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The Real (New) Deal: Levelling the Odds for Consumer-Litigants: On the Need for a Modernization, Part II

Joanna M.L. VAN DUIN* & Candida LEONE*

Abstract: With its New Deal proposals, the European Commission aimed to secure that all consumers ‘fully benefit from their rights under Union law’. We argue that such commitment requires taking a step back from an exclusive focus on enforcement, to tackle challenges to the justiciability of consumer rights. Consumers must be seen both in their role as claimants and when they act as defendants. By means of a case-study threading together the main developments in the case law of the Court of Justice of the European Union concerning procedural guarantees for consumers from the past year, we seek to highlight the shortcomings of the current reliance on ‘judicial harmonization’. The identified shortcomings, we claim, show that limited harmonization of civil procedure is required, with regard to establishing minimum protective standards in cases involving consumers. For interested readers, we also list a number of specific issues that we think such harmonization should engage with.

Zusammenfassung: Mit ihren New Deal-Vorschlägen (Vorschlägen zur Neugestaltung der Rahmenbedingungen für die Verbraucher) wollte die Europäische Kommission sicherstellen, dass alle Verbraucher ihre unionsrechtlichen Rechte uneingeschränkt nutzen können. In dem vorliegenden Beitrag argumentieren wir, dass für eine solche Zielsetzung ein Schritt zurück von einem ausschließlichen Fokus auf die Rechtsdurchsetzung gemacht werden muss, um zunächst den Herausforderungen an die Justiziabilität der Verbraucherrechte zu begegnen. Verbraucher müssen sowohl in ihrer Rolle als Kläger als auch als Beklagter betrachtet werden. Anhand einer Fallstudie, in der die wichtigsten Entwicklungen in der Rechtsprechung des Gerichtshofs der Europäischen Union in Bezug auf Verfahrensgarantien für Verbraucher aus dem vergangenen Jahr zusammengefasst werden, stellen wir die Mängel des derzeitigen Vertrauens in die „Harmonisierung der Justiz“ heraus. Die festgestellten Mängel, so unsere Argumentation, zeigen, dass eine begrenzte Harmonisierung des Zivilverfahrens erforderlich ist, um Mindestschutzstandards für Fälle, in denen Verbraucher beteiligt sind, festzulegen. Für interessierte Leser führen wir auch eine Reihe spezifischer Probleme auf, mit denen sich eine solche Harmonisierung unserer Meinung nach befassen sollte.

Résumé: Avec ses propositions de “New Deal”, la Commission européenne vise à garantir que tous les consommateurs “puissent exercer pleinement leurs droits dans le cadre de l’Union.” Nous prétendons qu’un tel engagement nécessite de prendre du recul par rapport

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à un objectif exclusif d'application, afin de s'attaquer aux difficultés de la "justiciabilité" des droits du consommateur. Les consommateurs doivent être pris en considération à la fois dans leur rôle de demandeurs et lorsqu'ils agissent comme défendeurs. Grâce à une étude de cas rassemblant les principaux développements dans la jurisprudence de la Cour de justice de l'Union européenne concernant les garanties procédurales pour les consommateurs au cours de l'année précédente, nous tentons de mettre en lumière les lacunes constatées, une harmonisation restreinte de la procédure civile est nécessaire en ce qui concerne l'établissement de normes de protection minimales dans les affaires impliquant les consommateurs. Pour les lecteurs intéressés, nous énumérons également un nombre de sujets spécifiques essentiels selon nous, pour une telle harmonisation.

Keywords: justiciability of EU consumer rights, procedural harmonization, consumer redress, ex officio application of EU consumer law, effective judicial protection, enforcement

1. Introduction: The Interdependence Between Substantive and Procedural Consumer Protection

1. On 11 April 2018, the European Commission proposed a 'New Deal for Consumers'. Contrary to what the title suggests, there is no Keynesian revolution in the proposed policy package; it consists of two legislative proposals both concerned with the effective enforcement of consumer law. In the Commission's own words, the package was meant to secure that '*all consumers fully benefit from their rights under Union law*' and '*to level the odds*' between consumers and business.¹ One of the proposals, the so-called 'Modernization Directive', has meanwhile been adopted.² By contrast, it is as yet unclear whether and how soon consensus will be reached on the second and in some way more ambitious proposal, concerning the introduction of a European collective redress scheme for infringements of EU (consumer) law.³

2. The proposals' focus on *consumer rights and enforcement*⁴ made us wonder (and invite papers revolving around the question of) whether the Commission intended to bring about *a new deal for civil justice* - whether it was moving away from the idea of justice for growth and taking the justiciability of consumer rights 'seriously', i.e. on its own terms. Having in mind the inspiring contributions to the Amsterdam conference - now largely re-elaborated in this special issue of the *European Review of Private*

1 See http://europa.eu/rapid/press-release_IP-18-3041_en.htm, (last accessed 12 June 2019).

2 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules, OJ 2019 L 328/7.

3 Proposal for a Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC COM/2018/0089 final - 2018/089 (COD).

4 See the title of the press release *supra* at 2: 'A New Deal for Consumers: Commission Strengthens EU Consumer Rights and Enforcement'.

Law – as well as our own insights presented in this article, we have concluded that this is not the case. While the Modernization Directive represents a significant step towards more effective remedies and sanctions, and the Collective Redress proposal could improve consumer access to justice in a number of Member States, no big (or new) deal has ever been in sight. This has little to do with the lack of collective redress mechanisms and much with the elephant in the room, represented by the interdependence between the substantive and procedural protection of consumers and the (absence of) harmonization of national procedural laws. In this respect, the combination between the introduction of individual remedies for unfair commercial practices and collective redress promised to bring a significant improvement. But the Commission’s emphasis on the importance of allowing consumers to claim damages shows a persistently incomplete apprehension of the problems surrounding consumer rights vindication. Whereas the New Deal is mainly justified with reference to ‘Dieselgate’, which clearly brings the notion of pan-European or cross-border infringements to the forefront, it seems oblivious of other forms of mass harm which have emerged in the past few years, particularly in the context of the financial crisis – such as the Spanish saga of *cláusulas suelo*⁵ or the widespread use of extremely harsh early maturity clauses and other dubious terms in mortgage contracts in several countries.⁶

3. The examples just provided – while only referring to one area of consumer law, namely that of unfair contract terms – open up to acknowledging one fact that seems lost on the New Deal drafters, namely that consumers are affected by civil procedure not only as claimants (think *cláusulas suelo*), but also as defendants (e.g. in mortgage enforcement proceedings). While the enforcement of consumer rights is plausibly most directly connected to (pro)active steps on the side of either authorities or private parties, the justiciability of those rights is not only at play both when consumers do take action themselves, but also and, perhaps even more urgently, when action is taken against them. By ‘justiciability’ we mean the possibility that (consumer) rights are appropriately considered by courts when they adjudicate consumer disputes, which presupposes that consumers have a genuine opportunity to exercise their rights by invoking them in court.⁷

5 ‘Floor clauses’, or terms making a variable interest rate fluctuate indefinitely upwards but only to a given point downwards. Consumers’ challenges against those terms and the consequences of their unfairness culminated in a CJEU Grand Chamber decision requiring Spanish courts to give full effect to the unfairness declaration by returning consumers all amounts unduly paid. See e.g. CJEU 21 December 2016 Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo* ECLI:EU:C:2016:980.

