Mohamed Aziz – sympathetic and activist, but did the Court get it wrong?[1]

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Case C-415/11 is outstanding in that it condenses in a nutshell the social and the societal consequences of the Euro crisis for Spanish citizens. This is more than just a 'case'. There are thousands of cases behind the case.[2] *Mohamed Aziz* falls in the category of public interest litigation in the meaning *Joel Handler*[3] gave to it. Societal problems as a result of the impact of the Euro-Crisis on over-indebted consumers are brought before European courts which then have to engage in social engineering. This is indeed 'Eurolegalism' as *D. Keleman*[4] calls it.

The legal analysis of the judgment is focussed on the arguments which the ECJ uses to justify a result which might be met with much sympathy, as it seems to defend social values to the benefit of those who lost their home in the aftermath of the crisis. However, it also raises complicated questions about how far the ECJ can go, might go and should go in achieving this kind of results. In short, we are claiming that the result might be politically acceptable and sympathetic, but that the ECJ should address the economic, social and constitutional issues upfront and should openly discuss its own role in the conflict as well as the tensions between the EU and the Member States and between different policies.

The analysis is structured around three issues:

1. placing *Mohamed Aziz* in the perspective of a recent series of ECJ cases on unfair contract terms demonstrates how the ECJ is gradually developing a *genuine* European law on the control of unfair contract terms and at the same time how it is laying down the foundations of a *genuine* European consumer procedural law,[5]

2. the *hidden* constitutionalisation of European private law. The ECJ deliberately avoids addressing the 'problématique' of the constitutionalisation of private law by not openly addressing the

[1] This contribution builds on Unfair Contract Terms – Public Interest Litigation before European Courts Case C-415/11 Mohamed Aziz, in V. Colaert/E. Terryn (eds.) Landmark Cases of EU Consumer Law – in Honour of Jules Stuyck, Intersentia, 2013, 615-634. The focus, however, is shifted towards the question of whether and if so, what exactly the Court got wrong and why. I would like to thank Federico Della Negra, 2nd Year PhD researcher at the EUI for discussions on the case law of the ECJ in consumer law and in particular on the procedural dimension of the unfair terms directive.

[2] P. Gutiérrez de Cabiedes, M. Cantero Gamito, Over-indebtedness of European Consumers after the Financial Crisis, long version to be published in the EUI-ERC Working Paper edited by Hans-W. Micklitz/Irina Domurath, the short version will be published in Hans-W. Micklitz/Irina Domurath (eds.), Consumer Debt and Social Exclusion in Europe, Ashgate 2014.

[3] Social Movements and the Legal System, 1979.

[4] The Transformation of Law and Regulation in the European Union, 2012.

[5] H.-W. Micklitz/N. Reich, The Court and the Sleeping Beauty, The revival of the Unfair Contract Terms Directive (UCTD), CMLR 51 (2041), 771.

relationship between the Charter of Fundamental Rights and European private law. However, this is in fact what happens – the ECJ is creating constitutionalised private law as a safety net,

3. the *managerial* role and function of the European Court of Justice. In a way, the ECJ is functioning as an instance of last resort for desperate national citizens. It compensates for the social deficit in the crisis management through the European Council, the European Commission and national governments. That is all very well, but...

THE FACTS

On 19 July 2007 Mr. Aziz signed a mortgage loan contract with Caixa D'Estalvis Tarragona (now Caixa D'Estalvis Catalan, Tarragona i Manresa, Catalunyacaixa).[6] In the information sheet by Caixa D'Estalvis Tarragona which identified the applicant it was stated that the property that would be subject to the mortgage loan was the family home of Mr. Aziz, who was married, and that the family was composed of two other members. Mr. Aziz was a specialised worker in machinery, engineering and mechanics. He had been a permanent employee of the same company since 2006 and had a fixed monthly income of 1.341,67 Euros. Mr. Aziz was a Moroccan citizen who had continuously worked in Spain in various occupations since December 1993. The borrowed capital was 138.000 Euros. The loan had to be repaid in 33 years, through 396 monthly installments which started on 1st August 2007. The last installment was due on 31 July 2040. Each monthly installment, including the initial interest rate, would be 701,40 Euros.

The loan agreement established an annual default interest of 18.75% which was chargeable automatically on unpaid amounts without the need of any claim by the creditor. In addition, the contract provided Catalunyacaixa with the power to declare the entire loan payable in the event that any of the terms agreed expired without the debtor having fulfilled his obligation to pay part of the capital or interest on the loan (Clause 6). Finally, the contract provided Catalunyacaixa with the possibility to resort to foreclosure to collect the debt, but it could also directly submit an appropriate settlement to determine the amount claimed (Clause 15). Mr. Aziz regularly paid the monthly installments from July 2007 to May 2008, but he stopped paying as of June 2008. Given this default, on 28 October 2008 Catalunyacaixa went to a notary in order to obtain a certificate which determined the amount of debt owed by Mr Aziz.

