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# Consumer Decision-Making Autonomy in the Digital Environment: Towards a New Understanding of National Courts' Obligation to Assess *Ex Officio* Violations of Fair Commercial Practices

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## Abstract

Digitalisation has changed traders' possibilities of influencing the autonomy of consumer choice in the digital environment. The digital market of the European Union involves a wide spectrum of commercial practices – such as dark and addictive patterns, target advertising and personalisation – that nudge consumers to take decisions that are not in their favour. One of the main aims of the Unfair Commercial Practices Directive 2005 is to protect the freedom of consumer decision-making. However, currently, the Directive's capacity to safeguard consumer choice in the digital environment is not sufficiently effective. Through the lens of law prohibiting unfair commercial practices, this article analyses the means available to consumer courts to strengthen consumer decision-making autonomy in the digital environment. The article argues that regulation of prohibition of unfair commercial practices regarding the digital environment should be modernised by obliging – in certain circumstances – national courts *ex officio* to assess violations of fair commercial practices and by reversing the burden of argumentation and proof.

**Keywords:** Consumer decision-making autonomy; digital environment; *ex officio* doctrine

## I. Unfair commercial practices in the digital age: fit for purpose?

### I. Stating the problem and clarifying the focus

With the digitisation of consumer markets, consumers as well as traders increasingly rely on algorithmic profiling, automated decision-making and predictive analytics. In addition, the COVID-19 crisis has intensified the shift of consumer social, learning and work activities into the online environment. These circumstances have enabled traders to develop a wide spectrum of unfair commercial practices such as dark patterns, targeted advertising, manipulative personalisation and other personalised persuasion practices, which are based on consumer data and aim to reduce the autonomy of consumer choice in a digital environment in favour of traders' economic interests. These practices exploit consumers' digital vulnerability and the asymmetry of digital power between the parties. Therefore, at this moment consumer decision-making autonomy in the digital environment is in more danger than consumer decision-making autonomy offline.

One of the main aims of the Unfair Commercial Practices Directive 2005 (UCPD)<sup>1</sup> is to protect the freedom of consumer decision-making.<sup>2</sup> As a result, the UCPD plays an important role in providing for the fairness of this practice and safeguarding consumer decision-making autonomy. However, the UCPD was created under the conditions of the classic market. This means that the peculiarities of the digital environment and the risks it creates for consumer decision-making autonomy were not considered in the process of drafting the law. Regrettably, despite the fact that the UCPD was a key piece of the Omnibus Directive,<sup>3</sup> the UCPD was not substantively updated. For example, with the Omnibus Directive consumers have a right to compensation, contract termination and other remedies if they suffer from unfair commercial practices (the Omnibus Directive also fixed new unfair practices regarding the digital environment, which are included in the UCPD), but there are no effective tools for consumers to ensure these new rights in practice because for the average consumer it is too complicated to prove an unfair commercial practice as fact, especially unfair algorithmic practices and other unfair digital practices.

In 2021, the European Commission (EC) revised its guidance on the interpretation and application of the UCPD so that it applies to practices that use tracking and targeting technologies, algorithmic personalisation, dynamic optimisation and distributed ledger technologies. Thus, the guidelines try to ensure the stronger protection of consumer choice in the digital market. However, follow-up EC activities confirm that soft law is not strong enough to resolve the problems mentioned above. Therefore, with the call for a Fitness Check of the European Union (EU) consumer law on digital fairness in the first quarter of 2022, the EC has begun to analyse whether the UCPD remains adequate for ensuring a high level of consumer protection in the digital environment. In addition, legal scholars criticise the effectiveness of the UCPD regarding the digital reality and argue for the necessity to update the regulation of the prohibition of unfair commercial practices by, for example, adding new unfair practices to the UCPD black list<sup>4</sup> and changing the understanding of such legal concepts as “the average consumer”, “consumer vulnerability” and “power asymmetry between traders and consumers” regarding the digital market.<sup>5</sup> Moreover, activities of the International Consumer Protection and Enforcement Network (ICPEN), the Consumer Protection Cooperation Network (CPCN) and EU national authorities confirm the existence of essential problems that are caused by unfair practices in the digital environment and ineffective regulation for combatting those practices; for example, in 2023, the ICPEN and the CPCN started “sweep” investigations on dark patterns

<sup>1</sup> Directive 2005/29/EC concerning unfair business-to-consumer commercial practices (2005) OJ L 149/22.

<sup>2</sup> N Reich, H-W Micklitz, P Rott and K Tonner, *European Consumer Law* (first published 2009, Cambridge, Intersentia 2014) pp 77–78.

<sup>3</sup> 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 modernisation of Union consumer protection rules (2019) OJ L 328/7.

<sup>4</sup> BEUC, “EU consumer protection 2.0. Protecting fairness and consumer choice in digital economy” report (2022) <[https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-015\\_protecting\\_fairness\\_and\\_consumer\\_choice\\_in\\_a\\_digital\\_economy.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-015_protecting_fairness_and_consumer_choice_in_a_digital_economy.pdf)> (last accessed 27 June 2023); Z Davida, “Patērētāju tiesību aizsardzības izaicinājumi digitalizācijas laikmetā: tehnoloģiskais totalitārisms/Challenges for consumer protection in the digital age: technological totalitarianism” in *Collection of Research Papers of the 78th International Scientific Conference of the University of Latvia* (Riga, University of Latvia Press 2020) pp 295–302.

<sup>5</sup> M Jagielska, M Namysłowska and A Wiewiórowska-Domagalska, “The changing nature of the consumer in the digital reality” in D Szostek and M Załucki (eds), *Internet and New Technologies Law* (Baden-Baden, Nomos 2021) pp 43–57; N Helberger, O Lynskey, H-W Micklitz, P Rott, M Sax and J Strycharz, “EU consumer protection 2.0. Structural asymmetries in digital consumer markets” (2021) <[https://pure.uva.nl/ws/files/62051712/beuc\\_x\\_2021\\_018\\_eu\\_consumer\\_protection.0\\_0.pdf](https://pure.uva.nl/ws/files/62051712/beuc_x_2021_018_eu_consumer_protection.0_0.pdf)> (last accessed 27 June 2023); G Howells, C Twigg-Flesner and T Wilhelmsson, *Rethinking EU Consumer Law* (London, Routledge 2018).

in online marketplaces, which have been joined by many of the authorities of EU Member States. In short, the signs confirm that the EU's unfair commercial practices prohibition law needs an upgrade.

The author of this article supports proposals by legal scholars and the European Consumer Organisation (BEUC):

- (1) To supplement the UCPD black list with new unfair practices regarding the digital market;
- (2) To add the concepts of “digital vulnerability” and “digital asymmetry”;
- (3) To change the understanding of the “average” and “vulnerable” consumer; and
- (4) To introduce a new rule alleviating the burden of proof for claimants and enforcement authorities.