6 See e.g. CJEU 20 September 2017 Case C-186/16 *Andriuc*, ECLI:EU:C:2017:703; CJEU 26 March 2019 Joined Cases C-70/17 and C-179/17 *Abanca Corporación Bancaria* ECLI:EU:C:2019:250.

7 In this sense, our understanding of ‘justiciability’ is broader than the direct effect of (subjective) EU rights or the mere existence of a (procedural) means of recourse. It includes rights originating from directives that have been implemented in national legal systems. Practical and legal obstacles – such as a lack of knowledge or financial means, as well as restrictive procedural conditions – may equally stand in the way of the justiciability of those rights.

4. While the legislative harmonization of civil procedure in the EU has so far taken place without a specific connection to consumer rights,⁸ pervasive inroads have happened at the hand of EU law-based adjudication. To the extent that the EU Court of Justice (CJEU), over the past decade, can be said to have laid the foundations of a ‘European consumer procedural law’,⁹ these foundations go as deep in planting procedural safeguards for consumer-defendants as in realizing access to justice for consumer-claimants. This judicial *acquis* is functional and sectoral:¹⁰ it is aimed at the enforcement of (substantive) EU consumer protection legislation, not the harmonization of national procedural laws as such, or the development of common EU standards of civil procedure.¹¹ Still, it likely affects consumers more significantly than many harmonized measures in the procedural sphere.¹²

5. The CJEU, however, cannot single-handedly make up for the lack of harmonized rules guaranteeing that consumers across Europe enjoy a similar opportunity of justice being done to their rights. This becomes clear if one looks at the case law concerning effective judicial protection for consumers, which provides privileged, if limited, insight into different ways in which in concrete cases national procedural rules were suspected of standing in the way of consumer protection. From this insight it is also possible to tentatively identify a number of friction points where guaranteeing justiciability of consumer rights presents challenges. These challenges must be, we submit, addressed at EU level by pursuing harmonization of minimum requirements for consumer litigation.

6. The article proceeds as follows. In section 2 we outline the approach taken by the New Deal proposals with regard to private ‘enforcement’. In section 3, we focus on two main developments which have taken place in 2018, showing how procedural rules may

8 On the basis of Art. 81 TFEU. See, for instance, the European Small Claims Regulation and the European Order for Payment Procedure; the Brussels I Regulation (n 55) contains some specific provisions for the procedural protection of consumers in cross-border disputes.

9 See further H.W. MICKLITZ & N. REICH, ‘The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)’, 51. *Common Market Law Review* 2014, p 771.

10 J.T. NOWAK, ‘Considerations on the Impact of EU Law on National Civil Procedure: Recent Examples from Belgium’ in V. Lazić & S. Stuij (eds), *International Dispute Resolution. Short Studies in Private International Law* (TMC Asser Press 2018), p 30; A. ADINOLFI, ‘The “Procedural Autonomy” of Member States and the Constraints Stemming from the ECJ’s Case-Law: Is Judicial Activism Still Necessary?’ in H.W. Micklitz & B. De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012), p 303.

11 J. ENGSTRÖM, ‘The Europeanization of Remedies and Procedures – the Principle of Effective Judicial Protection in the Swedish Judicial Habitat’, 23. *European Review of Public Law* 2011, pp 577, 594. See also Opinion of AG Trsaténjak in Case C-618/10 *Banco Español de Crédito v. Calderón Camino* (Banesto) ECLI:EU:C:2012:74, point 58.

12 See M. TULIBACKA, ‘Proceduralisation of EU Consumer Law and Its Impact on European Consumers’, 8. *Review of European Administrative Law* 2015, pp 51, 52–53; Nowak (n 11) 2 for a similar observation.

impact the justiciability of consumer rights. In section 3.2, we discuss several cases pertaining to order-for-payment procedures, as an example of ad hoc, judge-made solutions that do not provide sufficient guidance and may even lead to a multiplication of questions as to their implementation in national civil procedure. In section 3.3, we compare two specific decisions to draw attention to how the lack of harmonized minimum procedural guarantees for the justiciability of consumer rights results in uncertain and possibly arbitrary (especially from the consumer's perspective) outcomes at the interface between consumer rights and procedures – i.e. the vesting of private law remedies. These case-studies show the need for a more coherent, consistent way of dealing with procedural aspects that are crucial for the justiciability of consumer rights. We therefore submit in section 4 that a true new deal for civil justice in consumer cases will require a more systematic and coordinated approach towards the ‘proceduralization’¹³ of EU consumer protection – or rather, towards a procedural law for consumers, with some help from the EU. We argue that the next step must be the adoption of a new Directive consolidating the CJEU’s case law and/or containing general principles or minimum standards for civil litigation in consumer cases and provide a first indication of sensitive areas in search of deliberation.

2. The New Deal: All-In On Collective Redress

7. Two recent studies¹⁴ suggest that there is still an ‘enforcement deficit’ or ‘civil justice gap’¹⁵ in respect of EU consumer law. This gap seems to exist both at the level of substantive remedies and at that of procedures at the national level.¹⁶ Identified problems include a lack of (procedural) opportunities for consumers to

13 The term ‘proceduralization’ has been used to refer to the adoption of EU procedural rules in legislative instruments, e.g. the European Small Claims Regulation or the Consumer ADR Directive. It could also be said that the CJEU has started off this ‘proceduralization’ process: Tulibacka (n 13), pp 53–54. The CJEU’s progressive interpretation of the UCTD has led to a more indirect, judge-made ‘Europeanization’ of remedies and procedures, see e.g. A. BEKA, *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts’ Own Motion* (Intersentia 2018), pp 10, 17.

14 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. Strand 2: Procedural Protection of Consumers, Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission (JUST/2014/RCON/PR/CIVI/0082), published on 26 January 2018 (**Max Planck study**; available at http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49503) and Study for the Fitness Check of EU consumer and marketing Law – Final report Part 1: Main report, European Commission 29 May 2017 (**REFIT Main report**; available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332).

15 I. BENÖHR, *EU Consumer Law and Human Rights* (First edn, Oxford University Press 2013), p 177; S. WRBKA, *European Consumer Access to Justice Revisited* (Cambridge University Press 2015), p 33.

16 With ‘procedures’ we refer to rules governing access to, and the conduct of, court proceedings, i.e. providing a means of recourse intended to make substantive remedies (claim-rights or causes of

bring a claim; barriers, like the costs involved with litigation; uncertainty about the scope of the (*ex officio*) powers of the judge, in particular where this is not explicitly regulated in national law; and inadequate mechanisms for the protection of collective interests. The EU's activism, over the past decade, in the field of alternative and online dispute resolution, tries to alleviate - or, in a way, circumvent, some of these problems.¹⁷ The Collective Redress proposal aims to address the identified shortcomings, of, in particular, the Injunctions Directive.¹⁸

8. Compared to the Injunctions Directive the proposal enlarges the scope of harmonization - from the 'core' of EU consumer law¹⁹ to a number of regulated markets (from telecommunications to air travel), in line with the 2017 regulation on cooperation in the administrative enforcement of consumer law.²⁰ This should in itself reduce the obstacles to collective actions, in particular - according to the Commission - with an eye to cross-border infringements. Furthermore, a 2012 review of the Injunctions Directive had highlighted how the potential impact of injunctions was being held back by a combination of complex procedures,²¹ high costs and limited impact of the rulings - in particular due to lack of clear provisions on monetary compensation.²² The proposal, accordingly, includes a number of provisions that aim to improve the visibility and workability of collective redress - such as requiring the suspension of limitation periods while a collective action is pending, or asking Member States to impose information obligations on traders and requiring a degree of publicity for final decisions. With a few exceptions, such as Article 11 on limitation periods, however,

action) operational: see e.g. W. VAN GERVEN, 'Of Rights, Remedies and Procedures', 37 *Common Market Law Review* 2000, pp 501, 502-503; N. PÓLTORAK, *European Union Rights in National Courts* (Wolters Kluwer 2015), pp 9-10. This includes rules on the enforcement of judgments.