After Mr Aziz had failed to successfully pay the debt, Catalunyacaixa brought an enforcement procedure against him before the Court of First Instance No. 5 in Martorell on 11 March 2009. Its main claim was for 139.674,02 Euros, but it also claimed 90,74 Euros for due interests and 41.902,21 Euros for other interests and costs. Mr. Aziz did not attend to the procedure which resulted in an order of execution issued by the Court on 15 December 2009. A request for payment was

[6] ECJ, Case C-415/11, *Mohamed Aziz* [2013] ECR I-nyr.

also sent to Mr. Aziz, who did not respond and did not oppose the order. In these circumstances, a public auction was held on 20 July 2010 to proceed with the sale of the property. No offers were made. As a result, in accordance with Article 698 of the Spanish Civil Procedure Law, the Court of First instance number 5 of Martorell ordered the sale of the property at 50% of its real value. The Court indicated 20 January 2011 as the date on which the property transfer had to take place. As a result, Mr. Aziz was evicted from his home. Nevertheless, on 11 January 2011, Mr. Aziz applied to the Juzgado de lo Mercantil No 3 de Barcelona for a declaration seeking the annulment of clause 15 of the mortgage loan agreement on the ground that it was unfair. This would also mean that the enforcement proceedings would be annulled. It was this court which decided to stay the proceedings and to refer to the ECJ the following questions for a preliminary ruling:

> 1. Whether the system of levying execution, in reliance on judicial documents, on mortgaged or pledged property provided for in Article 695 et seq. of the Spanish Code of Civil Procedure, with its limitations regarding the grounds of objection, may be nothing more than a clear limitation of consumer protection since it involves, both formally and substantively, a clear impediment to the consumer's exercise of rights of action or judicial remedies of such a kind as to guarantee the effective protection of his rights?[7]
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> 2) How is the concept of disproportion to be understood with regard to:
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> a) the use of acceleration clauses in contracts planned to last for a considerable time – in this case 33 years – for events of default occurring within a very limited specific period;
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> b) the setting of default interest rates – in this case exceeding 18% – which are not consistent with the criteria for determining default interest in other consumer contracts (consumer credit), which, in other types of consumer contracts, might be regarded as unfair, and which, nevertheless, in contracts relating to immovable property, are not subject to any clear legal limit, even where they are applied not only to the instalments that have already fallen due but also to the totality of those that have become due as a result of acceleration;
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> c) the unilateral establishment by the lender of mechanisms for the calculation and determination of variable interest – both ordinary and default interest – which are linked to the possibility of mortgage enforcement and do not allow a debtor who is subject to enforcement to object to the quantification of the debt in the enforcement proceedings themselves but require him to resort to declaratory proceedings in which a final decision will not be given before enforcement has been completed or, at least, the debtor will have lost the property mortgaged or charged by way of guarantee – a matter of great importance when the loan is sought for the

[7] According to the Spanish Constitutional Court the procedure laid down in article 698 of the code of civil procedure complies with art. 24 Constitution which establishes the right to the effective remedy

purchase of a dwelling and enforcement gives rise to eviction from the property?'

I. THE ECJ IS GRADUALLY TAKING OVER THE CONTROL OF UNFAIR TERMS IN CONSUMER CONTRACTS

The adoption of the Directive 93/13/EEC on unfair terms in consumer contracts raised much concern in the academia of private lawyers around Europe, who had to realise the growing importance of European private law. *Océano Grupo Editorial*[8] constituted the first blow of the ECJ, which created fear that the ECJ could turn into a court of last resort which would exercise control over standard contract terms in Europe. In that case the ECJ struck down jurisdiction clauses. This would have undermined not only the separation of powers between EU law and national law, respectively between European courts and national courts, but it would also have put national private law litigation under the full scrutiny of EU law. *Freiburger Kommunalbauten*[9] brought a temporary end to these fears, since the ECJ delegated the responsibility of defining and setting acceptable standards to the national courts. In another Spanish reference, *Mostaza Claro*,[10] the ECJ had to rule on the fairness of arbitration clauses. To the dismay of consumer activists the ECJ did not put jurisdiction clauses and arbitration clauses on an equal footing – it recognised the substantial differences in the Member States. Whereas arbitration clauses in standard terms are prohibited in some countries, they are allowed in others.[11] However, this is not the end of the story. So far, *Mohamed Aziz* is the highlight of a breath-taking development in the ECJ's application of the UCTD, which has crystallised the procedural turn and which has revitalised the old fears which had been triggered by *Océano Grupo Editorial.*