Implementation of the listed proposals would improve the overall legal framework for the prohibition of unfair commercial practices in the digital environment. However, they will not provide effective protection from unfair commercial practices in the digital environment to individual consumers in private litigation, because consumers usually do not know or understand that a digital asymmetry or digital vulnerability has been exploited against them. Thus, with the implementation of these proposals alone the UCPD will not reach its aim – namely, to ensure a high level of consumer protection – and it will not ensure consumer decision-making autonomy in the digital economy for all consumers because, individually, in court litigation consumers will remain weak and in practice defenceless against digital traders, digital platforms and other digital business players. In this context, some problems will be resolved by the new Directive on representative actions for the protection of the collective interests of consumers.<sup>6</sup> However, these will only be available in certain cases (eg when a certain number of consumers will be reached or a certain amount of harm will be caused to consumers), which will not be enough to ensure consumer decision-making autonomy in the digital economy for all consumers. In 2018, the EC, promoting a consumer-orientated course, highlighted the need to strengthen the protection of consumer rights in the digital environment. This was followed by many different legislative proposals and regulatory innovations, such as the Artificial Intelligence Act,<sup>7</sup> the Digital Markets Act,<sup>8</sup> the Digital Services Act,<sup>9</sup> the Omnibus Directive,<sup>10</sup> Directive 2019/770<sup>11</sup> and Directive 2019/771.<sup>12</sup> In these activities, fragmentary

<sup>6</sup> Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (2020) OJ L 409/1.

<sup>7</sup> Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts. COM (2021) 206 final.

<sup>8</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (2022) OJ L 265/1.

<sup>9</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (2022) OJ L 277/1.

<sup>10</sup> 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 modernisation of Union consumer protection rules (2019) OJ L 328/7.

<sup>11</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (2019) OJ L 136/1.

<sup>12</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (2019) OJ L 136/28.

regulatory solutions are found to the problems of consumer rights protection in the digital environment. However, insufficient attention has been paid to studies of the risks to consumer decision-making autonomy in the digital environment, and there is no analysis of active consumer courts and their possibility of strengthening consumer decision-making autonomy. Therefore, the activities of EU institutions are not directly aimed at protecting consumer decision-making autonomy from unfair commercial practices in the digital environment.

## 2. Possible solutions

It is important to note that this article's scope will not focus on the increased vulnerability of consumers in the digital economy because many studies and much scholarly literature have already confirmed the existence of consumer digital vulnerability and digital asymmetry.<sup>13</sup> Thus, the article considers how to reduce the unfair use of digital vulnerability and digital asymmetry against individual consumers and argues in favour of a need for a modern solution that will not impose an additional load on the authorities, as their capacity and aim (in most EU Member States) do not allow them to provide protection to individual consumers in specific cases. Namely, most EU Member State authorities would start the process of assessing unfair commercial practices against consumer decision-making autonomy only if a violation of the collective interests of consumers was found. Such an approach is allowed by the UCPD; therefore, the Member States, saving the authorities' resources, choose such a model of consumer protection. As a result, the national court is the best prepared and is most suitable for individual dispute resolution in the EU. Moreover, the *ex officio* doctrine has proven its effectiveness in individual consumer cases regarding unfair contract terms; therefore, it is useful to evaluate the potential it provides in the protection of consumer decision-making autonomy in the digital environment as well.

In light of the foregoing, this article aims to analyse, through the lens of the law prohibiting unfair commercial practices, the means available to national courts, through the application of the *ex officio* doctrine, to strengthen consumer decision-making autonomy in the digital environment from the unfair use of digital vulnerability and digital asymmetry. The article will begin with a succinct overview of the role of the *ex officio* doctrine in EU consumer law. Then follows a discussion of the interaction of the *ex officio* doctrine separately with three areas of EU consumer law: unfair contract terms (Section II.1), consumer sales (Section II.2) and unfair commercial practices (Section II.3). Particular attention will be given to the *ex officio* doctrine as part of the active consumer court doctrine. The idea of an active consumer court is based on the argument that a fair digital marketplace is not only a private law issue in each individual case of legal proceedings but also covers public interests and consumer law policy. The article argues that, in digital markets, the protection of each consumer is important, and therefore regulation that protects the autonomy of consumer choice should also be transparent and effective in private consumer litigation. This is particularly contrasted with a consumer's legal obligation to prove unfair commercial practices, which is used against consumers in the digital environment. In cases of major digital asymmetries (eg algorithms that consumers cannot understand) this is a practically impossible requirement to meet unless

<sup>13</sup> Competition and Markets Authority, "Online Choice Architecture. How digital design can harm competition and consumers" (2022) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1066524/Online\\_choice\\_architecture\\_discussion\\_paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1066524/Online_choice_architecture_discussion_paper.pdf)> (last accessed 27 June 2023); Forbrukerrådet, "You can log out, but you can never leave. How Amazon manipulates consumers to keep them subscribed to Amazon Prime" (2021) <<https://fil.forbrukerradet.no/wp-content/uploads/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf>> (last accessed 27 June 2023).

the trader helps the consumer and comes forward with evidence of details of the practice employed or where the national authority has already proved the unfairness of a particular practice. At the same time, national courts are not active in helping consumers in cases of digital asymmetries, where it is possible to see reasonable suspicion of an infringement, because of a lack of clear EU consumer protection regulation and because of legal problems caused by the current system of the burden of proof. Subsequently, the article will demonstrate why an active consumer court is vital to ensuring consumer decision-making autonomy in digital markets and, finally, why in this context it is necessary to reverse the burden of argumentation and proof in the UCPD. The assessment of real, practical legal problems can be well illustrated by the example of Latvia as an EU Member State that has one of the stronger adversarial principle application traditions in the EU, and by the example of Ukraine as a European country outside the EU that has adopted the latest European standards of justice in its new civil procedure and therefore can reflect how EU law looks from the outside.

## II. The *ex officio* doctrine as an integral element of European Union consumer law

Most European countries' consumer private litigation is traditionally based on the procedural autonomy of the parties (eg the Netherlands, France,<sup>14</sup> Germany,<sup>15</sup> Sweden,<sup>16</sup> Norway,<sup>17</sup> Latvia<sup>18</sup> and others). It includes the adversarial principle and the principle of party disposition, both of which play the main roles in civil proceedings. The adversarial principle requires courts not to use in their decisions, facts or rules of law that are not discussed during the proceedings and that affect the proceedings in a way that a careful litigant could not have foreseen.<sup>19</sup> Thus, in the European legal system, civil proceedings are mainly based on a passive court role. However, over recent decades there has been a shift towards a more active approach by the courts, where courts do not infringe upon the right of the parties to define the subject matter of the dispute but do require additional documents, enquire why the parties do not refer to certain factual elements in the case file and ask questions as to the legal basis of the claim.<sup>20</sup> The EU has been exceptionally active in the consumer protection field<sup>21</sup>; as a result, EU consumer law is one of the most developed areas of EU law.<sup>22</sup> Consequently, it is not surprising that consumer law is one of the leading fields of law where courts have started using an active approach based on the case law of the Court of Justice of the European Union (CJEU), as well as in private litigation.

