

EU LAW AND MORTGAGE POSSESSION CASES – WHAT IS IT ALL ABOUT?

Abstract

Over 25 years ago, the EU legislated against unfair contract terms in consumer contracts, and Ireland adopted that law. It is now being applied by the CJEU in mortgage enforcement cases, and has become a significant feature of an active EU consumer policy. National courts must carry out an 'own motion' or 'ex officio' examination of consumer contracts, in disputes, for any unfair terms. This article considers the recent varied and somewhat hesitant development of Irish law on this topic.

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Introduction

A quarter of a century ago, Ireland adopted the EU Directive on unfair contract terms in consumer contracts (UCTD) setting out the means for consumers to enjoy these European consumer rights. In recent times, the Court of Justice of the European Union (CJEU) has applied these consumer protections to mortgages as consumer contracts. Irish consumers, however, have yet to fully enjoy these protections, with reluctance by courts and the relevant regulatory State bodies to subject standardised non-negotiable mortgage contracts to scrutiny.

This issue is significant. Central Bank of Ireland managers predict that some 14,000 households will lose their homes,¹ and suggest that sales of distressed mortgages to third-party funds are 'legitimate and necessary'.² Mortgage lending is at the maximum of Central Bank of Ireland permitted levels and house prices are rising.³ Meanwhile, the level of mortgage possession cases shows no sign of decreasing, with significant numbers of cases in the courts system.⁴ However, recent commentary seems to suggest limiting the potential consumer protection of EU law to mortgage consumers in Ireland, and there is a unique focus on the role of the borrower's solicitor. The application of the

¹ 'Over half of the cases progressing to long-term arrears are classified as involving the potential for loss of ownership outcomes'. See Sharon Donnery, et al, 'Resolving Non-Performing Loans in Ireland: 2010-2018' (Central Bank Quarterly Bulletin April 2018) p 67, <<https://www.centralbank.ie/docs/default-source/publications/quarterly-bulletins/qb-archive/2018/quarterly-bulletin---qb2-2018.pdf?sfvrsn=4>> accessed 24 February 2019. The Central Bank Quarterly Statistics on Mortgage Arrears and Repossessions (19 December 2018) showed that there were some 28,197 PDH accounts in arrears over 720 days. See Central Bank of Ireland, 'Residential Mortgage Arrears & Repossessions Statistics: Q3 2018' (Central Bank of Ireland 2018) <https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/2018q3_ie_mortgage_arrears_statistics.pdf?sfvrsn=10> accessed 16 March 2019.

² Eoin Burke-Kennedy, 'Sale of distressed loans 'legitimate and necessary' – Sibley' *The Irish Times* (Dublin, 06 June 2018).

³ Eoin Burke-Kennedy, 'Value of mortgage drawdowns rose 20% to €8.7bn last year' *The Irish Times* (Dublin, 29 January 2019). 'The value of mortgages taken out in Ireland last year rose nearly 20 per cent to €8.7 billion, with first-time buyers representing the biggest segment of the market. Figures from the Banking and Payments Federation of Ireland show that some 40,203 mortgages with a value of €8.7 billion were drawn down in 2018. In value terms this was €1.4 billion more than the previous year'.

⁴ Some 28,000 mortgage accounts are in arrears over two years, with many over 4 years, and in these situations financial institutions have invariably commenced legal proceedings to realize the security in the mortgage, requiring vacant possession before sale. The data recording by the Central Bank of Ireland and the corresponding data by the Courts Service on the extent of mortgage possession cases is not readily compatible.

'own motion assessment' to mortgage contracts for unfair terms has proven to be a major challenge in Ireland.

The Unfair Contract Terms Directive – Developing EU Consumer Rights

In 1995, Ireland enacted the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 implementing Directive 93/13 (UCTD) on unfair terms in consumer contracts - a minimum harmonising EU consumer law measure.⁵ Some of the recitals to the UCTD clearly set out its purpose:

Recital 3. Whereas, in particular, the laws of Member States relating to unfair terms in consumer contracts show marked divergences;

Recital 4. Whereas it is the responsibility of the Member States to ensure that contracts concluded with consumers do not contain unfair terms;...

Recital 14. Whereas Member States must however ensure that unfair terms are not included [in the statutory or regulatory provisions of Member States], particularly because this Directive also applies to trades, business or professions of a public nature;

Recital 15. Whereas it is necessary to fix in a general way the criteria for assessing the unfair character of contract terms;...