1. The procedural turn – two innovations the ex officio doctrine and injunctive relief

The ECJ discovered a new avenue and introduced a *procedural* remedy into the arsenal of European consumer law: the *ex officio* obligation of the national judge to examine the legality of standard terms.[12] In a whole series of follow-up references, *Pannon,*[13]*Asturcom,*[14]*Pénzügyi,*[15]*Photovost,*[16]*Invitel,*[17]*Banco Español de*

[8] ECJ, Case C-240-244/98, *Océano Grupo Editorial*, [2000] ECR I-4941.
[9] ECJ, Case C-237/02, *Freiburger Kommunalbauten* [2004] ECR I-3403
[10] ECJ, Case C-168/05, *Mostaza Claro* [2006] ECR I-10421.
[11] For an overview, N. Reich, Negotiations and Adjudication. Class Actions and Arbitration in Consumer Contracts, in F. Cafaggi/H.-W. Micklitz (eds.), New Frontiers of Consumer Protection, The Interplay between Private and Public Enforcement, Intersentia, 2009, 345.
[12] K. Saare/K. Sein, Amtsermittlungspflicht der nationalen Gerichte bei der Kontrolle von mißbräuchlichen Klauseln in Verbraucherverträgen, EUVR 2013, 15 draw a distinction between the legal and the factual side. They do not devote enough attention to the particular character of standardised terms which typically combine the two elements.
[13] ECJ, Case C-243/08, *Pannon* [2009] ECR I-4713.
[14] ECJ, Case C-40/08, *Asturcom* [2009] ECR I-9579.
[15] ECJ, Case C-137/08, *Pénzügyi* [2010] ECR I-10847.
[16] ECJ, Case C-76/10, *Pohotovost' s.r.o.* [2010] ECR I-11557..
[17] ECJ, Case C-472/10, *Invitel* [2012] ECR I-nyr.

Crédito,[18]*Banif,*[19] *Asbeek Brusse,*[20]the ECJ confirmed and developed more and more sophisticated criteria for this new procedural remedy. So far, the ECJ had imposed an obligation on the national judge in an order for payment procedure – *Banco Español*[21] - and in *inter partes* proceedings where the consumer objected against an order of payment – *Pènzügyi.*[22] In *Invitel*, the ECJ extended the *ex officio* doctrine to the action for an injunction. In so doing, it linked individual and collective redress. What remains to be decided is the degree to which the *ex officio* doctrine can be extended, beyond the scope of the unfair contract terms directive, to all EU rules which provide for a mandatory level of protection – not only in consumer law, but also in labour law, anti-discrimination law, environmental law, in short, whenever the EU sets binding standards.[23] *Martin*[24] confirmed the applicability to door-step selling, *Rampion*[25] to consumer credit and *Duarte Hueros* [26] to consumer sales. This means that at least in the area of consumer law it seems fair to speak of a comprehensive encompassing procedural remedy – leaving aside the question whether and to what extent the *ex officio* doctrine applies to all mandatory EU rules, such as in anti-discrimination law, in environmental law, in health and safety at work and even in primary community law.

In *Mohamed Aziz*, the referring Spanish court did not ask the ECJ whether the court hearing the enforcement proceedings must also assess of its own motion the effectiveness of individual contractual terms which have effects on enforcement. This meant that Advocate General *Kokott*[27] did not have to engage in an examination of individual terms. The ECJ did not spend a single word on the role and function of the *ex officio* doctrine in *Mohamed Aziz*. *Kušionová*[28] would have provided the ECJ with an opportunity to clarify its position. However, the contrary happened.

However, the Advocate General deduced from the principle of effectiveness the need to grant *interim relief* to protect the rights of over-indebted consumers against the disastrous effects of the separation of the declaratory and the enforcement proceedings. The ECJ confirmed this position by reference to