<sup>14</sup> A Ancery, "Consumer credit contracts and *ex officio* application: a Dutch perspective" (2021) 10(4) *Journal of European Consumer and Market Law* 160–64.

<sup>15</sup> I Bach, "The role of the judge in consumer cases – a German perspective" in A Nylund and M Strandberg (eds), *Civil Procedure and Harmonisation of Law. The Dynamics of EU and International Treaties* (Cambridge, Intersentia 2019) pp 141–51.

<sup>16</sup> A Torbjörn, "Ex Officio Application of the Unfair Terms Directive Cases against Consumers: A Swedish Perspective" in A Nylund and M Strandberg (eds), *Civil Procedure and Harmonisation of Law. The Dynamics of EU and International Treaties* (Cambridge, Intersentia 2019) pp 153–70.

<sup>17</sup> H Fredriksen and M Strandberg, "Ex Officio Application of EU Consumer Protection Law in Norwegian Courts" in A Nylund and M Strandberg (eds), *Civil Procedure and Harmonisation of Law. The Dynamics of EU and International Treaties* (Cambridge, Intersentia 2019) pp 171–91.

<sup>18</sup> Z Davida, "Saciġstes princips un patērētājs/Adversarial principle and consumer" in *Collection of Research Papers of the 77th International Scientific Conference of the University of Latvia* (Riga, University of Latvia Press, 2019) pp 265–73.

<sup>19</sup> *Čepek v Czech Republic* App no 9815/10 (ECHR, 2013).

<sup>20</sup> Ancery, *supra*, note 14, 163.

<sup>21</sup> Howells et al, *supra*, note 5, 1.

<sup>22</sup> BEUC, *supra*, note 4.

The *ex officio* doctrine is part of the active consumer court doctrine. The *ex officio* doctrine regarding consumer law is understood as an obligation on the part of national and local courts, by their own motion (*ex officio*), to assess violations of consumer rights. Over recent decades, doctrine in CJEU case law has been highlighted in many areas of EU consumer law – this started in 2000 with the *Oceano* case<sup>23</sup> on unfair contract terms (see Section II.1). Other areas of consumer law followed: consumer credit (eg *Rampion and Godard*, 2007),<sup>24</sup> doorstep selling (eg *Martín Martín*, 2009),<sup>25</sup> consumer sales (see Section II.2) and unfair commercial practices (see Section II.3). Despite the effect of the *ex officio* doctrine on restricting the adversarial principle in consumer litigation, it cannot be denied that the status of the *ex officio* doctrine as an integral element of EU consumer law is still uncertain. Thus, it complicates the work of national courts, because in all areas of consumer protection – particularly in the field of unfair commercial practices – it is not clear whether the doctrine should be applied and, if so, then the extent to which it should be applied. Therefore, the following sections discuss the interaction of the doctrine separately with three areas of EU consumer law: unfair contract terms, consumer sales and unfair commercial practices. These areas have been chosen for three reasons:

- (1) They play an important role in the EU consumer acquis.
- (2) They highlight degrees of doctrinal development that are currently different in each Member State.
- (3) Their sequential analysis reveals the role of the doctrine in effectively protecting the autonomy of consumer decision-making in the digital environment.

### 1. Unfair contract terms and the *ex officio* doctrine

Even though the Unfair Contract Terms Directive 1993 (UCTD)<sup>26</sup> does not provide a specific and unambiguous indication that national courts are obliged, of their own motion, to evaluate the fairness of the terms of consumer contracts, nevertheless the *ex officio* doctrine has evolved in the context of this Directive. That is, the development of the doctrine is a result of the CJEU's interpretation of the UCTD. Therefore, today the Member States' courts are required to check the fairness of contract terms even if the consumer, as a contractual party, has not raised the issue of fairness of the contract terms. Eventually, if a contract term turns out to be unfair, the national courts are obliged to impose all of the legal consequences established by national law for the unfairness of contract terms – for instance, that such a term is void.<sup>27</sup>

*Oceano* was the first case in which the CJEU stated that a national court could decide, of its own motion, that a term in a consumer contract is unfair and refuse to apply it.<sup>28</sup> Many other cases followed, such as *Cofidis*,<sup>29</sup> *Mostaza Claro*,<sup>30</sup> *Pannon*,<sup>31</sup> *Asturcom Telecomunicaciones*,<sup>32</sup> *Invitel*<sup>33</sup> and *Tomášová*.<sup>34</sup>

<sup>23</sup> Case C-240/98 to 244/98 *Oceano* ECLI:EU:C:2000:346.

<sup>24</sup> Case C-429/05 *Rampion and Godard* ECLI:EU:C:2007:575.

<sup>25</sup> Case C-227/08 *Martín Martín* ECLI:EU:C:2009:792.

<sup>26</sup> Directive (EU) 93/13/EEC on unfair terms in consumer contracts (1993) OJ L 95/29.

<sup>27</sup> M Durovic, "Private Law Consequences of Unfair Commercial Practices" in L de Almeida, M Cantero Gamito, M Durovic and KP Purnhagen (eds), *The Transformation of Economic Law. Essays in Honour of Hans-W Micklitz* (Oxford, Hart Publishing 2021) p 31.

<sup>28</sup> Case C-240/98 to 244/98 *Oceano* ECLI:EU:C:2000:346.

<sup>29</sup> Case C-473/00 *Cofidis* ECLI:EU:C:2002:705.

<sup>30</sup> Case C-168/05 *Mostaza Claro* ECLI:EU:C:2006:675.

<sup>31</sup> Case C-243/08 *Pannon* ECLI:EU:C:2009:350.

<sup>32</sup> Case C-40/08 *Asturcom Telecomunicaciones* ECLI:EU:C:2009:615.

<sup>33</sup> Case C-472/10 *Invitel* ECLI:EU:C:2012:242.

<sup>34</sup> Case C-168/15 *Tomášová* ECLI:EU:C:2016:602.

