rules? This is certainly a question of responsibility that for too long has been shifted by Member State legislators onto the judiciary in the name of the 'sanctity' and 'inviolability' of the integrity of national civil law and national civil procedural law.

Unfortunately, in this way, cardinal issues, such as redistribution policy and social justice, continue to remain unanswered in many Member States. This is not good for the stakeholders, including business entities who are affected by long-standing legal uncertainty, for judges who struggle with a high volume of appeals and recourse, for consumers who have lost trust in the judiciary, and the list goes on. Consumer over-in-

[72] *Lintner* (n 29) para 41.

debtedness affects the whole of society, including taxpayers. Nevertheless, surprisingly so far no state liability cases can be reported in the field of unfair contract terms law where consumers would have made state authorities liable for not acting and for not taking the steps allowed by EU law to issue mandatory legislation to abolish the procedural barriers in enforcing unfair contract terms law.

Access to justice does not always grant substantive justice, because in practice weak judicial protection draws limits on the effectiveness of unfair contract terms law and this ultimately raises justice concerns in the meaning of the Aristotelian division between corrective justice (this looks back at the interaction between the parties and provides reasons for restoring the parties' position[73]) and distributive justice (this provides solutions under which everyone has its share[74]). Maintaining procedural inequality further enhances the shift to more distributive justice in unfair contract terms law, started under the impact of the global financial crisis in 2008. This goes against the normative foundation of unfair contract terms law, as defined by the scope and wording of Directive 93/13/EEC, which is corrective justice.[75] Corrective justice deals with justice in interpersonal relations and does not deal with wider social aims; under corrective justice that has as its scope the maintenance and restoration of equality between the parties who enter a transaction, an injustice occurs by one party realising a gain and the other a loss.[76] Under the current model defended by the Member States and supported by the CJEU, procedural inequality raises obstacles to substantive justice.

There is a clear gap between the evolution of national judicial law under the impact of the 'own motion' doctrine of the CJEU and Member State civil procedural law. The reason for this is the weak integration of consumer policy considerations in Member State civil procedural law. Only Slovakia and Spain have amended their codes of civil procedure and enacted specific procedural rules under the impact of the judicial law developed by the CJEU, whereas other Member States (France, Latvia, Lithuania) have amended their substantive laws as a consequence of the *ex officio* doctrine.[77] In most Member States, no legislative impact can be identified, the issue being left to the domain of judicial law.

The reason behind this unsatisfactory development in continental civil procedural law is that civil procedural law which strictly defines the powers and obligations of the courts cannot be reformed via jurisprudence. Articles 6 (1) and 7(1) of Directive 93/13/EEC provide a proper

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[73] Ernest J Weinrib, *The Idea of Private Law* (OUP 1995) 62.

[74] Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 535.

[75] Mónika Józon, 'Unfair Contract Terms Law in Europe in Times of Crisis: Substantive Justice Lost in the Paradise of Proceduralisation of Contract Fairness (2017) 4 *Journal of European Consumer and Market Law* 157, 164.

[76] Weinrib (n 74) 62.

[77] Law (n 11) 300.

legal basis in terms of substantive law for the unfairness test carried out by judges, but are insufficient to promote legislative steps at Member State level in the field of civil procedural law.

Under such circumstances, it clearly becomes imperative to enact specific procedural rules aimed at enhancing the effectiveness of unfair contract terms law, as advanced in the Fitness Check of Consumer Law[78] and also in the MPI report on the procedural protection of consumers under EU consumer law.[79]

However, before proceeding, the EU should clearly define what type of social justice is promoted under Directive 93/13/EEC and should stop transferring this task onto the CJEU or the Member State judiciary, because fixing social distribution issues related to Directive 93/13/EEC is not a task for the courts, but one for the legislative branch.[80] This task should not be transferred to the Member States either, who bear the high economic and political costs of consumer over-indebtedness, because regulating differently procedural law aspects of unfair contract terms at Member State level may distort competition on the internal market of the EU.

Nevertheless, for this, more innovative solutions are needed to overcome the missing legal basis of the EU to act in the field of civil procedural law. Until this happens, the *ex officio* review remains an incomplete mechanism to compensate for the procedural inequality of consumers. *Lintner* is a good starting point, but is not sufficiently innovative.