17 While, however, arguably creating new problems - such as the possible circumvention of consumer protection rules in e.g. the Brussels I Regulation (n 55) by application of the trader's ADR scheme - see critically M.B.M. LOOS, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law', *European Review of Private Law* 2016, p 61.

18 Directive 2009/22/EC on injunctions for the protection of consumers' interests, OJ 2009, L 110/30. According to the Commission's own explanatory memorandum, the proposal strikes a balance between facilitating access to justice to protect (collective) consumers' interests and ensuring adequate procedural safeguards against 'abusive litigation'. The results of these efforts are commented upon elsewhere in this Issue. For our purposes, the anti-abuse safeguards are less interesting than the promotional parts of the balancing, whose shortcomings we criticize on their own premises.

19 Annex I of Directive 2009/22/EC lists consumer credit, package travel, unfair terms in contracts concluded with consumers, distance contracts and unfair commercial practices

20 Consumer Protection Cooperation Regulation (EU) 2017/2394.

21 COM(2018) 184 final 2018/0089 (COD).

22 According to the proposal, 'It is not always clear whether the [injunctions] Directive also covers consumer redress as a measure aimed at eliminating the continuing effects of the infringement. This uncertainty is widely considered to be a key reason for its insufficient effectiveness.'

these provisions do not go beyond signalling rather general principles which should guide the Member States' implementation of the Directive.²³ It does, however, expressly state that Member States should make sure that 'a redress order' can comprise at least compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid.²⁴

9. In attempting to push forward more effective consumer redress, in order words, it looks like the Commission spent most of its efforts on making sure collective redress in the form of compensation was on the menu everywhere in Europe. This does, however, not clearly do much to face most of the problems identified by the Commission's own reviews and the Max Planck study cited above. The proposal clearly frames collective redress as a solution to the problems encountered by individual consumers, who 'face the same obstacles when seeking individual redress now as they did 10 years ago': the Injunctions Directive has not eliminated obstacles as the excessive length of proceedings, uncertainty about one's rights and the perceived low likelihood of success. New and more effective remedies, thus, are supposedly meant to overcome these obstacles.

10. The emphasis on broad redress possibilities that characterizes the Commission's approach in the Collective Redress proposal is reflected in one core element of the Modernization Directive: the introduction of individual remedies for the violation of unfair commercial practices legislation. Whereas the Unfair Commercial Practices Directive (UCPD)²⁵ limited itself to defining and prohibiting unfair commercial practices, the Modernization Directive requires Member States to make sure that consumers have access to 'proportionate and effective remedies', including at least termination of the contract, price reduction and compensation for damages. Even though Member States may determine the 'conditions for the application and effects of those remedies', these may not set aside rights that consumers would otherwise enjoy under other EU or national rules.²⁶ Indeed, as the example of Dieselgate underlined, the possible availability of collective redress is of help only when substantive remedies can be invoked.²⁷

23 See e.g. Art. 12(1): 'Member States shall take the necessary measures to ensure representative actions referred to in Articles 5 and 6 are treated with due expediency.'

24 Article 6 Collective Redress proposal.

25 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005, L 149/22.

26 See Art. 1(5) Modernisation Directive proposal, inserting an Art. 11a in the UCPD.

27 Thus the proposal's accompanying text: 'In the Dieselgate case, many consumers have not been able to claim remedies even in Member States that already provide remedies for victims of unfair commercial practices. This is because the available remedies are only contractual. The remedies can therefore only be applied against the consumers' contractual counterparts, which in this case are usually the car sellers and not the car manufacturers.'

11. Both ‘prongs’ of the New Deal package, thus, seek to promote the private enforcement of EU consumer law by consumers on the *claimant* side. This is, however, a very limited view on the procedural dimension of consumer protection. Just as crucial to the enforcement and protection of EU consumer rights is the scenario where consumers are not the claimant but the *defendant*, i.e. a claim is brought – and awarded – against a consumer in spite of an infringement of EU consumer law, because procedural rules prevent the consumer from obtaining, or the court from granting, an effective (judicial) remedy. In *Océano*, the very first preliminary ruling on the Unfair Contract Terms Directive (UCTD), the CJEU already called attention to the ‘real risk’ that consumers will not contest unfair terms because they are unaware of their rights or encounter difficulties in enforcing them.²⁸ In this respect, a ‘compensatory function’ of civil procedure could be observed.²⁹ Subsequent case law shows how the substantive protection of consumers against unfair terms may be undermined by a shortfall in procedural protection.

12. The New Deal does not seem to sufficiently acknowledge the need to make sure that consumers are not only empowered as efficient market actors but also consistently seen as often weaker parties,³⁰ who also need protection in the procedural realm. As we will argue, it is not sufficient to rely entirely on the CJEU to fill the previously identified ‘civil justice gap’.

3. The Limits of Judge-Made ‘Proceduralization’ of EU Consumer Protection

3.1. Case-study: *The Impact of Procedural Rules on the Justiciability of Consumer Rights*

13. Compared to the scenarios with which the Collective Redress proposal is concerned, the picture of national civil procedures that is offered to us by preliminary rulings in the field of unfair terms in consumer contracts reveals quite different patterns. While in both cases the problem of consumer inertia seems paramount, and resources also play a fundamental role, the case law of the CJEU in this field provides us valuable insight on how procedural systems impact the justiciability of consumer rights. In particular, the case law tells us much about the effect of national procedural rules on the rights of consumers which are brought to court as *defendants*.

28 CJEU 27 June 2000 Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v. Murciano Quintero* ECLI:EU:C:2000:346, para. 26.

29 H.W. MICKLITZ & N. REICH, 51. *Com. Mkt. L. Rev.*, pp 803–804.

30 H.W. MICKLITZ, ‘The Consumer: Marketised, Fragmentised, Constitutionalised’, in D. Leczykiewicz & S. Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016).

14. Separating these two perspectives – consumers as claimants or as defendants – also highlights the different normative dimensions of the justiciability of consumer rights. While *from the perspective of regulatory effectiveness* it is consumer-claimants that are most expedient, from the perspective of the effectuation of individual rights the two perspectives carry equal weight – and consumer-defendants possibly demand more urgent attention, since it is possible that state powers are being used in order to enforce an agreement that has somehow violated their rights. Moreover, in typical consumer cases the consumer is the defendant;³¹ they are likely to find themselves on the ‘receiving end’ of court proceedings – which will affect their legal position, whether they participate or not.³²

15. When consumers are summoned to appear in court, it is usually on the basis of a monetary obligation: due to their easy quantification and to their being often grounded in written documents, the enforcement of these obligations is relatively straightforward. They are relatively frequently enforceable through proceedings that, in one way or another, deviate from the basic adversarial, safety-imbued structure of civil procedure. This was in particular the case for obligations arising from (the non-performance of) credit contracts which made up for a large share of the cases discussed by the CJEU in the fallout of the 2008 economic crisis.