In *Cofidis*, the CJEU claimed that national courts should assess, without the motion of consumers, whether a term is unfair because the consumer is unaware of their rights or because they are deterred from enforcing those rights on account of the costs that judicial proceedings would involve.<sup>35</sup> Furthermore, in *Mostaza Claro*, the CJEU stated the obligation of the national courts to assess whether a contractual term (ie the subject of a dispute) falls within the scope of the UCTD. This was legitimated because of the public interest that the regime set by the Directive is designed to protect. The CJEU maintained that the purpose of the UCTD is to strengthen consumer protection and, in particular, to raise the standard of living and the quality of life in its territory.<sup>36</sup> In *Pannon*, the CJEU claimed that if a national court has all the factual and legal information available to it to assess the unfairness of a term, it is required to do so in its own motion.<sup>37</sup> In this case, as well as in *Cofidis*<sup>38</sup> and *Mostaza Claro*,<sup>39</sup> the CJEU highlighted a national court's obligation to act on its own motion, contrary to *Oceano*.<sup>40</sup> With that, the case law strengthened the court's obligation (not just willingness, as stated in *Oceano*) to act on its own motion. In addition, in *Tomášová*, the CJEU confirmed that an action for state liability is available against the final court of appeal in national jurisdiction for an infringement of EU Law.<sup>41</sup> Therefore, *Tomášová* is an important warning call to national courts to take seriously their obligation under the *ex officio* principle.<sup>42</sup>

To sum up so far, the obligation (not just willingness) of the national courts to assess *ex officio* whether a contractual term – and the subject of a dispute – falls within the scope of the UCTD and, if so, whether a contractual term is fair forms an important part of unfair contract terms law. The court's obligation is justified by the highest public interest,<sup>43</sup> and for many years case law on fair contract terms has confirmed the effectiveness of the *ex officio* doctrine throughout the EU.<sup>44</sup> Efficiency has been achieved despite the fact that the UCTD is a minimum harmonisation directive and Member States have different legal systems. As a result, there are no doubts that today national courts should have the skills to assess *ex officio* the fairness of contract terms.

Consumer contract law and unfair commercial practice law are tightly coupled and interrelated; therefore, EU consumer law should be regarded as a unitary rather than as a dualistic construction.<sup>45</sup> For example, contract law remedies can be used by victims of unfair commercial practices, as the existence of unfair commercial practices represents one of the factors that national courts use to assess the fairness of a contract term or even the entire contract. This means that the national courts should already have the skills to assess *ex officio* not only the fairness of contract terms but also the fairness of commercial practice, which also includes the question as to whether consumer choice in the digital environment has not been unfairly influenced by a trader, even in situations in which a consumer has not asserted it. In light of the foregoing, there is no indication that the national courts' skills to assess unfair commercial practices could differ from one Member State to another, especially since the UCPD is a full harmonisation directive, in the application of which all Member States must act in unison.

<sup>35</sup> Case C-473/00 *Cofidis* ECLI:EU:C:2002:705.

<sup>36</sup> Case C-168/05 *Mostaza Claro* ECLI:EU:C:2006:675.

<sup>37</sup> Case C-243/08 *Pannon* ECLI:EU:C:2009:350.

<sup>38</sup> Case C-473/00 *Cofidis* ECLI:EU:C:2002:705.

<sup>39</sup> Case C-168/05 *Mostaza Claro* ECLI:EU:C:2006:675.

<sup>40</sup> Case C-240/98 to 244/98 *Oceano* ECLI:EU:C:2000:346.

<sup>41</sup> Case C-168/15 *Tomášová* ECLI:EU:C:2016:602.

<sup>42</sup> Howells et al, *supra*, note 5.

<sup>43</sup> M Durovic, *The Impact of the Unfair Commercial Practices Directive (2005/29/EC) on Contract Law*. Doctoral dissertation (European University Institute 2014) p 298.

<sup>44</sup> Case C-488/11 *Asbeek Brusse un de Man Garabito* ECLI:EU:C:2013:341; Case C-472/11 *Banif Plus Bank* ECLI:EU:C:2013:88; Case C-511/17 *Lintner* ECLI:EU:C:2020:188; Case C-137/08 *VB Pénzügyi Lízing* ECLI:EU:C:2010:659.

<sup>45</sup> M Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Oxford, Hart Publishing 2016) p 190.

## 2. Consumer sales and the *ex officio* doctrine

As analysed above, in short, the national court's duty to act on its own motion in the unfair contract terms law field has been confirmed many times by the CJEU. The *Faber*<sup>46</sup> case is significant in terms of consumer sales. The CJEU was asked whether, following the principle of effectiveness, a national court should, of its own motion, examine whether the purchaser is to be regarded as a consumer within the meaning of EU Directive 1999/44/EC<sup>47</sup> (fully replaced from 1 January 2022 by EU Directive 2019/771<sup>48</sup>), even though that party has not relied on that status. The CJEU gave an affirmative answer: the national courts must apply the law based on matters of fact and law that they have at their disposal or may have at their disposal simply by requesting clarification.<sup>49</sup> Peter Rott presumes that this might be read in the sense that the national court has to take a more active stance, asking the parties to bring evidence to its attention.<sup>50</sup> This goes against the "classic" formula established by the CJEU in previous judgments and states that the national court has to take into account all of the evidence and in particular the terms of the contract to determine whether there are any violations of consumer rights. However, later, in the judgment in *Costea*,<sup>51</sup> the CJEU reiterated the "classic" formula whilst referring to *Faber*, which may indicate that the CJEU did not mean to extend that formula.<sup>52</sup>

Overall, there is no doubt that the national courts need to be active in consumer litigation on consumer sales issues, especially with regard to the question of whether one of the parties has consumer status. However, the general question remains: how far must the national court go in investigating the law and the case facts? Should national courts ask the parties to bring evidence to their attention? If not, how can a consumer prove their status if they do not know that they have to? Answers to those questions are also important in cases of unfair commercial practices in the digital environment because normally consumers cannot provide evidence on unfair practices in the digital environment, which exploits the digital asymmetry between the trader and consumer (eg algorithms that consumers cannot understand but traders will not provide the evidence of willingly). On the one hand, the national courts should already have the skills to assess *ex officio* whether consumer choices in the digital environment have not been unfairly influenced by traders because the existence of unfair commercial practices can be one of the factors that national courts use to assess the fairness of a contract term or the entire contract (about the court's obligation to assess *ex officio* the fairness of contractual terms (see Section II.1), but on the other hand, courts are not sure whether they can ask the parties to produce evidence in that respect. Thus, without a clear regulation, the courts have reasonable concerns as to whether they might violate the principle of neutrality by taking active action.

## 3. Unfair commercial practices and the *ex officio* doctrine

Similarly to the UCTD, the UCPD also does not clearly state that national courts should assess *ex officio* the existence of unfair commercial practices in a dispute in which the consumer is involved. Despite the fact that national courts have asked preliminary questions, the CJEU, using the principle of self-limitation, has not yet given a clear answer on this matter.