[18] ECJ, Case C-618/10, *Banco Español de Crédito* [2012] ECR I-nyr.
[19] ECJ, Case C-472/11, *Banif Plus Bank* [2013] ECR I-nyr.
[20] ECJ, Case C-488/11, *Asbeek Brusse* [2013] ECR I-nyr.
[21] ECJ, Case C-618/10, *Banco Español de Crédito* [2012] at 42 and 43
[22] ECJ, Case C-137/08, *Pénzügyi* [2010] ECR I-10847at 56.
[23] For the ex officio control in other areas of EU law, see Case C-312/93 *Peterbroeck* [1995] ECR I-4599, in relation to article 52 EEC Treaty and Case C-126/97 *Eco Swiss* [1999] ECR I-3055, in relation to article 85 EC Treaty. However, the Court narrowed down the scope of application of the ex officio control in Joined cases C-222/05 to C-225/05, J. van der Weerd 2007 ECR I-I-04233, para 40-41
[24] ECJ, Case C-227/08, *Eva Martín Martín* [2009] ECR I-2009 I-11939.
[25] ECJ Case C-429/05, *Rampion* [2007] ECR I-8017.
[26] ECJ, Case C-32/12, *Duarte Hueros* [2013] ECJ I-nyr.
[27] Opinion of the AG Kokott in case C-415/11, *Mohamed Aziz* [2013] at 56.
[28] ECJ. 10.09.2014, Case C-34/13, *Kušionová* 2014 ECR I-nyr, downgrading the principle of effectiveness and upgrading the role and function of fundamental rights, see the case note F. della Negra forthcoming.

Unibet.[29] More or less in passing the ECJ 'invented' a *new procedural remedy* that links the enforcement proceedings and the declaratory proceedings. The procedural autonomy of the Member States, which is frequently emphasised, did not meet the effectiveness test. However, this is not a stand-alone test. Advocate General *Kokott* built a bridge between the rights granted under Directive 93/13/EEC and the need to provide for appropriate protection within national procedural law.[30]

Putting the referring question in such a perspective already implies the answer. The complete separation of the two proceedings makes it literally 'impossible' for the consumer to raise in the enforcement proceedings the question of whether the underlying contractual terms are in compliance with the requirements of Directive 93/13/EEC. Procedure and substance remain interlinked. Without Directive 93/13/EEC in the background there would not have been an opportunity for the ECJ to look deeper into the procedural law of Spain.

A first set of questions to the procedural turn

There are follow-on questions, which will certainly keep the ECJ busy. They are linked to the *ex officio* doctrine.[31] Is it for the judge in the mortgage enforcement proceedings to inquire into substantive fairness in order not to undermine the right of the consumer to apply for interim relief? Or is it for the judge in the declaratory proceedings not only to secure the protection of consumer rights by granting interim relief against foreclosure but also to investigate the underlying standard contract terms *ex officio*? Does it matter at what stage the national judge has to intervene – already in the declaratory proceedings or later in the enforcement proceedings? What exactly is the national judge obliged to do? Should a court analyse of its own motion the existing consumer protection rules – not only in relation to national law but also in relation to European law? Does it mean that national judges are under an obligation under EU law to closely follow the case law of the ECJ? And what happens if national judges fail to engage into an inquiry of the legality of the term? Could this result in State liability under the *Francovich*[32] and the *Köbler* [33] doctrine?

And further ahead – is the remedy of *interim relief* only linked to the declaratory and enforcement procedures or can the rationale behind the aim of interim relief be generalised? Interim relief would then have to be granted whenever the disconnection of European *substantive* and national *procedural* law would endanger the effective and equivalent protection of substantive EU law. Substantive EU contract law would then shape national procedural law –

[29] ECJ, Case C-415/11, *Mohamed Aziz* [2013] at 59. See also ECJ, Case C-432/05 *Unibet* [2007] ECR I-2271 at 77.
[30] Opinion of the AG Kokott in case C-415/11, *Mohamed Aziz* [2013] at 46.
[31] F. Cafaggi/St. Law, in V. Colaert/E. Terryn (eds.) Landmark Cases of EU Consumer Law – in Honour of Jules Stuyck, Intersentia, 2013, 653, who discuss the institutional and conceptual implications of such a shift of responsibilities.
[32] ECJ, C-479/93, *Francovich* [1995] ECR I-03843.
[33] ECJ,Case C-224/01, *Köbler* [2003] ECR I-10239.

contrary to and far beyond the overall constitutional architecture of the Treaty, under which enforcement of EU law remains in the hands of the Member States. Such an extensive reading would further erode the already shaky procedural autonomy of the Member States.[34]

Just to give a couple of examples of the potential reach in European private law: interim relief could be applied to national prescription rules which prevent the consumer from recovering the illgotten gains as a result of unfair contract terms which did not comply with the European fairness test.[35] One might even raise the question whether and to what extent the procedural turn of the ECJ – reading *Mohamed Aziz* and *Invitel* together – would allow for the introduction of a European skimming-off procedure *ex lege*. Can it be justified under the new procedural doctrine of interim relief that the users of unfair contract terms or unfair commercial practices whose terms and practices infringe EU law can keep their illgotten gains, which would undermine considerably the effectiveness of the action for an injunction, and, more importantly, the *acquis* of the Directive 93/13/EC on unfair contract terms? Such court-driven improvement of procedural remedies would close an important gap in the protection of collective rights of consumers where no agreement between the Member States on a European solution seems possible in the near future.[36] For the first time in the history of EU law it is legally possible to argue for such a solution under existing EU law.