Recital 21. Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer...

The final Recital states: Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.⁶

The test for unfair terms is set out in Article 3(1):

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The test for unfair terms must take into account the nature of the goods or services for which the contract was concluded by referring, at the time of the conclusion of the contract, 'to all the circumstances attending the conclusion of the contract and to all the

⁵ Council Directive 1993/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29 (UCTD). European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI 1995/27. These Regulations were amended on a number of occasions – see European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000, SI 2000/307; European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2011, SI 2011/160; European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014, SI 2014/336.

⁶ Council Directive 1993/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29. Article 1 of the Directive states: 'The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer'.

other terms of the contract or of another contract on which it is dependent'.⁷ Significantly, however, 'core terms,' such as the definition of the main subject matter of the contract, or the adequacy of the price or remuneration, are not subject to the test for unfairness, but must be in plain intelligible language.⁸

The UCTD aims to assist individual consumers by ensuring that unfair terms are not enforceable against them, and there is also a dissuasive principle contained in Article 7(1) and Recital 24. Article 7(1) states: 'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'.

The Irish Regulations giving effect to the UCTD provide two procedures for declaring a standard contract term unfair. Firstly, an authorised body (the Central Bank of Ireland, the Competition and Consumer Protection Commission or an authorised consumer organisation) can apply to the Circuit or High Court for a declaration (or an injunction) that a term in general use is unfair to prevent its use.⁹ It is not necessary to prove loss to the consumer, or negligence by the seller, and the Court can grant an order prohibiting use of the unfair term. To date, only one such application has been made, where the Director of Consumer Affairs, in 2001, sought a ruling on the unfairness of stage payments within the industry standard home-building contracts.¹⁰ Secondly, a consumer can rely on the Regulations in any case before a court of competent jurisdiction. Indeed, EU law now obliges courts in EU Member States to carry out *ex officio* or 'own motion' assessments for unfair terms – along the lines of the *Oceano*,¹¹ *Aziz* and other cases.¹² This has only recently become accepted in Ireland, and is not universally applied in all mortgage possession or indeed, consumer cases.

The rationale behind the UCTD is to give courts the power to rebalance the unequal bargaining position between consumers and suppliers by examining non-negotiable terms before delivering judgments against the weaker party to the bargain. With the industrialisation of mortgage lending, thousands of mortgage consumers must accept standard non-negotiable mortgages set by mortgage providers. Indeed, modern expectations of home-ownership and access to credit have become synonymous with mortgages being viewed as a form of public or consumer utility, with a small number of corporate State and non-State providers.¹³ These changes reflect the evolution of the use of mortgage credit as the major vehicle of access to housing for the majority of the

⁷ Article 4(1) UCTD (n 5) as transposed in Article 3(2) European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI 1995/27.

⁸ Article 4(2) UCTD (n 5).

⁹ European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI 1995/27, Article 8 as amended by European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013, SI 2013/160.

¹⁰ *In the Matter of an Application Pursuant to Regulation 8(1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (HC, 20 December 2001) (Kearns J).

¹¹ Case C-240/98 to C-244/98 *Océano Grupo Editorial SA v Rocio Murciano Quintero and Salvat Editores SA v José M Sánchez Alcón Pradés and Others* [2000] ECR I-04941; Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421; Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikéné Györfi* [2009] ECR I-04713.

¹² Case C-415/11 *Mobamed Aziz v Caixa d'Estalvis de Catalunya* (ECJ, 14 March 2013); In Case C-377/14 *Ernst Georg Radlinger and Helena Radlingerová v Finway a.s.* (ECJ, 21 April 2016), the CJEU reiterated that a national court is obliged to examine of its own motion the compliance with the rules of EU consumer protection law in insolvency proceedings as well as consumer credit agreements, including mortgages.

¹³ Anthi Beka, 'The Protection of the Primary Residence of Mortgage Debtors: Embedding a 'Basic Needs' Principle in Mortgage Repossession Proceedings' in Luca Ratti (ed), *Embedding the Principles of Life Time Contracts* (Eleven Publishing 2018).

population in the context of the global financialisation of housing.¹⁴ In this context, the legal liberal model based on nineteenth century freedom of contract norms is not a suitable basis for dealing with widescale mortgage arrears.