<sup>46</sup> Case C-497/13 *Faber* ECLI:EU:C:2015:357.

<sup>47</sup> Directive (EU) 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (1999) OJ L 171/1.

<sup>48</sup> Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (2019) OJ L 136/28.

<sup>49</sup> Case C-497/13 *Faber* ECLI:EU:C:2015:357.

<sup>50</sup> P Rott, "Improving consumers' enforcement of their rights under EU consumer sales law: *Froukje Faber*" (2016) 53(2) Common Market Law Review 516.

<sup>51</sup> Case C-110/14 *Costea* ECLI:EU:C:2015:538.

<sup>52</sup> Rott, *supra*, note 50.



*Pereničová* was the first case in which the CJEU assessed the interaction between unfair commercial practices and the unfairness of contractual terms. The CJEU explained that the provision of untrue information about the annual percentage rate is to be considered a misleading act, following Article 6 of the UCPD. In those circumstances, the unfairness of such a practice does not directly lead to the unfairness of a contract term concluded because of such a practice, but it is one element amongst others on which the competent court may base its assessment of the unfairness of contractual terms under Article 4(1) UCTD.<sup>53</sup> Overall, the fact that a contract was concluded as a consequence of an unfair commercial practice cannot have any kind of direct effect on the validity of a contract.<sup>54</sup>

In *Bankia*, the CJEU stated that a national court that assesses the fairness of contract terms in light of the UCTD, including its own motion, can assess, in the context of that review, the unfairness of a commercial practice on which that contract was based. On the other hand, the CJEU, in *Bankia*, maintained that, in other cases, national courts are not obliged to assess *ex officio* whether a particular contract or any of its terms has been concluded under the impact of unfair commercial practices. The CJEU highlighted that, during mortgage enforcement proceedings, national courts do not need to be able to review whether an enforceable instrument breaches the UCPD, because the UCPD does not place such an obligation on the national courts.<sup>55</sup> The CJEU decision in this case is explained by the fact that the UCPD does not provide for contractual consequences, unlike Article 6(1) of the UCTD.

With some disappointment, Mateja Durovic concludes that the introduction of an obligation for the national courts of Member States to assess *ex officio* the fairness of commercial practices and apply all relevant contract law consequences to a contract concluded under its impact would not be contrary to the approach of the CJEU in *Pereničová*. However, the opportunity to do so, and to adopt the same approach for the UCPD as for the UCTD, was missed, owing to the CJEU's decision in *Bankia*.<sup>56</sup> However, the EU Omnibus Directive<sup>57</sup> has introduced a new Article 11a of the UCPD, which contains individual remedies for consumers who suffer from unfair commercial practices. Under this new provision, consumers harmed by unfair commercial practices should have access to proportionate and effective remedies, including compensation for damage suffered and, where relevant, a price reduction or termination of the contract. This has been applicable from 28 May 2022. This regulation has changed the legal situation because now the fact that a contract was concluded as a consequence of an unfair commercial practice can have a direct effect on the validity of a contract. The EC presumes that the addition of that unequivocal new provision may entail an extension of the requirement of *ex officio* control to unfair commercial practices under the UCPD.<sup>58</sup> On the one hand, considering *Tomášová*, which highlighted the aspect of state liability for breaches of EU law committed by the judiciary, national courts need to be careful with the obligation that follows from the *ex officio* principle. On the other hand, it is not ethical to put all of the risk on the national courts; therefore, the EU legislator should take active action in clarifying this issue in the UCPD.

Despite the legal certainty, to render the new Article 11a of the UCPD effective, this article claims that with Article 11a of the UCPD national courts are obligated to assess

<sup>53</sup> Case C-453/10 *Pereničová*, ECLI:EU:C:2012:144.

<sup>54</sup> Durovic, *supra*, note 27, 34.

<sup>55</sup> Case C-109/17 *Bankia*, ECLI:EU:C:2018:735.

<sup>56</sup> Durovic, *supra*, note 27, 35.

<sup>57</sup> Directive (EU) 2019/2161 on the better enforcement and modernisation of Union consumer protection rules (2019) OJ L 328/7.

<sup>58</sup> EU Commission, "Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market" OJ C 526/1 (2021) 15.

*ex officio* whether a contract was concluded as a consequence of unfair commercial practices because such unfairness of practice may have a direct effect on the validity of a contract, including directly leading to the unfairness of a contract term. This also includes the obligation on the part of national courts to assess whether a consumer's choice in the digital environment has been unfairly influenced by a trader as a result of which the consumer concluded a contract. The last thesis is the central one of this article. To ensure that this court's assessment is not just formal, the courts, especially in certain circumstances (eg in cases involving reasonable suspicion of an infringement and major digital asymmetries), need to have the right to ask the trader to bring evidence of the fairness of its practice in the digital environment. As will be seen in Section III, the existence of this court's rights can be deduced from the active consumer court doctrine and *ex officio* doctrine as a part thereof, but the question – whether the above-mentioned understanding will be confirmed by the CJEU – remains open. In addition, Section III will argue that the obligation of national courts to assess *ex officio* whether consumer choice in the digital environment was influenced by unfair commercial practices should be extended to protect consumer choice in the digital reality generally, not just in situations in which the unfair practice affected the conclusion of the contract.

### III. The autonomy of consumer decision-making in the digital economy and the *ex officio* doctrine

According to the Treaty on the Functioning of the EU (TFEU),<sup>59</sup> consumer protection requirements shall be taken into account in defining and implementing other EU policies and activities. Such requirements in the TFEU are set only for two fields – environmental protection and consumer protection – because they both arise from the welfare state<sup>60</sup> and give Europe a social dimension.<sup>61</sup> Furthermore, EU law (eg Article 38 of the Charter of Fundamental Rights of the European Union (CFEU)<sup>62</sup>) emphasises the need to ensure a high level of consumer protection. Iris Benöhr and Hans-W. Micklitz argue that EU consumer protection shows elements of a new generation of fundamental rights.<sup>63</sup> In addition, EU consumer law is a designation of high-quality safety standards – in other words, a brand of Europe. Consumer trust is an essential element that allows the EU market to be globally competitive. Thus, consumer rights are omnipresent but unfortunately still underspecified EU fundamental rights, therefore causing the following problems.

The CJEU and national courts are important EU tools in achieving a high level of consumer protection by interpreting the law. Case law has a strong influence on the content of EC legislative proposals as well. The *ex officio* doctrine, which emphasises the role that national courts can play in the application of EU consumer law, is one of the most effective legal powers in court proceedings. According to Anthi Beka, a court is not simply a publicly funded dispute resolution centre,<sup>64</sup> but it is the crossroads of public and private law. Whilst remaining an instrument of private law for the parties, courts are, in fact, also the means through which states ensure the realisation of the law. Thus, consumer cases

<sup>59</sup> Treaty on the Functioning of the European Union (2012) OJ C 326.