If one links these recent developments in the field of remedies to the *ex officio* doctrine, it seems that the ECJ has started to lay down an autonomous European procedural consumer law. It would then be for national courts to investigate the compliance with EU law not only in individual disputes but also in collective litigation. So far, the ECJ has had few occasions to shape the action for injunction – let alone to decide on a European remedy for illgotten gains based on Directive 93/13/EC in combination with the principles of equivalence and effectiveness. Notwithstanding its feasibility and legality under the existing law, the extension of the *ex officio* doctrine would put even heavier weight on national judges – on their obligations and their commitment to the protection of collective interests of consumers. This is not pure speculation, as the ECJ already extended the *ex officio* doctrine to the action of injunction in *Invitel*. Does this mean that the national judge has to investigate the possibility and the feasibility of a skimming-off claim? Does he or she have to inform potential beneficiaries of such a possibility and by what means could that be achieved?

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[34] M. Bobek, *Why there is no Principle of Procedural Autunomy of the Member States*, in H.-W. Micklitz/B. de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, 2012, 305.

[35] See ECJ, Case C-92/11, *RWE*, *Vertrieb* [2013] ECR I-nyr; for the story of the 5000 consumers behind RWE H.-W. Micklitz/N. Reich, Luxemburg ante portas – jetzt auch im deutschen „runderneuerten" AGB-Recht? in Festschrift für Ulrich Magnus zum 70. Geburtstag, P. Mankowski/W. Wurmnest (Hrsg.), Sellier, 2014, 631-654 shortly discussed in same authors, Sleeping Beauty, CMLR 2014, 771.

[36] Recommendation 2013 with regard to the two new initiatives in the extension of collective remedies, Ch. Hodges, Collective Redress: A Breakthrough or a Damp Sqibb?' (2013) *Journal of Consumer Policy* DOI (2014) 37:67–89.

The advocates of public interest litigation, who trust in courts to promote particular and usually socially neglected policies such as environmental protection, anti-discrimination and consumer protection, may applaud such judicial activism from Luxemburg to the national courts. However, the enthusiasm for the ECJ's engagement in social policy is somewhat outweighed by the reluctance of national courts to follow the ECJ's reading of the *ex officio* doctrine. Six case studies on the impact of the economic crisis on consumer indebtedness demonstrate that a *Mohamed Aziz* case exists in all six countries, though in variations, but that national courts face difficulties to accept and handle the new *ex officio* doctrine.[37] Hungarian, Slovakian and, most of all, Spanish courts are overloading the ECJ with preliminary references which seek clarification of mortgage enforcement proceedings. At the time of writing 11 follow-on references have been made where a direct connection to the mortgage proceedings can be made. Two of them have already been decided (ended up with a judgment) after *Mohamed Aziz*.[38] National judges, supported by consumer activists, might over-estimate the possibility for the ECJ to settle the case. An increasing amount of references cannot guarantee success for consumers who lost or who are about to lose their homes. Quite the contrary might be true. The flood of references may provoke an opposite reaction by the ECJ. The good intention of national courts to use the ECJ as a catalyst might in the end 'kill the case'. This means that it might demonstrate the limits of judicial activism to solve social problems that have a strong political background. This is not really surprising if one looks back at the follow-on cases after *Barber* in equal treatment[39] or after *Heininger* in credit-financed consumer investments into housing[40].

However, there is another interpretation of the seemingly sympathetic recent developments in the ECJ's case law. Is the ECJ not simply going too far, moving from interpretation to bold law-making beyond all constitutional boundaries? In *Mohamed Aziz* the ECJ applied the logic behind EU mandatory rules in substantive law to the judicial procedure. At the substantive level it is the legislator which sets mandatory standards – in European consumer contract law the EU legislator. At the procedural level, there is much less room for standard-setting, neither by the EU legislator nor by the ECJ. This is the realm of procedural autonomy, which secures de-centralised enforcement in the Member States under the Treaty. The EU has no genuine competence in procedural matters outside Article 81 TFEU, which limits law-making to trans-border issues.

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[37] H.-W. Micklitz/I. Domurath (eds.), Consumer Debt and Social Exclusion in Europe, Ashgate 2014.