The UCTD has become a central part of EU mortgage consumer law in recent times. The mortgage crisis in Spain and the courts' frustration with the absence of fair procedures around mortgage evictions prompted requests for Preliminary Rulings to the CJEU.¹⁵ Since then, the CJEU has also scrutinised many European national mortgage law and procedural systems for compatibility with these consumer rights.¹⁶ It has clearly established that implementation of the UCTD requires courts in EU Member States to carry out own motion assessments for unfair terms,¹⁷ and this process must also consider the impact of the EU Charter of Fundamental Rights.¹⁸

Ireland is Unique

The humanity of Irish Registrars and Judges, and the *pro bono* work of many solicitors and barristers has mitigated the worst excesses of corporate lender actions in the mortgage crisis.¹⁹ However, despite many Reports on the causes of the Irish mortgage and banking crisis, which showed the extent of reckless lending on housing and commercial property, Irish courts do not recognise a tort of reckless lending.²⁰ While,

¹⁴ Manuel B Aalbers, *The Financialization of Housing* (Routledge 2016).

¹⁵ Hans-Wolfgang Micklitz and Norbert Reich, 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2015) 51 *Common Market Law Review* 771.

¹⁶ For Spain see Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya* (ECJ, 14 March 2013); Case C-280/13 *Barclays Bank SA v Sara Sánchez García and Alejandro Chacón Barrera* (ECJ, 30 April 2014); Case C-169/14 *Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* (ECJ, 17 July 2014); Cases C-482/13 to C-484/13, C-485/13 *Unicaja Banco, SA v José Hidalgo Rueda and Others and Caixabank SA v Manuel María Rueda Ledesma and Others* (ECJ, 21 January 2015); Case C-539/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA* (ECJ, 16 July 2015); Case C-8/14 *BBVA SA v Pedro Peñalva López and Others* (ECJ, 29 October 2015); Case C-49/14 *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others* (ECJ, 08 April 2016); Case C-421/14 *Banco Primus SA v Jesús Gutiérrez García* (ECJ, 26 January 2017); For Slovakia, see: Case C-34/13 *Monika Kušionová v SMART Capital, a.s.* (ECJ, 10 September 2014); For Czech Republic see case C- 377/14 *Ernst Georg Radlinger and Helena Radlingerová v Finnway a.s.* (ECJ, 21 April 2016); For Romania see Case C-110/14 *Horățiu Ovidiu Costea v SC Volksbank România SA* (ECJ, 03 September 2015); For France, see Case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA* (ECJ, 23 April 2015); For Hungary see Case C-26/13 *Kásler and Káslerné Rábai* (ECJ, 06 June 2014).

¹⁷ Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikéné Györfi* [2009] ECR I-04713 (*Pannon GSM*), paras 31 and 32; Anthi Beka, *The Active Role of Courts in Consumer Litigation – Applying EU Law of the National Courts' Own Motion* (Intersentia 2018) described the 'active consumer court' doctrine developed in the CJEU which requires national courts to raise of their own motion mandatory rules of EU consumer contract law, notably those relating to unfair terms, resulting in increased procedural protection in mortgage possession proceedings involving the primary family residence of the mortgage debtor, and the development of human rights issues in this context.

¹⁸ Case C-169/14 *Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* (ECJ, 17 July 2014); Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] OJ C 83/01; Charter of Fundamental Rights of the European Union [2010] OJ C 83/02. See also Federico Della Negra, 'The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: *Sánchez Morcillo and Kušionová*' (2015) 52 *Common Market Law Review* 1009, 1027, where it is suggested that the 'incorporation' of the principle of effective judicial protection in article 47 of the Charter into the principle of effectiveness of EU law is of particular importance in the cases concerning the legal protection of over-indebted consumers.

¹⁹ See Padraic Kenna, *Access to Justice and the ECB – A Study of ECB Supervised and other Mortgage Possession Cases in Ireland* (Centre for Housing Law, Rights and Policy 2018) <<https://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Access-to-Justice-and-the-ECB-Report-CHLRP-2018.pdf>> accessed 24 February 2019.