<sup>60</sup> K Tonner, "Consumer protection and environmental protection: contradictions and suggested steps towards integration" (2000) 23(1) Journal of Consumer Policy 63.

<sup>61</sup> Howells et al, *supra*, note 5, 23.

<sup>62</sup> CFEU (2012) OJ C326/391.

<sup>63</sup> I Benöhr and H-W Micklitz, "Consumer protection and human rights" in G Howells, I Ramsay, T Wilhelmsson and D Kraft (eds), *Handbook of Research on International Consumer Law* (Cheltenham, Edward Elgar Publishing 2018) pp 17, 31.

<sup>64</sup> A Beka, *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion* (Cambridge, Intersentia 2018) p 80.

are no longer private issues but reflections of the effectiveness of national courts in applying EU law.<sup>65</sup>

In CJEU case law (*Faber*<sup>66</sup> and other cases discussed in this article) as well as in legal doctrine,<sup>67</sup> the unifying argument is revealed by the question: why do national courts need to assess *ex officio* violations of consumer rights? This is a matter of EU and national public policy and public interest, from which follows the necessity to ensure the effectiveness of EU consumer law. Namely, consumer law is part of public policy and public interest, so consumer cases are not only individual cases, but rather they influence the legal situation in the EU common market. This legal construction allows the CJEU to respect the principle of procedural autonomy but at the same time to make sure that EU consumer law must be enforced by national courts at a higher level if things have gone wrong at the lower level.<sup>68</sup> Such a general conclusion that national courts need to assess *ex officio* violations of consumer rights in all private litigation can be evaluated positively from the point of view of consumer rights protection, but this is too utopian in the current situation. Therefore, this article narrows overall consumer rights to consumer decision-making autonomy in the digital environment and analyses *ex officio* doctrine from this angle. Consumer decision-making autonomy in the digital environment is chosen because the digitalisation of societies and markets has led to consumers facing unprecedented challenges; therefore, consumer decision-making autonomy online is in significantly greater and more serious danger today than in the offline market. However, the UCPD as the main legal framework for protecting it does not meet the EU's obligation of a high level of consumer protection due to its gaps and uncertainties.

As already demonstrated in this article, the status of the *ex officio* doctrine as an integral element of EU consumer law is still uncertain because the obligation to use the doctrine is recognised as obvious only in certain aspects of consumer law (eg unfair contract terms law and determining whether a consumer is involved in the dispute). Unfair commercial practice law is one of the legal fields in which there is no clear understanding of how active the courts should be. The prevailing understanding of EU unfair commercial practice law is that the legal protection of consumer decision-making autonomy is related to the need to protect the economic interests of consumers.<sup>69</sup> Therefore, in private litigation, in which consumers can claim damages that stem from unfair practice, it is a matter only of private law. In contrast, the legal basis for the protection of consumer decision-making autonomy is established in European constitutional law. Namely, the obligation of the EU to ensure a high degree of protection for consumer decision-making autonomy follows from Articles 12, 16 and 169 of the TFEU and Articles 1, 7, 8 and 38 of the CFEU. Consumer freedom of choice and free will in the digital environment are only two of many aspects of private life covered under Article 8 of the European Convention on Human Rights.<sup>70</sup> In *Pretty v the United Kingdom*, the European Court of Human Rights stated that the notion of personal autonomy is an important principle that derives from the notion of private life.<sup>71</sup>

<sup>65</sup> P Kenna, "Book review: 'The Active Role of Courts in Consumer Litigation – Applying EU Law of National Court's Own Motion,' by Anthi Beka" (2020) 9(2) *Journal of European Consumer and Market Law* 87.

<sup>66</sup> Case C-497/13 *Faber* ECLI:EU:C:2015:357.

<sup>67</sup> H Schebesta, "Does the National Court Know European Law? A Note on *Ex Officio* Application after *Asturcom*" (2010) 4 *European Review of Private Law* 877–78; H-W Micklitz and N Reich, "The court and sleeping beauty: the revival of the Unfair Contract Terms Directive (UCTD)" (2014) 51 *Common Market Law Review* 771–808.

<sup>68</sup> Rott, *supra*, note 50, 517.

<sup>69</sup> See Art 1 UCPD; MR Leiser and MM Caruana, "Dark Patterns: Light to be Found in Europe's Consumer Protection Regime" (2021) 10(6) *Journal of European Consumer and Market Law* 245–46; Reich et al, *supra*, note 2, 77–78; B Keirsbilck, "Towards a Single Regulatory Framework on Unfair Commercial Practices?" (2009) 20(4) *European Business Law Review* 508, 534, 558.

<sup>70</sup> European Convention on Human Rights (1950).

<sup>71</sup> *Pretty v the United Kingdom* App no 2346/02 (ECHR, 2002).

Therefore, the right to personal autonomy is intricately linked to human dignity.<sup>72</sup> Additionally, Member States' constitutional law recognises a similar legal basis. Referring to national examples, Latvia is an EU Member State that has one of the stronger adversarial principle application traditions. Namely, current Latvian national case law clearly and strictly denies the application of *ex officio* doctrine in consumer litigation (the exception is cases of unfair contract terms).<sup>73</sup> Therefore, the example of Latvia may illustrate well the inadequacies in the protections of consumer decision-making autonomy in the digital economy currently afforded by the UCPD. Thus, in the context of the *ex officio* doctrine analysis it is useful to look at the example of Latvia.

Articles 89 and 96 and Sentence 1 of Article 105 (interpreted in conjunction with Article 389 of the Commercial Law of Latvia 2000<sup>74</sup> and Article 4 of the Consumer Rights Protection Law of Latvia 1999<sup>75</sup>) of the Constitution of the Republic of Latvia 1922<sup>76</sup> link protection of consumer decision-making autonomy with the dimension of constitutional protection of human dignity, state welfare, social justice, public order, public interest, private life, property rights and freedom of transactions. Therefore, consumer decision-making autonomy as a fundamental right is established in the constitutional law of Latvia. Nevertheless, the Latvian Supreme Court has stated that a difference in the level of legal knowledge between the parties cannot be the basis for the court, under the pretext of the principle of proportionality and justice, to deviate from the adversarial principle and the principle of dispositiveness.<sup>77</sup> This was criticised in Latvian legal doctrine by the argument that such an interpretation of Section 10 of the Civil Procedure Law of Latvia 1998<sup>78</sup> (which states that the parties shall exercise their procedural rights by way of adversarial proceedings) and Section 17 of the Law on Judicial Power of Latvia 1993<sup>79</sup> (which states that the court shall, when examining any case, be obliged to establish the objective truth) requires the court to examine civil disputes by ascertaining only the relative (incomplete) truth and not deciding in favour of injustice, trickery and skill of the parties over justice.<sup>80</sup> Currently, in Latvian civil proceeding consumers cannot rely on an active consumer court. This EU legal situation creates risks of inequality. Namely, each EU Member State has different national procedural laws, legal traditions and understandings of the adversarial principle; therefore, in the same factual circumstances, different national courts may make different judgments. This is contrary to the EU consumer law *acquis*, which requires that all consumers in the EU can receive equal protection regardless of the country where the consumer rights violation occurred or where the dispute resolution process takes place.