16. As is known, the CJEU has shown keen awareness of consumers’ tendential ‘inertia’ and the possibility that factors such as unawareness of their rights and financial risks involved with litigation³³ may lead consumers ‘to forego any legal remedy or defence’.³⁴ This is reflected in the CJEU’s explanation of the national courts’ duty to apply a number of provisions of consumer law *ex officio*, i.e. in a way unconnected to the actions of the parties.

17. Through an analysis of the CJEU’s case law on unfair terms control, we aim to show, first, in which ways procedural rules may stand in the way of the justiciability of consumer rights, and secondly, how the solutions provided by the CJEU only lead to a multiplication of questions as to their implementation in national procedural laws. Many preliminary references reveal how national (civil)

31 Max Planck study, p 111.

32 As observed by AG Sharpston in her Opinion in Case C-147/16 *Karel de Grote – Katholieke Hogeschool Antwerpen v. Kuijpers*, ECLI:EU:C:2017:928, point 32.

33 M.B.M. Loos, ‘Access to Justice in Consumer Law’, 36. *Recht der Werkelijkheid* 2015, p 113. The term ‘inertia’ – used by the CJEU in e.g. its judgment of 6 October 2009 Case C-40/08 *Asturcom Telecomunicaciones v. Rodriguez Nogueira* ECLI:EU:C:2009:615, para. 47 – implies an indifference that does not correspond with the notion of overindebted and vulnerable consumers: A. BEKA, *The Active Role of Courts*, pp 298-299.

34 *Océano*, para. 22; CJEU 9 November 2010 Case C-137/08 *VB Pénzügyi Lizing v. Schneider* ECLI:EU:C:2010:659, para. 54.

courts seek further (CJ)EU guidance in this respect. For instance, in the last few years alone several cases have been decided which concerned similar order-for-payment procedures in Spain and, later, Poland and Slovakia.³⁵ This shows how CJEU judgments (e.g. *Banesto* in 2012) may give rise to new issues (e.g. *Profi Credit* in 2018). The case law on these procedures – due to their expedited nature and limited scope – brings to light restrictive procedural conditions that have proven to be problematic in other proceedings involving consumer-defendants as well, such as default proceedings, mortgage enforcement proceedings and annulment of arbitral awards.

18. We argue that, if we take the justiciability of individual consumer rights seriously, the CJEU’s law-making cannot on its own fill the ‘civil justice gap’ left open by the lack of harmonization in the field of remedies and procedures. In this section, we substantiate this claim by examining, on the one hand, how the operationalization of *ex officio* has unearthed several ways in which national rules of civil procedure hinder the effectuation of consumer rights (section 3.2). On the other hand, we highlight the external limits of *ex officio* qua its correlation with, and possible dependence on, the existence of effective substantive remedies (section 3.3). Taken together, we aim to show, the cases highlight – on the one hand – how sensitive (besides intricate) the balancing between consumer protection and other interests can be, e.g. efforts to render the administration of justice more efficient.³⁶ They also suggest – on the other hand – that the place of this balancing is a moving target, with elements within the given procedure being matched with elements besides the procedure in order to determine whether, overall, effective enforcement is not being hindered. In section 4, these observations form part of our criticism of the New Deal.

19. The results of this analysis form the basis for our criticism of the Commission’s limited focus on enforcement (and neglect of justiciability) of consumer rights in its 2018 package.

35 CJEU 14 June 2012 Case C-618/10 *Banco Espanol de Credito v. Calderon Camino (Banesto)* ECLI:EU:C:2012:349, CJEU 18 February 2016 Case C-49/14 *Finanmadrid v. Alban Zambrano* ECLI:EU:C:2016:98, CJEU 21 June 2016 Case C-122/14 *Aktiv Kapital Portfolio v. Egea Torregrosa* ECLI:EU:C:2016:486, CJEU 13 September 2018 Case C-176/17 *Profi Credit Polska v. Wawrzosek* ECLI:EU:C:2018:711, CJEU 28 November 2018 Case C-632/17 *PKO Bank Polski v. Michalski* ECLI:EU:C:2018:963, CJEU 20 September 2018 Case C-448/17 *EOS KSI Slovensko v. Dankova* ECLI:EU:C:2018:745.

36 See also J. WERBROUCK, ‘Another Brick in the Wall: The Court’s Judgment in *KdG/Susan Kuijpers*, 17 May 2018 [C-147/16]’, *European Review of Private Law* 2019, pp 135, 154.

3.2. *Ex officio and Access to Justice in Order-For-Payment Procedures: From Banesto to Profi Credit*

20. Over the past ten years, an impressive number of preliminary references concerning the UCTD³⁷ have been made by national courts. A large share of these concerned, at least in part, procedural issues.³⁸ These preliminary references lay bare widespread tension between consumer protection requirements and national civil procedure, as well as the potentially disruptive effect of the introduction of additional procedural safeguards for consumers.³⁹

21. The first few cases on the UCTD could be seen as essentially necessary in order to clarify the meaning of the Directive's Articles 6 and 7; the result that unfair terms are not binding on consumers would not be achieved if consumers were themselves obliged to raise the question of unfairness. In more recent years, however, the focus has gradually shifted to procedural arrangements which appear difficult to square with the *rationale* of the *ex officio* doctrine because the role of courts is limited or even excluded. In these cases, the public policy concerns behind *ex officio* require a degree of scrutiny and court involvement that runs contrary to the notions underpinning special procedures. In principle, the CJEU assesses national procedural provisions according to the principles of equivalence and effectiveness; under this test, and in particular under the second prong, it examines whether a provision makes the application of European Union law 'impossible or excessively difficult'. This question 'must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies'.⁴⁰

22. The tension between accelerated proceedings and the CJEU's protective agenda becomes evident in the context of order-for-payment procedures, which

37 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993, L 95/29.

38 The exact number of cases depends on the definition of 'procedure' (see also n 14). Out of the 79 'Directive 93/13' cases that, according to the EUR-Lex database, have so far resulted in a decision (judgment or order), at least 23 cases include a reference to the procedural rights and safeguards of Art. 47 of the EU Charter of Fundamental Rights, which guarantees the right to an effective judicial remedy and a fair trial; this figure is likely an underestimation since it does not include, e.g. references on the implementation of *ex officio* in national procedural law (starting with, most famously, *Océano*), unless they have expressly referred to Art. 47.

39 In this respect, AG Trstenjak's Opinion in *Banesto* is telling, in particular her observation that 'the imposition of a duty to undertake a thorough investigation in the context of the order for payment procedure and to give a ruling in *limine litis* on whether a term concerning interest on late payments in a consumer credit agreement [is unfair] would result in a fundamental modification of the operation of that procedure, which would eliminate an important efficiency benefit of the order for payment procedure, namely the quick enforcement of uncontested pecuniary claims' (point 56). Opinion AG Trstenjak in Case C-618/10 *Banesto* ECLI:EU:C:2012:74.