²⁰ Joint Committee of Inquiry into the Banking Crisis, *Report of the Joint Committee of Inquiry into the Banking Crisis* (2016); Patrick Honohan, et al, 'The Irish Banking Crisis- Regulatory and Financial Stability Policy 2003-2008 - A Report to the Minister for Finance by the Governor of the Central Bank' (Central Bank of Ireland 2010) <<http://www.bankinginquiry.gov.ie/the%20irish%20banking%20crisis%20regulatory%20and%20financial%20stability%20policy%202003-2008.pdf>> accessed 16 March 2019; Commission of Investigation into the Banking Sector in

almost uniquely in Europe, Irish property legislation in 2009 had differentiated housing loan mortgages (as consumer loans) from other mortgages,²¹ the Irish legal system has strictly enforced the security of mortgages, even in the absence of borrower legal representation in courts. In *Irish Life and Permanent v Dunne and Irish Life and Permanent v Dunphy*,²² the Supreme Court clarified that modern consumer protection codes, or any contemporary development of equitable remedies, would not lead to any rebalancing of the contractual rights in mortgage contracts in Ireland, suggesting that any such changes be made by the legislature through recalibration of the law.

However, at a personal level, Irish Registrars and Judges are dedicated to ensuring fairness for all parties, and in this context, Barrett J applied EU consumer law in this legal arena. In *Start Mortgages v Hanley*,²³ a clause in the mortgage contract provided that the lender could demand repayment of the entire loan, on seven days' notice, regardless of whether a breach of the terms had occurred. The Court held that the examination of potential unfair terms required the case to be referred for a Plenary Hearing. The case of *AIB v Cunnihan*²⁴ established the obligation on Irish courts to carry out an own motion assessment for unfair terms in financial consumer contracts or loans.²⁵ The notion that Ireland, as a 'common law' jurisdiction, had any special (opt –out) status in respect of EU harmonising laws was dismissed, and this interpretation was reiterated in *Grant v The County Registrar from the County of Laois and Pepper Finance Corporation (Ireland) Ltd.*²⁶

But Irish courts have not been able to find any unfair contract terms in mortgage contracts to date, and many pre-2009 mortgages contain archaic and unfair terms. This seems surprising, given that the UCTD is increasingly being cited in pleadings. The reasons are varied, from situations where the lending corporation failed to provide all necessary documentation for the Court to properly carry out an assessment for unfair terms,²⁷ or the proceedings were *res judicata*,²⁸ or the borrowers had not pointed to any unfair term and the Court had not been able to discern one,²⁹ to instances where the borrowers had a solicitor acting for them.³⁰

Ireland 2011); Klaus Regling and Max Watson *A Preliminary Report into the Sources of Ireland's Banking Crisis* (Prn A10/0700, 2010); *ICS Building Society v Grant* [2010] IEHC 17.

²¹ The Land and Conveyancing Law Reform Act 2009 redefined a significant portion of mortgages as 'housing loans', with special rules on notices, enforcing the security and protection of borrowers. This 'housing loan' has the meaning given to it by section 2 (1) of the Consumer Credit Act 1995, as substituted by section 33 of, and Part 12 of Schedule 3 to the Central Bank and Financial Services Authority of Ireland Act 2004 and 'housing loan mortgage' means a mortgage to secure a housing loan.

²² [2015] IESC 64.

²³ [2016] IEHC 320.

²⁴ [2016] IEHC 752.

²⁵ This obligation arises from *Oceano* (n 11) and followed in *Aziz* (n 12), para 46.

²⁶ [2016/787 J.R.].

²⁷ *EBS v Kenehan and Ryan* [2017] IEHC 606. In this case, the court decided that a possession order obtained before a lower court could not now stand, and the matter was remitted for a Plenary Hearing. See also *Harbell Ltd v James Walsh (Auto Electrical) Ltd* [2017] IEHC 572.

²⁸ *Cronin v Dublin City Sheriff* [2017] IEHC 685, although the court suggested that the own motion assessment should take place if it were a 'live' case. In relation to *res judicata* - see also Case C-421/14 *Banco Primus SA v Jesús Gutiérrez García* (ECJ), 26 January 2017).

²⁹ *Bank of Ireland v McMahon* [2017] IEHC 600 [17]; *Bank of Ireland v Roarty* [2017] IEHC 789 [22]. Signing a waiver of legal advice before signing the contract was not considered a term of the contract for the purposes of the UCTD, although it was accepted that it 'relates' to the contract. Of course, the CJEU has held in Case C-602/13 *Banco Bilbao Vizcaya Argentaria, SA v Fernando Quintano Ujeta and María Isabel Sánchez García* (ECJ), 11 June 2015) that where the national court finds that a term is unfair within the meaning of the Directive, the fact that the term has not been applied in practice does not preclude the court from determining all the consequences to be drawn from such a finding.