[38] See the judgments in the cases C-470/12, *Pohotovosť s. r. o.,* [2014] ECR I-nyr and C-280/13, *Barclays* [2014] ECR I-nyr. See the orders issued in the joined Cases C-482/13 and 487/13, *Unicaja Banco* [2014] and 169/14, *Sànchez Morcillo* [2014]. For the pending cases see the case C-116/13 *Banco de Valencia*, C-602/13, *Banco Bilbao Vizcaya Argentaria,* referred the 25.11.2013; C-8/14, BBVA, referred the 10/1/2014; C-90/14, *Banco Grupo Cajatres, referred the* 24.2.2014*;* C-93/14, *Zurbano Belaza and Artieda Soria,* referred the 26.2.2014; C-122/14, *Aktiv Kapital Portfolio Invesment,* referred the 14.3.2014.

[39] C. Kilpatrick, H.-W. Micklitz, The Politics of Judicial Co-operation, 2005, at 165.

[40] H.-W. Micklitz, The Heininger Saga The Relationship between National and European Consumer Policy – Challenges and Perspectives, Yearbook of Consumer Law 2008, Ashgate 2007, 35-66.

Aziz is based on the application of Directive 93/13/EC on unfair terms. The procedural rules are only an annex to the substantive legal rules - a regulatory technique – which the ECJ has accepted to be in compliance with Article 114 TFEU.[41] Legitimated by the Annex competence in procedural matters in the narrow field of control of unfair contract terms, the ECJ is influencing national procedural law horizontally. This is clear from the *ex officio* doctrine and it seems also possible for the new remedy of interim relief.

Constitutionally speaking the ever deeper involvement of the ECJ into procedural matters rests on shaky legal ground. The ECJ certainly fills a gap in procedural consumer law. However, so far, Member States have indicated limited political willingness to leave it to the EU to shape national procedural law.

2. Back to substantive control – ECJ 'Guidance' for national courts

Squeezed between no control (*Freiburger Kommunalbauten*) and full control (*Océano Grupo Editorial*), the ECJ is going to develop a third way - one where it provides increasingly tight guidance to national courts. In *Pénzügyi*[42] and in *Invitel*[43] the ECJ started to upgrade the indicative list; in *RWE*[44] it gave the transparency principle in Directive 93/13/EEC a genuine meaning, which specifies the proposed distinction between contractual and competitive transparency;[45] in *Mohamed Aziz* it further strengthened not only the function of the indicative list[46] but it also engaged in a European interpretation of good faith, significant imbalance and disproportion.

Good faith, significant imbalance and disproportion: For the first time ever Advocate General *Kokott* and the ECJ were asked to analyse the guiding importance of the general fairness test – in the language of the Directive 93/13/EEC –: good faith and significant imbalance. *Freiburger Kommunalbauten* already gave the ECJ the opportunity to embark on an analysis of the deeper meaning of the so-called general clause, but the ECJ decided not to do so – maybe in light of the uproar against *Océano Grupo Editorial.* The then House of Lords – now Supreme Court – refused twice to refer questions to the ECJ on the highly sensitive issue of 'good faith' in consumer contract law – firstly in *First National*[47] and later in the *Bank Charges*[48] case.

The referring Juzgado de lo Mercantil No. 3 de Barcelona did not mention the general clause in Article 3 of the Directive explicitly, nor did it use the terms

41 ECJ, Case-C-359/92, ECR 1994 I-306 European Commission vs. Germany dealing with competences delegated to the European Commission in the management of emergency situations in the field of product safety.
42 ECJ, Case C-137/08, *Pénzügyi* [2010] ECR I-10847.
43 ECJ, Case C-472/10, *Invitel* [2012] ECR I-nyr.
44ECJ, Case C-92/11, *RWE*, *Vertrieb* [2013] ECR I-nyr.
45 H.-W. Micklitz capater 3 in H.-W. Micklitz/N.Reich/P. Rott/K. Tonner, European Consumer Law, Intersentia 2nd edition, 2004, at 142.
46AG Kokott at 84, ECJ at 74 and 75.
47 Judgment of the House of Lords of 25 October 2001, The General of Fair Trading v First National Bank plc, [2001] UKHL 52.
48Judgment, 25.11.2009, Office of Fair Trading (Respondents) v Abbey National plc & Others (Appellants), Michaelmas Term (2009) UKSC 6 on appeal from (2009) EWCA Civ 116

'good faith' and 'imbalance'. All what the Juzgado did was to ask '*how is the concept of disproportion to be understood with regard to*'[49] the there enumerated three concrete contract terms. The AG started her analysis with a clarification of the function of the fairness test as laid down in Article 3 and 4 of the Directive 93/13/EEC. She rejected the idea of an abstract control which had been promoted by the European Commission[50] and she applied what I have called 'an abuse control of unfair terms'[51] which links the fairness test to the concrete circumstances of the case. The ECJ did not discuss the correct approach but impliedly agreed, since it used Articles 3 and 4 of Directive 93/13/EEC concurrently.