40 This test has been applied in the context of the UCTD at least since *Asturcom*, para. 39.

are the focus of the present subsection. Practice shows that orders for payment are rarely contested, which enhances the need for judicial scrutiny.⁴¹ In so far as there is no scope for judicial intervention – and unfair terms control – this may result in an enforceable judicial decision being issued even though the claim is (partially) based on unfair terms. Examples of such terms are clauses that set an excessively high interest rate; unilateral determination clauses, which allow the creditor to determine the amount owed by the debtor; or early maturity clauses, which allow the creditor to claim the full amount after the debtor’s failure to pay a number of instalments. All these clauses have an impact on either the claimed amount or the creditor’s ability to bring a claim.

3.2.1. *Banesto and Finanmadrid: the Link Between Substantive and Procedural Protection*

23. The first case in our review, *Banco Español de Crédito (Banesto)*, concerned a Spanish order-for-payment procedure aimed at granting creditors easy and rapid access to justice for uncontested claims. In this procedure, the creditor had to provide prima facie evidence of the claim, i.e. the existence of a pecuniary debt by the submission of a contract or invoices. If the debtor did not lodge an objection, the procedure was non-contentious and the court merely had to ascertain whether the formal requirements were met. It could not, in *limine litis*, assess whether the terms on which the enforcement was based were unfair. This ‘shift of procedural initiative’ to the debtor entails that the burden is placed on the defendant to initiate adversarial proceedings, i.e. a contentious debate on the merits. In the view of AG Trstenjak, the procedure, which expressly disallowed any substantive scrutiny by the court, was not problematic in terms of effectiveness. The fact that consumers could trigger full proceedings (and thus, possibly, unfair terms control) by lodging an objection was sufficient.⁴²

24. However, the CJEU found that even if such an opportunity for the debtor exists, there is a significant risk that consumers would not make use of it,

- because of the particularly short period provided for that purpose (20 days),
- because consumers might be dissuaded from defending themselves in view of the costs legal proceedings would entail in relation to the amount of the disputed debt,
- because they are unaware or do not appreciate the extent of their rights, or

41 Max Planck study, p 241.

42 Opinion AG Trstenjak in *Banesto*, point 73.

- because of the incomplete nature of the information available to them, due to the limited content of the request for the order for payment submitted by the creditor.⁴³

Traders may count on this and try to circumvent judicial control through ‘opportunistic exercises of party autonomy’.⁴⁴ In practice, it would be sufficient for them to initiate an order-for-payment procedure to deprive consumers of the benefit of the Directive’s protection.⁴⁵ This promotes the settlement of claims founded on unfair terms.⁴⁶ Thus, the court must be allowed to assess unfair terms *ex officio* where it has the necessary legal and factual elements available to it.⁴⁷

25. *Finanmadrid* concerned a follow-up issue, namely a situation in which any court involvement was made dependent on the consumer-debtor lodging an objection. The CJEU concluded that, in so far as an order for payment is issued by an official (i.e. a court registrar) who does not have the status of a magistrate and does not have the power to exercise unfair terms control *ex officio*, such control by a court must be ensured at the enforcement stage as a last resort.⁴⁸ The mere fact that an order has become final and binding because the consumer did not challenge it (in time), cannot in itself justify the total absence of judicial review.⁴⁹ Time-limits, in particular, must be sufficient in practice to enable the consumer to prepare and bring an action.⁵⁰ In the words of AG Szpunar, a balance must be struck ‘between the notion that a court should compensate for a procedural omission on the part of a consumer’ and ‘the notion that [the court] should not make up fully for the consumer’s total inertia’.⁵¹ If the time-limit is too short, there is a significant risk that the consumer does not lodge an objection and no unfair terms control takes place.⁵²

43 *Banesto*, para. 54.

44 O. GERSTENBERG, ‘Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts’, *European Law Journal* 2015, 610, no. 13. A focus on party autonomy, without taking the weaker position of consumers into account, may facilitate aggressive debt-collection and repossession practices: D. CARUSO, ‘Fairness at a Time of Perplexity’ in S. Vogenauer & S. Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017), p 349.

45 *Banesto*, para. 55.

46 Opinion AG Kokott of 15 September 2016 in Case C-503/15 *Margarit Panicello v. Hernandez Martinez* ECLI:EU:C:2016:696, points 133–136.

47 *Banesto*, para. 57.

48 *Finanmadrid*, paras 46 and 55; cf. *EOS KSI Slovensko*, para. 92.

49 *Finanmadrid*, para. 48.

50 Cf. CJEU 29 October 2015 Case C -8/14 *BBVA v. Peñalva López* ECLI:EU:C:2015:731, para. 29.

51 Opinion of AG Szpunar in Case C-49/14 *Finanmadrid* ECLI:EU:C:2015:746, point 43, with reference to *Banesto* and *Asturcom*.

52 *EOS KSI Slovensko*, paras 52–53.

26. AG Szpunar pointed out other possible procedural obstacles, such as prohibitive costs or the absence of recourse against an order adopted without the defendant's knowledge.⁵³ *Finanmadrid* concerned one main debtor and three guarantors; it was unclear whether they had been duly notified of the procedure. *Ex officio* control of unfair terms does not fully remedy a violation of their rights of the defence (cf. Article 47 of the EU Charter of Fundamental Rights). In this respect, Szpunar drew a parallel with the Brussels I Regulation,⁵⁴ under which a balance is struck between the claimant's right of access to court and the defendant's rights of the defence in cross-border disputes.⁵⁵ This Regulation recognizes that consumers are worthy of special protection and, for that reason, contains additional procedural guarantees.⁵⁶ *Banesto* and *Finanmadrid* show that, in the context of the UCTD, there is an equal need for additional procedural safeguards, both to ensure the consumer's access to justice (or rights of the defence, which are two sides of the same coin here) and judicial control of unfair terms; procedural and substantive protection are intertwined. These cases also show that *ex officio* control is an imperfect response to the combination of restrictive procedural conditions and a reliance on party initiative in national procedural law. Rules that are otherwise justifiable, such as short time-limits in the course of an expedited order-for-payment procedure, may be problematic when they are viewed in light of the risk that consumers are prevented or deterred from exercising their rights in court.

3.2.2. *Profi Credit Polska and PKO Bank Polski: A Genuine Opportunity to Exercise Consumer Rights*

27. Two more recent cases - *Profi Credit Polska* and *PKO Bank Polski* - concerned an order-for-payment procedure in Polish law, similar to the Spanish procedure at issue in *Banesto* and *Finanmadrid*. In both cases, a financial institution had brought a claim against a consumer-debtor on the basis of a promissory note respectively a bank ledger that provided security for a credit agreement. An important difference with *Banesto* was that the entire procedure rested on the presumption that the promissory note fully proved the factual basis for the claim, so the agreement itself was not in the case file. The court only had to

53 Opinion AG Szpunar in *Finanmadrid*, point 95.

54 Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (often referred to as '**Brussels I Regulation**'). As per 10 January 2015, Regulation 44/2001 has been replaced by Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (also referred to as '**Brussels Ibis Regulation**').

55 See e.g. CJEU 17 November 2017 Case C-327/10 *Hypoteční banka v. Lindner* ECLI:EU:C:2011:745.

56 Cf. Opinion AG Bobek of 7 May 2019 in Case C-347/18 *Salvoni v. Fiermonte* ECLI:EU:C:2019:370.

establish that the promissory note was formally valid. It was up to the debtor to contest not only the obligation arising from the promissory note, but also the underlying contractual relationship. In the context of this procedure, the *Banesto* rule does not appear immediately applicable: after all, in that decision the CJEU had established that courts must be allowed to perform their duty of *ex officio* control *when they have available all the necessary information*. This is not the case when the underlying contract does not need to be provided in order to request an order for payment, as in the case of the Polish procedure under consideration.