³⁰ *AIB v Cosgrave* [2017] IEHC 803.

Spotlight on the role of solicitors

So what is the role of solicitors in relation to consumers signing non-negotiable industry standard mortgage contracts containing unfair terms? One commentator has observed that mortgagors are almost always represented by solicitors when executing mortgage deeds.³¹ This viewpoint has been reiterated in recent cases.³² Of course, loan offers contain statements advising mortgagors to seek independent legal advice before signing – although the mortgage application contains standard terms which are often accepted by the consumer before a solicitor is engaged. The offer letter refers to the lender's General and Special Conditions, its Deed of Mortgage and Charge. It has been established that all these documents are within the purview of the 'own motion assessment' for unfair terms.³³

Clearly, there are solicitor undertakings as to good marketable title, and rights under the Family Home Protection Act 1976 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 to be addressed, but can this be taken to include advice on the loan documentation in relation to unfair terms protection?³⁴ Where signatures on associated deeds are 'witnessed by a solicitor', does this imply that advice on any unfair terms in the mortgage consumer contract was given?³⁵

In one recent case, it was held that the Court has to take cognisance of the fact that the defendants had the benefit of a solicitor when executing the Mortgage Deed. Moreover, the offer document clearly advised the defendants to consult with their solicitor 'on the offer documents, the conditions and the security which will be taken over your home.'³⁶ In *Permanent TSB Plc formerly Irish Life & Permanent Plc. v Fox*,³⁷ it was held that 'the Court cannot discount the fact that the defendants signed the letter of loan approval and by doing so confirmed that their solicitor had 'fully explained' the terms and conditions of the loan to them'. The defendants 'cannot but have been aware of the principal terms of the mortgage contract'.³⁸ The fact that there might be other unfair terms in the contract, which were not relied upon by the lenders, was viewed as irrelevant for the purposes of carrying out an own motion assessment for these terms.³⁹

Some of these developments would appear to shift the onus on ensuring compliance with the UCTD in industry standard mortgage contracts, away from the State agency (Central Bank of Ireland) charged with ensuring its application, and possibly to dilute the

³¹ Eoin Martin, 'Unfair Terms in Consumer Contract Loans' (2017) 24(4) *Commercial Law Practitioner* 71.

³² *Ulster Bank Ireland v Costelloe* [2018] IEHC 289; *Permanent TSB Plc formerly Irish Life & Permanent Plc. v Fox* [2018] IEHC 292.

³³ *EBS v Kenehan* [2017] IEHC 606 [27].

³⁴ See *AIB v Cosgrave* [2017] IEHC 803 [71].

³⁵ See *Bank of Ireland v Mahon and Woods* (CC, 9 August 2017).

³⁶ *Ulster Bank Ireland v Costelloe* [2018] IEHC 289 [68].

³⁷ [2018] IEHC 292.

³⁸ *Ulster Bank Ireland v Costelloe* [2018] IEHC 289 [66].

³⁹ *Ulster Bank Ireland v Costelloe* [2018] IEHC 289 [67]. However, it is worth noting that in Case C-421/14 *Banco Primus SA v Jesús Gutiérrez García* (ECJ, 26 January 2017), Judgment of the Court (First Chamber), the CJEU held at para 73 that: 'in order to ensure the dissuasive effect inherent in Article 7 of Directive 93/13, the prerogatives of the national court ruling on whether a term is unfair, within the meaning of Article 3(1) of that directive, cannot be contingent on whether that term was actually applied or not. Accordingly, the Court has already held that Directive 93/13 must be interpreted as meaning that, where the national court has established the 'unfairness' within the meaning of Article 3(1) of Directive 93/13 of a term in a contract between a consumer and a seller or a supplier, the fact that that term has not been executed cannot, in itself, prevent the national court drawing the appropriate conclusions from the 'unfair' nature of that term'.

courts obligation to examine and protect the consumer's rights in mortgage enforcement proceedings. In shifting the focus towards the duty of care obligations within the fiduciary relationship between borrower/consumer and their solicitor, there is a risk that consumers may seek to recover losses from the provider of legal 'advice', rather than on the grounds of the unfair terms in the mortgage contract itself.⁴⁰ The CJEU has held that whether a consumer is assisted by a lawyer or not, this cannot alter the effectiveness of EU consumer law protection on unfair contract terms.⁴¹

Primacy of EU Law in Ireland?

