

The ECJ on the Unfair Contract Terms Directive (Dir. 93/13/EEC)

Council Directive 93/13/EEC, on unfair terms in consumer contracts (the UCTD), has recently turned 30 years old. The ‘childhood’ of the directive went relatively unnoticed, with no judgment from the European Court of Justice (ECJ or the Court) until the beginning of the current century.¹ Before the 2007–08 global financial crisis, the Court had rendered less than a dozen judgments but that crisis triggered the ‘awakening of Sleeping Beauty’ (following Micklitz and Reich’s analogy).² Since then, the ECJ has dealt with almost two hundred requests for preliminary rulings on the UCTD. This makes it the EU private law instrument the Court has visited most often. Litigation over the UCTD is also significant at a national level, numbering in the hundreds of thousands of cases in some Member States, such as Poland or Spain.

However, the relevance of the UCTD is not just quantitative. It has served to tackle serious economic grievances and situations of over-indebtedness. It fulfilled the purpose of a social safety net amid the financial crisis and after. Therefore, it brought EU law to the attention of citizens as able to tackle their pressing needs. On the business side, the overall economic interest at stake has made the UCTD a central piece of legislation, especially for banks and credit companies. Looking forward, the UCTD is increasingly called on to play a major role in regulating digital markets.

From a technical perspective, the ECJ judgments on the UCTD have advanced EU private law by providing a uniform interpretation of the directive’s key concepts. In addition, the ECJ has expanded the UCTD by enshrining legal solutions that were not so evidently comprised within its scope. In this way, the Court’s judgments have reshaped national laws, including their procedural aspects. As a less measurable outcome, the ECJ’s intervention has underscored the distinctiveness of EU law to private lawyers and has highlighted inevitable tensions with national contract laws.

The UCTD has served as a test bench for multilevel judicial dialogue. As the actual application of the ECJ’s decisions falls in the realm of national courts, the

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- 1 The first one being ECJ 27 Jun. 2000, ECLI:EU:C:2000:346, *Océano Grupo Editorial SA v. Rocío Murciano Quintero* (C-240/98) and *Salvat Editores SA v. José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) and *Emilio Viñas Feliú* (C-244/98), curia.europa.eu/juris/liste.jsf?num=C-240/98.
 - 2 H-W. MICKLITZ & N. REICH, ‘The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)’, 51. *CMLR* (*Common Market Law Review*) 2014, 771, doi: 10.54648/COLA2014061.

harmonizing effects of the Court's judgments have not reached all Member States to the same extent or in the same way. While the ECJ remains the final interpreter of the UCTD, its constitutional impediment to deciding on the matrix of facts has often led to inconclusive answers. This has resulted in manifold requests for preliminary rulings on similar matters. The peculiarities of national legal traditions that embed the cases and mark the Court's judgments are the cherry on the cake that makes the UCTD a difficult instrument to grasp.

Against this backdrop, we considered it necessary to reflect on the judgments that the ECJ has rendered so far on the UCTD. With this aim, we organized an international working group to produce a comprehensive and updated study of the key concepts of the UCTD, as interpreted by the ECJ. We were fortunate to have been joined by knowledgeable, generous and enthusiastic colleagues. They had all been working on the UCTD for some time and so were familiar with its intricacies and huge impact on private law.

We were aware that focusing on the EU level was a partial assessment. A complete picture would require researching the application of the UCTD in all the Member States. However, that task cannot properly be conducted without first determining where the law stands in the EU. This was the scope of our study. An investigation into the case law of the ECJ on the UCTD would prove the extent of the development of EU private law in this area. Nevertheless, we informed the national visions of the UCTD with a balanced representation of legal traditions and countries of origin of cases.

We present the outcome of our endeavours in this issue. We hope it provides scholars and practitioners with a structured road map to navigate the established notions of the directive, while also raising awareness about those that may still be subject to development. The resulting articles underscore certain obscurities in the Court's interpretation of the UCTD. We considered their identification an additional outcome. Moreover, readers might notice certain contradictions in the contributions to this issue. They come from divergent views of the authors. As editors, we aimed at systematic consistency rather than conceptual coherence, with the shared understanding that from that premise academic discussion flourishes.

The work was distributed around topics, with one rapporteur in charge of each topic and a main discussant. The contributors considered their drafts during a workshop in Madrid, on the occasion of the 30th anniversary of the UCTD. It was an enriching opportunity, bolstering the quality of the papers that we now present to the readers of this journal.

Hans Schulte-Nölke offers an overview of the UCTD, critically outlining its main provisions, as interpreted by the ECJ. Tatjana Josipović examines the scope of application of the UCTD, which reflects delicate compromises between legal traditions and balances the various goals the directive was meant to achieve. Marie Jull Sørensen delves into the unfairness control, dealing with its definition, exceptions and the various tests the Court has developed to assess terms not individually negotiated. Aneta Wiewiórowska-Domagalska focuses on transparency. She highlights

the complementarity of remedying both power and informational imbalances under the UCTD, without neglecting their broader function as pillars of EU consumer law. Francisco de Elizalde interprets the remedies for unfair terms in light of the general principles of EU law. This perspective signals a thread in the intricate case law of the ECJ on the consequences of unfair terms. Three papers deal primarily with the procedural impact of the UCTD. Michel Cannarsa approaches its multifaceted enforcement, including individual and collective, public and private enforcement. Charlotte Pavilion expounds on the ex officio control of unfair terms against the backdrop of the procedural autonomy of Member States. Pietro Sirena, Maddalena Ginestri and Elisa Valletta analyse specific issues concerning statutory limitations on actions, res judicata and legal costs.

An early assessment of the UCTD appeared in this journal in 1995. Almost thirty years later, we were trusted with a similar task. We are honoured by this while remaining very aware of the responsibility it entails. We would like to express our gratitude to the European Review of Private Law. We especially thank the contributors. We are also grateful to IE Law School (Madrid) for hosting the workshop at which the papers were discussed. It has been a fascinating, thought-provoking journey and we very much hope you enjoy reading the issue.

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