28. According to AG Kokott, it was not problematic per se that consumers are required to lodge an objection: they could reasonably be expected to take this step to assert their rights.⁵⁷ What was nevertheless problematic, was a constellation of restrictive procedural conditions: a time limit of only two weeks for consumers to substantiate their complaints, combined with strict admissibility requirements – the consumer did not only have to raise complaints but also to adduce facts and evidence – and a court fee that was three times higher for the consumer than for the other party. The Court agreed with Kokott’s assessment.⁵⁸

29. In line with what had been decided in the Spanish cases, thus, the CJEU declared that the Polish rules were not compatible with the UCTD – read in conjunction with Article 47 Charter – insofar as they allowed granting an order for payment in the absence of a genuine opportunity for the consumer-debtor to file an opposition or a possibility for the court to exercise *ex officio* control. In that case, the only way forward for the court seems to be to ask the trader to submit the underlying agreement or refuse to issue an order for payment, as it is unclear on what (factual and legal) basis it could otherwise conduct an unfairness assessment (*ex officio*).⁵⁹

30. The Polish cases confirm that the judicial protection of consumers against unfair terms presupposes consumers can exercise their rights effectively. This should not be a formality, but a *genuine opportunity*.⁶⁰ It would probably go too far to eliminate the efficiency benefit of expedited procedures by expanding their scope to a full examination of the merits.⁶¹ Avoiding costly and lengthy ordinary

57 Opinion of AG Kokott in Case C-176/17 *Profi Credit Polska* ECLI:EU:C:2018:293, points 64 and 71-73 with reference to the European Order for Payment Procedure.

58 *Profi Credit Polska*, paras 65-68; Opinion AG Kokott, points 77-81.

59 The CJEU recently confirmed that the national court may require traders to produce the necessary documents so that it can be verified whether the rights consumers derive from the UCTD and the CCD are observed: [...] CJEU 7 November 2019 Joined Cases C-419-18 and C-483/18 *Profi Credit Polska v. Włostowska* ECLI:EU:C:2019:930.

60 Cf. M. DOUGAN, ‘The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before the National Courts’, in Paul Craig & Gráinne De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011), pp 412, 424.

61 Cf. Opinion AG Kokott in *Profi Credit Polska*, point 76; Opinion AG Trstenjak in *Banesto*, point 56.

proceedings may, after all, even be in the interest of consumers. On the other hand, these procedures should not turn into avenues for depriving consumers of the rights – including the right to effective judicial protection – that EU law confers upon them. The creation of a structure for the easy and rapid enforcement of claims might encourage opportunistic debt collection practices; creditors may count on the passivity of consumers and take their chances with claims that are potentially based on unfair terms or otherwise unfounded. These cases also demonstrate that the CJEU’s case law inevitably gives rise to more questions, especially because it is not an easy task to transpose a judgment pertaining to e.g. Spanish or Polish law to other jurisdictions.⁶² The effectiveness test further enhances the complexity of the assessment, making it all but unsurprising that national courts demand guidance.

3.3. *Procedural Protection and Substantive Remedies: From Radlinger to Bankia*

31. As we have seen in the previous section, *ex officio* control is only part of the equation; the abstract possibility of such control is of little help to the consumer e.g. when access to the competent court is restricted by excessive court fees. Furthermore, in the case of non-declaratory proceedings, the limitation may be not in the active role of the court but in the outright possibility to consider the merits of the case. This was the case in all the procedures discussed in the previous paragraph: even though national courts were phrasing their questions in terms of their duties to act *ex officio*, the applicable national rules also would have prevented them from acting at the consumer’s request. Every time that courts are required to apply consumer protection rules *ex officio*, they must a fortiori be also capable of considering express submissions of consumers based on the same provisions. What consumer rights must be protected in all procedural constellations and how much weight is attached to them in balancing effective consumer protection with other interests,⁶³ is a matter of contention – and one on which the CJEU itself appears to be divided. Different outcomes on this issue have rather serious consequences on the level of protection afforded to consumer rights.

3.3.1. *Radlinger v. Bankia: No Individual Remedy, No ex officio?*

32. In *Radlinger*,⁶⁴ the CJEU had to decide, among other things, whether national courts are required to examine of their own motion whether the

62 See e.g. P. KALAMEES & K. SEIN, ‘Case Law of the Court of Justice of European Union on Unfair Contract Terms Directive: Implications on Estonian Domestic Law’, 3. *International Comparative Jurisprudence*, p 115.

63 Such as, according to *Asturcom* (para. 39), ‘the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure’.

64 CJEU 21 April 2016 Case C-377/14 *Radlinger v. Finway* ECLI:EU:C:2016:283.

information requirements established by Consumer Credit Directive (Directive 2008/48 or CCD)⁶⁵ have been complied with. The question was raised in the context of insolvency proceedings, which in principle required the court to only consider objections based on a limited number of grounds – existence of unfair terms and compliance with information obligations not included. After having clarified that the duty of *ex officio* control of unfair terms also applied in the context of insolvency procedures, the CJEU answered the question concerning *ex officio* scrutiny of compliance with information obligations as well.

33. In this context, the Court considered that it had ‘recalled on a number of occasions the obligation of national courts to examine of their own motion infringements of *EU consumer protection legislation*’, in particular with reference to contracts negotiated away from business premises and to the Consumer Sales Directive.⁶⁶ This requirement is justified by a number of concerns relating to the consumer’s weak position vis à vis the trader and the risk that, in particular but not only due to lack of information, the consumer may not exercise their rights.⁶⁷

34. Against this background, ‘effective consumer protection [can] be achieved only if the national court [is] required, of its own motion, to examine compliance with the requirements which flow from EU law on consumer law’.⁶⁸ In the specific context of the CCD, the results pursued by the Directive, in particular through its provisions on information requirements, require examination by a national court of its own motion.⁶⁹ The CJEU stresses how the Directive requires the Member States to lay down ‘dissuasive’ penalties for infringement of national implementing provisions. *Ex officio*, in turn, is reconnected to this requirement: according to the CJEU, *[t]here can be no doubt that examination by the national courts of compliance with the requirements flowing from th[e] directive is dissuasive*. Given the broad reference to the ‘requirements which flow from EU law on consumer law’, *Radlinger* seemed to confirm an expansive tendency of *ex officio* requirements – from its ‘core’ in the UCTD to a growing number of other instruments.⁷⁰ This trend seems to have come to a halt, somewhat unexpectedly, with the 2018 *Bankia* decision.

65 Directive 2008/38/EC on credit agreements for consumers, OJ L 33/66.

66 *Radlinger*, para. 62.

67 *Radlinger*, para. 63.

68 *Radlinger*, para. 66.

69 *Radlinger*, para. 68.

70 Micklitz went so far as to say of *ex officio* that ‘at least in the area of consumer law it seems fair to speak of a comprehensive encompassing procedural remedy’: H.W. MICKLITZ, ‘Mohamed Aziz – Sympathetic and Activist, but Did the Court Get It Wrong?’, in A. Sodersten & J.H.H. Weiler, *When the ECJ Gets It Wrong* (European Constitutional Law Network 2013), p 5, <http://www.ecln.net/florence-2013.html>.