The *Aziç* case established that national procedural rules cannot undermine the effectiveness of EU consumer law. National procedural autonomy is now subject to the principles of effectiveness and equivalence in EU consumer law cases.⁴² Indeed, the CJEU has established that the principle of effectiveness is breached where a court registrar is restricted to checking compliance with formalities, precluding any assessment of potentially unfair terms.⁴³ A recent EU-wide study on the equivalence and effectiveness of national procedural protection under EU consumer law identified Ireland as an outlier.⁴⁴

In another context, the CJEU has recently decided that arrangements in Irish law and procedure for the effective application of an EU Directive breached this principle of effectiveness.⁴⁵

Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law (see, to that effect, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 22; of 19 June 1990, *Factortame and*

⁴⁰ This raises important questions about the undertakings made by solicitors involved in the conveyancing process.

⁴¹ Case C-497/13 *Fronkje Faber v Autobedrijf Hazet Ochten BV* (ECJ), 04 June 2015), para 47.

⁴² See Fabrizio Cafaggi, & Paola Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' [2017] *European Review of Private Law* 575. See also Federico Della Negra (n 18).

⁴³ Case C-49/14 *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others* (ECJ), 08 April 2016). The recent High Court decision by McDermott J in *Grant v The County Registrar from the County of Laois and Pepper Finance Corporation (Ireland) Ltd.* [2016/787 J.R.] confirmed at paras 80-87 that the Circuit Court, of its own motion, must interpret Irish law including its powers and procedures in conformity with its obligations under the UCTD in order to ensure that appropriate consumer protections and remedies are made available to the consumer. However, in this case, a power of entry upon the lender without a court procedure in the mortgage was held not to constitute an unfair contract term as the clause could only operate subject to Article 40.5 of the Constitution and s 62(7) of the Land Registration Act 1964 and now s 97 of the Land and Conveyancing Law Reform Act 2009. The case also considered the 'proportionality' of the possession order in terms of Article 7 of the EU Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights.

⁴⁴ Max Plank Institute, 'An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law- Report JUST/2014/RCON/PR/CIVI/0082' (European Commission 2017) <https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49503> accessed 19 March 2019, 204.

⁴⁵ Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* (ECJ), 04 December 2018). Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

Others, C-213/89, EU:C:1990:257, paragraph 20; and of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 56).⁴⁶

The application of this reasoning to the UCTD in Irish cases could be valuable.

Since *Aziiz*, the CJEU has ruled that in mortgage cases where the UCTD is engaged, the EU Charter of Fundamental Rights is also applicable, including Article 47 on the right to an effective remedy and fair procedures.⁴⁷ In Ireland, where 70% of distressed mortgagors are unrepresented before the courts, Article 47 is clearly relevant.⁴⁸ The CJEU has already interpreted the application of the UCTD through the prism of Article 7 of the Charter – invoking the right to respect for the home into judicial reasoning.⁴⁹ Significantly, the CJEU held that ‘[u]nder EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13’.⁵⁰ The referring court is of course, the national or local court, and there is therefore a clear obligation to draw on all the Charter Articles, including Article 47, in its interpretative obligations relating to the UCTD.

Conclusion

Irish courts have now accepted the obligation to carry out ‘own motion assessments’ for unfair contract terms in mortgage possession cases. However, in the reported cases no such term has been found in any Irish mortgage, despite much anecdotal evidence among solicitors of the prevalence of such terms. Neil Maddox points out that some pre-2009 acceleration clauses in mortgages could be vulnerable to challenge.⁵¹ Yet, the application of the UCTD is recognized as poor in Ireland, and the Central Bank of Ireland has, so far, failed to refer any standard mortgage contracts to a court for examination for unfair terms.⁵² Rather, it has been left to individual consumers and their advocates to present the EU law, and for Irish courts to incorporate this developing EU jurisprudence into the highly charged legal arena of mortgage repossession cases, where any slight deviation from the established norms could – as it were – ‘frighten the horses’ of global financial flows into Irish property portfolios. Indeed, the obligation to protect the mortgage industry from a rise in consumer rights has led to some interesting observations, such as Binchy J in *Bank of Ireland v McMahon*⁵³ in the Irish High Court:

⁴⁶ *ibid*, para 36.