Both the AG and the ECJ did not spend a single word on the ongoing academic debate about what good faith means and whether and to what extent good faith and significant imbalance have a similar or even the same meaning. However, they both took 'significant imbalance' as the starting point – without entering into a debate about the relationship between significant imbalance and good faith and without trying to specify in depth what significant imbalance[52] might mean; whether good faith should be defined subjectively or objectively[53] and whether or not it could have an autonomous meaning in the European legal order.[54] In the application of the fairness test, the national legal order seems to form the major point of reference for the ECJ. At first sight, this makes sense, but difficulties might arise if the national order provides for standards that might be regarded as 'unfair' – perhaps not in the national order in question but in the

[49] Mohamed Aziz at 31.

[50] AG Kokott at 64-70, the ECJ does not discuss the issue but indirectly followed her line of argument by distinguishing between abstract and concrete at 37 and 38.

[51] Micklitz, in Micklitz/Reich/Rott/Tonner European Consumer Law, 2014, at 146.

[52] In C-226/12, *Constructora Principado SA* [2014] the Court pinpoints that "the existence of a 'significant imbalance' does not necessarily require that the costs charged to the consumer by a contractual term have, as regards that consumer, a significant economic impact having regard to the value of the transaction in question, but can result solely from a sufficiently serious impairment of the legal situation in which that consumer, as a party to the contract, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under that contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules.

[53] Neither the Court nor the AG did focus on the "balancing test", concerning the parties ' rights and obligations, that the Court put forward in the Freiburger case (see, in this regard, C. Willet, Fairness in Consumer Contracts. The Case of Unfair Terms, Ashgate, 2007, 105.) This test gives to the concept of good faith the objective meaning that emerges not only from the recital 16 of the Directive 1993/13 but also from the definition of good faith and fair dealing provided by art. I. - 1:103 (1) DCFR and art. 2, b) CESL. In the absence of the balancing test good faith could be interpreted subjectively, in this direction AG Kokott at point 74.

[54]ECJ, Case C-415/11, *Mohamed Aziz* [2013] at 68 "As stated by the Advocate General in point 71 of her Opinion, in order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms"

legal order of another Member State. Implicitly, the ECJ seems prepared to take national default rules enshrined in codified legal systems as a yardstick to measure whether a deviating standard term can be justified. In *Kásler*[55] the ECJ was even more explicit about national default rules – though not as yardstick for fairness, but as reference point for replacing the unfair term which leaves a gap in the contract. This approach very much resonates the typical thinking of lawyers who have been trained in continental legal thinking and ignores the differences between those Member States which have a codified private law order and those which have not. [56]

Guidance to the three disputed contract terms: One by one the Advocate General and the ECJ investigated the three disputed terms, which were at the heart of Spanish mortgage contracts. Just as in *RWE* the ECJ went far in its guidance on the 'correct' and 'fair' interpretation of what it is 'disproportionate'. By way of three contract terms the Caixa bank had strengthened its position: a) via the acceleration clause – in case of default by the debtor in respect of just one of the total of 396 monthly instalments, the lending bank may automatically claim the entire amount of the loan, b) via the default interest clause – if the borrower defaults on payment, without the need for any notice or reminder whatsoever, he must pay default interest of 18,75 % p.a. on the capital sum due, c) via unilateral determination of the amount owed – for the enforcement proceedings the lender may unilaterally determine the balance of the loan and can autonomously create an important condition for the conduct of the simplified mortgage enforcement proceedings. The ECJ largely relies on the arguments of the Advocate General in its assessment of the acceleration clause[57] and the default interest clause[58] – less so with regard to its assessment of the unilateral determination clause.[59]

A second set of questions on the reach of guidance in the interpretation of European private law rules

Can *national* default rules be used to provide guidance for the interpretation of good faith and significant imbalance in *European* contract law? Does the standard reference in ECJ judgments "*…it is for the national court to decide on the basis of the facts of case*…" suffice to overcome the problem that there are no European default rules? What could be the role and function of the Draft Common Frame of Reference as default rules, or could the ECJ refer to 'general principles of civil law' to close the gap?[60]