35. In *Bankia*,⁷¹ the Court was asked to decide on whether the UCPD could also require *ex officio* action on the side of court invested with consumer disputes. As a result of the *Aziz* case,⁷² the relevant Spanish legislation had been amended to allow consumers to oppose mortgage enforcement on the basis of unfair terms and requiring courts to perform *ex officio* control of (only) unfair terms *ex ante*. In this case, however, the consumers claimed that the bank had abused of a contract novation procedure by lowering the conventional value of their house. In this way, when they later defaulted on due payments, the consumers were in a considerably worse position than they would have been before the novation. In opposing the enforcement, the consumers claimed that the bank had engaged in unfair commercial practices. This, however, was not something that the competent court could consider in the course of the enforcement proceedings. Hence the preliminary reference procedure, asking whether the restriction on the CJEU's competences was compatible with the UCPD.

36. In this case, however, the CJEU did not reach the same conclusion that it reached in *Aziz*. The main justification for this conclusion lay in the different approaches adopted by the UCTD and the UCPD. The UCTD prescribes that unfair terms are not binding on consumers and thus includes a remedy - the terms' inopposability to consumers. By contrast, the UCPD 'merely requires Member States to ensure that adequate and effective means exist to combat unfair commercial practices'. This need not imply the enactment of individual remedies for consumers, as the goal of putting an end to such practices can be pursued by means of '*legal action against such practices or administrative proceedings with the possibility of legal review*'. Besides, Article 13 UCPD leaves it to Member States to '*lay down suitable penalties as regards traders using unfair commercial practices*'.⁷³

37. This difference is crucial, according to the CJEU, because it allows to distinguish the case from the famous *Aziz* precedent where unfair terms control performed *ex post* would not be enough to meet the CJEU's effectiveness test. A decision on the merits by a different court in separate proceedings, on the possible unfairness of certain contract terms - which could possibly invalidate the very terms the enforcement was based on - could never achieve full effectiveness when the contract had meanwhile already been enforced.

3.3.2. *From ex officio to a Chance for Any Form of Judicial Review*

38. The UCPD, unlike the UCTD, does not include a substantive provision on the consequences of unfair commercial practices for private legal relationships; in

71 CJEU 19 September 2018 Case C-109/17 *Bankia v. Mari Mereno* ECLI:EU:C:2018:735.

72 CJEU 14 March 2013 Case C-415/11 *Aziz v. CatalunyaCaixa* ECLI:EU:C:2013:164.

73 See *Bankia*, para. 42.

particular, it does not affect the validity of a contract and/or an enforceable instrument that may be the result of unfair commercial practices. The establishment of any consequences in this domain is left to the Member States,⁷⁴ which have chosen widely different paths. Thus, whether the relevant Member States has decided, e.g. that the deployment of unfair commercial practices in individual consumer relations gives rise to a claim in damages or to a contract's invalidity has no bearing on the effectiveness of the Directive – nor does, as a consequence, securing the effective application of the one or the other remedy.

39. The reasoning, if very crude from the perspective of consumers who face eviction and a large outstanding debt in tight connection with dubious creditor behaviour, is not illogic. Given that the Directive expressly excluded⁷⁵ any impact on national contract law, giving effect to it in individual relations is not something the CJEU can light-heartedly pursue at the expense of the Member States' discretion. The distinction between the UCPD and the UCTD, in other words, does not seem to come out of thin air. However, the argument in *Bankia* is rather difficult to square with *Radlinger* – which was based on a directive, the Consumer Credit Directive, bearing more resemblance to the UCPD than to the UCTD.

40. On the one hand, much like the UCPD, the information rules in the CCD do not seek to harmonize national contract laws. On the contrary, Article 10(1) CCD expressly states that it is '*without prejudice to any national rules regarding the validity of the conclusion of credit agreements which are in conformity with Community law*'. It is true that the CCD also contains a number of rules with a direct impact on contract law – such as the mandatory right to early repayment of the outstanding debt – but these rules were not at stake in *Radlinger*.

41. The Court in that case uses the wording of Article 23 CCD – according to which the MS '*shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.*' This formulation is essentially overlapping with the text of Article 13 UCPD.⁷⁶ The further reference, in Article 11

74 In the words of the CJEU (para. 31), the UCPD '*restricts itself to providing, in Article 5(1) thereof, that unfair commercial practices "shall be prohibited" and that, accordingly, it leaves the Member States a margin of discretion as to the choice of national measures intended, in accordance with Articles 11 and 13 of that directive, to combat those practices, on condition that they are adequate and effective and that the penalties thus laid down are effective, proportionate and dissuasive (see, to that effect, judgment of 16 April 2015, UPC Magyarország, C 388/13, EU:C:2015:225, paragraphs 56 and 57 and the case-law cited).*'

75 See Directive 2005/29, recital 9.

76 Which reads: '*Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.*'

UCPD, to the need for Member States to ensure ‘*that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers*’, does not seem to take away from the provision on penalties – rather, it provides for *more* interference with MS autonomy since it dictates a number of implementation requirements. However, while in *Radlinger* the CCD penalties provision is used in an affirmative manner – Member States must ensure that there are effective, proportionate and dissuasive penalties in place – in *Bankia* the twin UCPD provision is used⁷⁷ in a restrictive manner: Member States are *merely* required to secure appropriate penalties, with EU law not having much to say about them.

42. There is, it seems, not much in the CCD that justifies the difference: to the extent that the Directive establishes a clearer connection with contract law effects, it is remarkable to observe that Article 22, establishing a number of requirements meant to embed the protection offered to consumers by the CCD, conspicuously makes no reference to the information obligations.⁷⁸ To the extent that the absence of an express remedy for violations of the UCPD may lead to the conclusion that the Directive establishes duties for professionals with no corresponding consumer rights to speak of, the argument, again, would be replicable with reference to the information requirements established by the CCD’s Article 10, which *Radlinger* however brought within the area of *ex officio* protection.

43. In conclusion, the developments surveyed testify to a shift from the CJEU’s original focus on securing *ex officio* in itself to guaranteeing that there is a meaningful chance for any form of judicial review to take place (including: at the consumer’s request); this assessment requires a look at the combined effect of different procedures, possibly different steps in each procedure, at a complex number of rules ranging from court fees to limitation periods to interim measures and other court powers. This seems all but guaranteed to raise more questions as the principles established by the CJEU need to be implemented with reference to different procedures or different Member States. In this way, the first case-study suggests, the UCTD risks never becoming *acte clair* with regard to procedural arrangements, while consumers (and, to an extent, traders) are exposed to uncertainty and substantive difficulties.

44. The fear that a similarly complicated development may get underway in the field of the UCPD could be the reason which has moved the Court in *Bankia* to refuse that Directive the same infiltrating power that has been

77 By a different chamber – while *Radlinger* was decided by the Third Chamber, *Bankia* was brought before the Fifth. Most of the cases (e.g. *Rampion*, *Faber*) expanding procedural protections beyond the UCPD were, in contrast, decided by the First Chamber.