At the stage of consumer private litigation, the national courts can offer effective protection to consumer decision-making autonomy in the digital economy because they are already capable of assessing *ex officio* consumer choice in the digital environment. This derives from the courts' obligation to assess *ex officio* the fairness of contract terms in which one of the elements could be an unfair commercial practice, and also now from the new Article 11a of the UCPD, which introduces rights to compensation, contract

<sup>72</sup> I Ziemele, "The European Convention on Human Rights: living instrument at 70 – science and technology" in *The European Convention on Human Rights: Living Instrument at 70* (2020), 22 <[https://www.echr.coe.int/Documents/Dialogue\\_2020\\_ENG.pdf](https://www.echr.coe.int/Documents/Dialogue_2020_ENG.pdf)> (last accessed 27 June 2023).

<sup>73</sup> Case C15233015, SKC-292/2018 *AS Attīstības finanšu institūcija Altum* ECLI:LV:AT:2018:1206.C15233015.1.S, Latvia.

<sup>74</sup> Commercial Law, Republic of Latvia (2000).

<sup>75</sup> Consumer Rights Protection Law of Latvia, Republic of Latvia (1999).

<sup>76</sup> Constitution of the Republic of Latvia (1922).

<sup>77</sup> Case C12193319, SKC-974/2020 *SIA Naujenes pakalpojumu serviss* ECLI:LV:AT:2020:1104.C12193319.10.S, Latvia.

<sup>78</sup> Civil Procedure Law, Republic of Latvia (1998).

<sup>79</sup> Law on Judicial Power, Republic of Latvia (1993).

<sup>80</sup> J Kārklīņš, "Sacīkstes princips un taisnīgums/The adversarial principle and justice" (2022) 41(1255) *Jurista Vārds* 21.

termination and other remedies if a consumer suffers from unfair commercial practices. Despite the argument made in this article that the concept of active consumer courts derives from constitutional law and that Article 11a of the UCPD expands the use of the *ex officio* doctrine in the law on prohibiting unfair commercial practices, the problems that are created by the gaps and uncertainties of the UCPD application remain. Therefore, there is a need to update consumer private litigation in the UCPD in two respects. First, the regulation should require national courts to perform *ex officio* control of unfair commercial practices in private consumer litigation when from the case circumstances it can be seen that there are signs of unfair influence on consumer decision-making autonomy in the digital environment – in other words, the case contains reasonable suspicion of an infringement and signs of major digital asymmetries. Second, in addition to facilitating the court's duty to carry out *ex officio* control, it is important to shift the burden of argument and proof, putting the burden of proof on the trader in private consumer litigation in certain circumstances (ie when the case contains reasonable suspicion of an infringement and signs of major digital asymmetries). Such circumstances that should be considered are the use of personalisation practice (in which a consumer can see what kind of algorithms and data are being used but cannot be sure what exactly the algorithms are doing), unsafe digital designs (unfavourable algorithmic defaults, addictive behaviour or dark patterns and attention traps, including putting pressure on a consumer to stay on a digital platform for as long as possible) and others. The proposed revision of the UCPD could reduce the unfair use of digital vulnerability and digital asymmetry against individual consumers and ensure a balance of power for the consumer is struck vis-à-vis the other, usually stronger party in private litigation, as well as empower the national courts to act actively to reach a fair resolution of the dispute and reduce the inequality of consumer rights protection between Member States. Additionally, the proposed revision of the regulation will not have coordinate problems with the rest of EU consumer law, because the UCPD is a full harmonisation directive that already has a consentaneous interplay between other EU laws. Moreover, the idea of the *ex officio* doctrine is not new in EU consumer law. It has already proven its effectiveness and suitability in protecting consumer rights in relation to the UCTD. Therefore, *ex officio* doctrine is already integrated into the legal systems of the Member States. This article argues that the proposed regulation updates will not cause legal problems for Member States, but the question of materially increasing the workload of national courts could be raised. Namely, if imposing additional duties on judges, it would be fair to increase the material and human resource capacities of the courts.

#### **IV. Conclusion: a need for stronger protection of consumer decision-making autonomy in the digital environment**

The principle of consumer decision-making autonomy stands at the core of consumer law. The regulation of the prohibition of unfair commercial practices (ie the UCPD) plays one of the main roles in protecting consumer decision-making autonomy in the EU. However, the regulation was created under the conditions of the classic market for the industrial economy. Therefore, the peculiarities of the digital economy and digital society and the risks that are created by the digital market for consumer decision-making autonomy today were not considered in the process of drafting the law. The development of digital technologies has led to the emergence of new commercial practice models based on the processing of consumer data that significantly reduce consumer decision-making autonomy in the digital environment. Thus, the UCPD is not adequate to ensure a high level of consumer decision-making autonomy in the digital environment. As such, this article seeks an answer to the following question: what can be done to strengthen consumer decision-making autonomy in the digital environment? Within that question,

this article suggests expanding active consumer courts, which, upon the occurrence of certain circumstances, should have an obligation to assess *ex officio* violations of fair commercial practices in the digital environment. Importantly, this article admits the possibility of broadening this obligation of a court to all kinds of violations of consumer rights but does not analyse this in more detail, as the aim is to study the possibilities of strengthening consumer decision-making autonomy in the digital environment.

The *ex officio* doctrine is part of the active consumer court doctrine. The justification of *ex officio* protection is visible from constitutional law in terms of human private life, property rights and public interest. Therefore, this article seeks to demonstrate that the legal basis for the protection of consumer decision-making autonomy is established in European constitutional law. For example, consumer freedom of choice and free will in the digital environment are two amongst the many aspects of private life. The right to consumer autonomy is intricately linked to human dignity and other constitutional values, such as state welfare, social justice, public order, public interest, private life, property rights and freedom of transactions. According to Anthi Beka, the national courts need to assess *ex officio* violations of consumer rights on the legal grounds of national public policy and public interest, from which follows the necessity to ensure the effectiveness of EU consumer law. Therefore, consumer cases are not only individual cases, but rather they also influence the legal situation in the EU common market. This general conclusion can be evaluated positively from the point of view of consumer rights protection, but this is too utopian in the current situation. Therefore, this article emphasises that consumer rights are omnipresent but unfortunately still underspecified fundamental rights. Thus, as mentioned above, this article starts with consumer decision-making autonomy in the digital environment as the core of consumer law, which at this moment faces a significant risk of endangerment through, for instance, unfair use of consumer digital vulnerability and digital asymmetry on the side of traders in the digital environment.