Various potential legal bases exist in the TFEU for developing specific procedural rules to enhance the effective enforcement of Directive 93/13/EEC, such as Article 19(1) TEU that formulates the duty of sincere cooperation established in Article 4(3) TEU in the field of procedural law, Article 114 TFEU, Article 352 TFEU, and Article 197(2) TFEU. The sector-specific legal basis could also be used as 'implied procedural competence'[81] for enhancing the effectiveness of substantive rules by procedural provisions. As the *ex officio* rule was developed from Articles 6 (1) and 7(1) of Directive 93/13/EEC, specific rules could also be developed from a sectoral legal basis and included into the text of Directive 93/13/EEC by the next revision. It would not be for the first time that the Commission codifies relevant EU case law in secondary mandatory law. Soft

[78] Civic Consulting, Study for the Fitness Check of EU Consumer and Marketing Law (European Commission 2017) 91.

[79] Max Planck Institute, An Evaluation Study of National Procedural Laws and Practices in Terms of Their Impact on the Free Circulation of Judgments and on the Equivalence and Effectiveness of the Procedural Protection of Consumers under EU Consumer Law (2017) 47.

[80] Critically on the missing social justice clarifications at EU level concerning Directive 93/13/EEC, see Andrea Fejős, 'Social Justice in EU Financial Consumer Law' (2019) 24 (1) Tilburg Law Review 68.

[81] The expression used by Schütze in search of the legal basis of procedural rules, in Robert Schütze, *European Union Law* (CUP 2015).

rules in the form of a Commission notice or other type of guidance to courts would not suffice against mandatory rules on Member State procedural laws.

Given the lack of EU measures, the ECtHR established at end of 2018 in *Merkantile* that the consumer protection aim of Directive 93/13/EEC as public policy may justify the enactment of specific procedural rules at Member State level. However, one cannot find the impact of this human right law decision in the EU legal literature on unfair contract terms law or on the reasoning of the CJEU on the own motion doctrine in unfair contract terms cases. It seems forgotten that procedural autonomy supposes that Member State procedural rules are applied in a way that does not impede the effectiveness of EU law. Procedural autonomy should indeed be interpreted in the meaning that 'based on the assumption that national civil procedural law may provide adequate procedural means oaswever, granting the effective enforcement of the EU, civil procedural law has a subordinated function to substantive law'.[82] The principle of procedural autonomy has proven to block changes in Member State civil procedural law.

However, the lack of legislative actions at EU level should not be an excuse for the Member States or their judiciary not to take the necessary approach and measures under the tools available to them within domestic law and under EU law as the case of Hungary testifies, instead of transferring the enforcement problems to the EU level. For example, Article 3(2) of the Hungarian Civil Procedural Code provides that *lex specialis* may override the traditional rule of civil procedural law that proclaims that the court is bound by the submissions and legal statements made by the parties. In this context, the question arises as to why the national implementing rules of Directive 93/13/EEC and the CJEU case law were not considered a sufficient legal basis by the Hungarian court ruling that the obligation to act on own motion overrides the traditional principles of civil procedural law. A further tool that could have been used by the Hungarian court to clarify its doubts without shifting the problem from the national to the EU level is the definition of unfairness under Article 4(1) of Directive 93/13/EEC read in conjunction with the rules of interpretation of contracts in the Civil Code, stating that the terms of the contract should not be interpreted individually but in their interplay, having regard to the scope of the contract. Nevertheless, it is not the job of the CJEU to exploit the potential of Member State law; this remains the task of the national judiciary. In the end, the Hungarian referring court achieved an interpretation that does not help it very much and does not make consumers better off under Hungarian civil procedural law.

The proceduralisation of unfair contract terms law has not brought with it the expected results. On the contrary, it has shifted the focus from substantive justice to procedural justice, which is a step locked by proce-

[82] Walter van Greven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 502.

dural law barriers at the Member State level.[83] This was easier than fixing the social justice considerations of Directive 93/13/EEC needed for legislative measures to grant effective justice in terms of substantive justice.

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[83] Józon (n 76).