78 The provision’s ss 2-4 all aim to secure that the rights conferred on consumers cannot be waived or circumvented by drafting or choice of law.

attributed to the UCTD – but also, somewhat more surprisingly, to the CCD. While the move can thus be understood, the differentiation between the level of protection offered to consumers who are victims of a breach of the UCTD respectively the UCPD seems rather arbitrary – especially when one thinks that the latter, unlike the former, is a maximum harmonization directive. One may well maintain, however, that the asymmetry must be solved not by the CJEU but by the (European) legislator.

4. Consumer Civil Procedure in Search of an Author

45. It may seem unfair to criticize the New Deal for not doing something which it did not endeavour to do in the first place. However, the proposals *were* presented as aiming to secure the effectiveness of consumer rights – thus, calling them out for neglecting an important aspect of what threatens such effectiveness (notwithstanding the relevant input offered by at least two elaborate studies) is not inappropriate. Furthermore, given the fact that the Collective Redress proposal has rather poor chances of being approved as it is, an appeal to the next Commission – that they spread their fiches more evenly rather than betting all on collective enforcement – seems perfectly timely.

46. By requiring Member States to establish individual remedies for violations of the rules implementing the Unfair Commercial Practices Directive, the Modernization proposal takes one step towards closing the protection gap laid bare by *Bankia*.⁷⁹ The two remedies expressly mentioned in the Directive, however – namely, termination and damages – do not seem particularly suitable to make a difference in *Bankia*-like cases, since none of them would unequivocally have justified procedural protection against enforcement of a claim based on questionable premises. Under the current CJEU standards, only a contract-preserving remedy closer to the spirit of Article 6 UCTD would have the potential of offering consumers a defence within the pending procedures rather than requiring them to seek justice elsewhere. Alternatively, the same result may be achieved by setting clear rules as to when different consumer rights need or need not be considered by courts – whether *ex officio* or at the consumer's request. The dependence on 'right' remedies in order to provide procedural protection, in other words, is not a logical necessity – but it cannot be overcome without intervening directly on procedural rules.

47. Common to all cases under review is the tension between securing justiciability of consumer claims and various forms of accelerated proceedings. In *Bankia*, the court could only consider substantive questions concerning the presence of

79 In this respect, see also the Commission's observation in that case, highlighting how adopting a restrictive reading such as the one that the CJEU eventually opted for seriously undermined the achievement of a high level of consumer protection against unfair commercial practices.

unfair terms; in *Profi Credit Polska* and *PKO*, all controls concerning the foundations of the claim were excluded, enforcement being in principle granted on the basis of guarantee documents.

48. The CJEU has held that the detailed characteristics of court proceedings cannot constitute a factor liable to affect the legal protection of consumers,⁸⁰ but those characteristics are essential for the enforcement and protection of consumer rights at the national level. The case-study on order-for-payment procedures before the CJEU highlights a number of aspects of (not only those) procedures that appear sensitive in consumer cases, in particular:

- (1) time-limits,⁸¹
- (2) costs,⁸²
- (3) the information that must be provided by the creditor as proof of the claim, and
- (4) the stage of the proceedings where judicial control takes place (i.e. preferably before the trader obtains an enforceable title against the consumer).
To this one could add
- (5) the possibility of appeal against a failure to exercise *ex officio* control in first instance,⁸³
- (6) the information that is provided to consumers as to their legal options,⁸⁴
- (7) procedural rules requiring consumers to specify the legal or economic details of their claims, effectively rolling back *ex officio* protection.

49. Additionally, as mentioned above, the *Bankia* case suggests that the remedies provision in the Modernization directive may not be enough to secure the justiciability of rights granted to consumers in the field of unfair commercial practices. A directive on consumer protection in civil proceedings would need to indicate clearly whether or not all consumer rights are suitable for *ex officio* justiciability and, more

80 See e.g. CJEU 10 September 2014 Case C-34/13 *Kušionová v. SMART Capital* ECLI:EU:C:2014:2189, para. 53, with reference to *Banesto*, para. 55 and *Aziz*, para. 62.

81 The case law seems to be inconsistent as to what are acceptable time-limits. Della Negra has rightfully observed that – given what is at stake in *Kušionová*: the loss of a family home – a 30-day time-limit to oppose mortgage enforcement *ex ante* is not so much longer than the 20-day time-limit in *Banesto*: F. DELLA NEGRA, ‘The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kušionová’, 52. *Common Market Law Review* 2015, pp 1009, 1024.

82 See e.g. *Profi Credit Polska*, paras 63–64.

83 In the Max Planck study, it is proposed that Member States should provide in their procedural codes or laws that a court’s failure to apply EU consumer law *ex officio* entails the right to appeal (p 31).

84 See e.g. CJEU 1 October 2015 C-32/14 *ERSTE Bank v. Sugár* ECLI:EU:C:2015:637.

generally (rather than, as it not appears to be the case, by implication) whether and to what extent they must be considered across the board of national procedures.

50. Procedural minimum standards for consumer litigation could contribute to legal certainty, without entering into the difficult question of maximum harmonization or unification of national civil procedure.⁸⁵ The argument that a legal basis in EU primary law is lacking⁸⁶ can be countered by the argument that remedies and procedures constitute the corollary to consumers' rights under EU consumer law.⁸⁷ A case gets a European dimension once it falls within the scope of EU (consumer) law; it does not need to be a cross-border dispute. For litigating parties, a distinction between cross-border and domestic disputes makes no sense; such distinction is not based on any logic inherent in subject-matter.⁸⁸ From the perspective of (consumer-)defendants it arguably does not make much difference if a claim is brought against them by a domestic or a foreign creditor. Thus, it is hard to explain why for cross-border litigation EU minimum standards apply to guarantee the rights of the defence,⁸⁹ whereas no (clear) standards have been laid down for domestic litigation. While this may not be resolute in terms of establishing competence under Article 81 TFEU, it seems sufficient to attract the issue to the area of Article 114 TFEU. If Article 114 could serve as legal basis for the Collective Redress proposal, 'in light of several mass harm situations where European consumers were unable to receive redress' in the absence of collective redress instruments,⁹⁰ it does not seem far-fetched to claim that the establishment of minimum standards on a restricted number of aspects important to preventing access to justice for consumers from being hollowed out could also be based on the same provision. For consumers exposed to procedural hurdles making their rights invisible and ultimately, devoid of justiciability - any real new deal will require more comprehensive, less tunnel-visioned European intervention. A nice procedural challenge for the coming legislative term.

85 Cf. A. ONTANU, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures* (Intersentia 2017), p 6.

86 V. TRSTENJAK, 'Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU', *European Review of Private Law* 2013, pp 451, 453.

87 V. TRSTENJAK & E. BEYSEN, 'European Consumer Protection Law: Curia Semper Dabit Remedium?', 48. *Common Market Law Review* 2011, pp 95, 110.

88 G. WAGNER, 'Harmonisation of Civil Procedure: Policy Perspectives', in X.E. Kramer & C.H. Van Rhee (eds), *Civil Litigation in a Globalising World* (Springer/TMC Asser Press 2012), p 98.

89 See e.g. Regulation 805/2004 creating a European Enforcement Order, specifically designed for the accelerated and simplified cross-border enforcement of uncontested pecuniary claims; in particular preamble sub (12).

90 According to the proposal (section 3), several examples of such harm were produced in order to respond to an initial negative assessment by the regulatory scrutiny board, next to information 'about the number of Member State authorities (21) that supported the addition of mechanisms for redress to the Injunctions Directive'. None of these arguments seem to establish a more direct connection to the internal market than our proposal would be able to claim.