The obligation of the national courts of EU Member States to assess *ex officio* violations of consumer rights is still developing. There are indications that slowly but surely the *ex officio* doctrine as an integral element of EU consumer law is becoming recognised through the activities of the EU legislator and the EC; moreover, it is distinguished in the legal doctrine of EU consumer law and in the case law of the CJEU as well. At present, there is no doubt that according to CJEU case law the doctrine must be applied in the area of unfair contract terms and to some aspects of consumer credit, consumer sales and doorstep selling. Therefore, in these types of litigation consumers can expect an active consumer court, which should balance the difference in legal knowledge between the parties and ensure the equivalence of party autonomy, thereby protecting the weaker party (ie the consumer). However, this does not mean that the competent court must in all consumer litigation evaluate and take into account the fact of unfair commercial practice, because this is just one element amongst others on which the court may base its assessment of the unfairness of contractual terms under Article 4(1) of the UCTD. In a nutshell, according to current CJEU case law, the fact that a contract was concluded as a consequence of an unfair commercial practice (eg dark patterns) cannot have any kind of direct effect on the unfairness of the contract terms. This means that in consumer private litigation national courts, *ex officio* evaluating the fairness of a consumer contract's terms, do not have an obligation but merely a willingness to protect consumer decision-making autonomy against unfair practices in the digital environment.

On 28 May 2022, the legal situation in the EU changed. That is, until 28 May 2022 case law could hold on to the legal presumption that unfair commercial practices cannot have a direct effect on the validity of a contract. With the new Article 11a of the UCPD, which contains individual remedies (which also include termination of the contract) for consumers who suffer from unfair commercial practices, the fact that a contract was concluded as a consequence of unfair commercial practices now can have a direct effect on

the validity of the contract. Presumably, this new legal situation will affect the direction of development of CJEU case law. Namely, it may entail an extension of the requirement of *ex officio* control to unfair commercial practices. However, problems remain. First, courts do not have effective legal tools to evaluate whether a contract was concluded as a consequence of an unfair commercial practice, particularly in situations in which traders refuse to provide evidence on the details of the practice employed. Second, the new Article 11a of the UCPD, because of its narrow and specific content, cannot be a panacea that will sufficiently protect the autonomy of consumer decision-making in the digital economy. For instance, consumers can suffer from unfair commercial practices in the digital market and as a consequence refuse to conclude a contract that would be in their favour. In such situations, the court will most likely be passive, and consumers will be forced to prove the fact of unfair practice and its negative effect on their autonomy of choice in a digital environment. It is an undue legal requirement that consumers should prove digital unfairness (eg the unfairness of algorithms, manipulative personalisation and targeted advertising, dark patterns and unfair digital business models).

Therefore, the law prohibiting unfair commercial practices is one of the legal fields in which there is no clear understanding of how active the courts should be regarding the protection of consumer decision-making autonomy in the digital environment. Moreover, the current legal situation creates risks of inequality because each EU Member State has different national procedural laws, legal traditions and understandings of the adversarial principle. This is contrary to the EU consumer law *acquis*, which requires that all consumers in the EU market can receive equal protection regardless of the country where the consumer rights violation occurred. Therefore, this article asserts that active consumer courts are appropriate for the digital age. Thus, in consumer private litigation the national courts can offer effective protection to consumer decision-making autonomy in the digital economy. An important argument in favour of active consumer courts is the fact that even now the national courts of Member States must have the skills to evaluate unfair commercial practices on their own initiative. This follows from the UCTD and the case law of the CJEU, which stated that a national court, assessing the fairness of contract terms in light of the UCTD, in the context of this review might assess, in its own motion, the unfairness of a commercial practice on which contract was based.

Importantly, in recent years, the EC has followed up with many different legislative proposals and regulatory innovations, such as the Artificial Intelligence Act, the Digital Markets Act, the Digital Services Act, the Omnibus Directive, Directive 2019/770 and Directive 2019/771. These activities result in fragmentary regulatory solutions to specific problems of consumer rights protection in the digital environment. Moreover, they do not pay enough attention to studies of the threat to consumer decision-making autonomy in the digital environment, analysis of its effective protection and integration into the EU consumer *acquis*. Namely, the new legislative proposals and regulatory innovations are directed at specific economic operators (eg traders, suppliers, providers of artificial intelligence systems and others), but consumers have been left on the sidelines. Therefore, the newest activities of the EU institutions are not directly aimed at protecting consumer decision-making autonomy from unfair commercial practices in the digital environment and do not analyse the gains to be made from an active consumer court protecting it.

Therefore, to clarify unfair commercial practice law regarding courts' obligation to assess *ex officio* violations of fair commercial practice in the digital environment and to strengthen consumer decision-making autonomy in the digital environment, the UCPD should be revised. First, in private consumer litigation cases that contain signs of major digital asymmetries (eg algorithms that consumers cannot understand) and where there is reasonable suspicion of an infringement, the burden of argument and proof should be put on the trader. Second, after this, a regulation update should be adopted that requires national courts to perform *ex officio* control of unfair commercial practices in private

consumer litigation when from the case circumstances there are signs of unfair influence on consumer decision-making autonomy in the digital environment (ie the case shows signs of major digital asymmetries and there is reasonable suspicion of an infringement). A good example of a positive change in the legal environment is liability law and non-discrimination law, in which a change in the burden of proof resolved many legal problems caused by the difference in legal knowledge between the parties and the non-equivalence of party autonomy. The proposed revision of the regulation will not have coordinate problems with the rest of EU consumer law because the UCPD is a full harmonisation directive that already has a consentaneous interplay with other EU laws. Moreover, the idea of the *ex officio* doctrine is not new in the EU acquis. It has already proven its effectiveness and suitability in protecting consumer rights in relation to the UCTD. Therefore, the *ex officio* doctrine is already integrated into the legal systems of the Member States. In short, the proposed revision of the regulation will not cause legal problems for Member States, but the question of materially increasing the workload of national courts could be raised. Namely, by imposing additional duties on judges, it would be fair to increase the material and human resource capacities of the courts. Therefore, updating the UCPD to establish clear and modern regulation would be appropriate and would represent an important initial step towards achieving stronger protection for consumer decision-making autonomy in the digital environment.

**Competing interests.** The author declares none.