⁴⁷ See Case C-169/14 *Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* (ECJ, 17 July 2014). See EU Charter (n 18).

⁴⁸ See Padraic Kenna, *Access to Justice and the ECB – A Study of ECB Supervised and other Mortgage Possession Cases in Ireland* (Centre for Housing Law, Rights and Policy 2018) <<https://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Access-to-Justice-and-the-ECB-Report-CHLRP-2018.pdf>> accessed 24 February 2019).

⁴⁹ Case C-34/13 *Monika Kušionová v SMART Capital, a.s.* (ECJ, 10 September 2014), paras 63–65. Jacobien Rutgers, ‘The right to housing (article 7 of the Charter) and unfair terms in general conditions’ in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017) 132.

⁵⁰ See Case C-34/13 *Monika Kušionová v SMART Capital, a.s.* (ECJ, 10 September 2014), paras 63–65.

⁵¹ Neil Maddox, *Mortgages: Law and Practice* (2nd edn, Round Hall 2017) paras 4.91–6.

⁵² The Opinion of the European Central Bank of 17 November 2016 on the conferral of powers on the Central Bank of Ireland (CBI) to assess competition in the market for mortgage loans and to issue lenders with directions on variable interest rates (CON/2016/54) pointed out, at para 3.3.4.1., that ‘[I]n Ireland, the CBP’s responsibilities include ensuring compliance with, inter alia, the Consumer Protection Act 2007, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 and with the European Union (Consumer Mortgage Credit Agreements) Regulations 2016’.

⁵³ [2018] IEHC 455 (Ex Tempore).

[...]To suggest that the Regulations or the [UCTD] Directive apply to the deed of mortgage itself is in my view an absurd proposition, which, if accepted, might very well undermine the domestic mortgage market.⁵⁴

Yet, there are signs of a nascent European standard, linking between mortgage law, consumer law and human rights law, with the CJEU developing the nexus between European legislation on mortgages, between credit default, indebtedness and the family home.

In Ireland, though, there seems to be a shift in focus onto the borrower's solicitor, and away from the credit institutions' standard form mortgage contracts, or their supervisory agency – the Central Bank of Ireland/ECB. Solicitors are placed in an invidious position when dealing with a mortgage borrower with a non-negotiable contract. Solicitors are placed on the horns of a dilemma – between accepting the non-negotiable mortgage contract with unfair terms, or not proceeding, and losing the mortgage and associated purchase. This demonstrates the enormous significance of the judicial own motion assessment under the Directive to identify and strike out unfair non-core terms in mortgage contracts.

In the absence of State agency application of EU consumer law, the role of the courts becomes critical. Courts must interpret national legislation and procedures in line with EU law obligations, and interpretations of national property and contract law may have to be adjusted to comply with EU Charter of Fundamental Rights.⁵⁵ Even where the national law copies out the rules and principles established by an EU Directive, it still may be questioned whether the national law accurately implements EU law, if the meaning and content of the directive itself needs to be interpreted in an unexpected way in order to ensure compliance with EU Charter rights.⁵⁶ Given the extent of legal representation in possession cases, it is an open question as to whether Irish legislation and court procedures make it excessively difficult or impossible in practice to protect the rights conferred on consumers by Directive 93/13, in relation to the 700,000 private residential mortgage accounts for principal dwellings, held in the Republic of Ireland.⁵⁷

⁵⁴ *ibid*, [20]-[21].

⁵⁵ Hugh Collins, 'The Challenges Presented by the Fundamental Rights to Private Law' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Bloomsbury 2017) 215.

⁵⁶ Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017) 5-6. See EU Charter (n 18).

⁵⁷ See *Aziç* (n 12), para 50, 'In that regard, in the absence of harmonisation of the national mechanisms for enforcement, the rules implementing the grounds of objection allowed in mortgage enforcement proceedings and the powers conferred on the court hearing the declaratory proceedings, which enjoys jurisdiction to analyse the lawfulness of the contractual clauses on the basis of which the right to seek enforcement was established, are a matter for the national legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by European Union law (principle of effectiveness) (see, to that effect, Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* EU:C:2006:675 paragraph 24, and Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* EU:C:2009:615, paragraph 38)'.