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[55] ECJ, case C-26/13, *Kásler and Káslerné* [2014], ECR I-nyr.
[56] St. Weatherill, The 'principles of civil law' as a basis for interpreting the legislative acquis, ERCL 2010, 74 makes that point in discussing the role and function of general principles of private law.
[57] ECJ, Case C-415/11, *Mohamed Aziz* [2013] at 73.
[58] ECJ, Case C-415/11, *Mohamed Aziz* [2013] at 74.
[59] ECJ, Case C-415/11, *Mohamed Aziz* [2013] at 75.
[60] ECJ, Case C-412/06, *Hamilton* [2008] ECR I-02383 at 42 'general principles of civil law'; Case C-489/07, *Messner* [2008] ECR I-07315, see the opinion of the AG Trstenjak at 91 and 108 and the ECJ, at 29 'general rules of civil law' (AG) 'principles of civil law (ECJ); case C-101/08, *Audiolux* [2009] ECR I-09823, see the opinion of the AG Trstenjak 'general principles of equal treatment of shareholders', and the ECJ 'general principle of equal treatment of minority shareholders' at 52), now N. Reich, General Principles of EU Civil Law, Intersentia 2014.

But deeper: is it for the European Court of Justice to gradually take over the substantive control and to define the standards of fairness for Europe as a whole? Technically speaking Directive 93/13/EEC on unfair terms sets minimum standards. Is the ECJ defining the threshold for minimum justice[61]? What about national courts? Are they turned into agents who have to follow the ECJ – as the German Supreme Court did in *RWE* – or will they simply refrain from referring a case to Luxemburg – as the former House of Lords did twice in the area of contract terms?

II. THE HIDDEN CONSTITUTIONALISATION OF PRIVATE LAW

Since nearly 10 years constitutionalisation belongs to the favourite subjects of private law research. In particular, much ink has been spilt on the analysis of national courts – preferably national constitutional courts or national supreme courts. [62] Usually the undertone is that constitutionalisation of private law allows for 'better' and 'more just' solutions – in particular, to protect the weaker party, the worker, the migrant, the tenant, the private investor and/or the consumer.[63]

Constitutionalisation at the European level has two limbs: the four economic freedoms and the fundamental rights which have now been laid down in the Charter of Fundamental Rights. The first has been the object of analysis in particular by German authors who have extended ordo-liberal thinking to the making of European private law. *Ernst Steindorff's*[64] book remains the lighthouse of analysis despite the more recent book from *Arthur Hartkamp*.[65]

Mohamed Aziz adds a new layer to the 'constitutionalisation of private law debate' – a layer we would like to call 'hidden' constitutionalisation. Neither Advocate General *Kokott* nor the ECJ refer to the Charter of Fundamental Rights,

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[61] see J. Stuyck in Liber Amicorum, Patterns of Justice in the European Constitutional Charter: minimum harmonisation in the field of consumer law, L. Krämer/H.-W. Micklitz/K. Tonner (eds./Hrsg.), Law and diffuse Interests in the European Legal Order/Recht und diffuse Interessen in der in der Europäischen Rechtsordnung, Liber amicorum Norbert Reich, Band 3 der VIEW Schriftenreihe, 1997, 279.

[62] O. Cherednychenko, Fundamental Rights, Contract Law and the Protection of the Weaker Party. A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions (Munich, Sellier, 2007); Ch. Mak, Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England (Alphen aan den Rijn, Kluwer, 2008); in G. Brüggermeier, A. Colombi Ciacchi, G. Comandé (ed) Fundamental Rights and Private Law in the European Union. Volume II: Comparative Analyses of Selected Case Patterns (Cambridge, University Press, 2010).

[63] Hugh Collins, The Constitutionalisation of European private law as a path to social justice? In H.-W. Micklitz, The Many Faces of Social Justice in European Private Law, 2011, 115, now N. Reic, General Principles of EU Civil Law, 2014, who identifies the protection of the weaker party as a general principle of European civil law.

[64] In a more theoretical perspective Ch. Schmid, Die Instrumentalisierung des Privatrechts durch die Europäische Union, Privatrecht und Privatrechtskonzeption in der Entwicklung der Europäischen Rechtsverfassung (Baden-Baden, Nomos, 2010); still relevant the ground breaking analysis of the ECJ case law, E. Steindorff, EG-Vertrag und Privatrecht (Baden-Baden, Nomos, 1996)

[65] European Law and National Private Law, 2012.

despite the fact that 'the right to housing' is mentioned in Article 43 (3), albeit in a rather weak format:

> *In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.*

A direct reference by the AG or the ECJ would have made it necessary to define Article 43 in the Charter as a principle rather than as a right and would have required a discussion about social inclusion and poverty. Even more difficult: the ECJ would have had to investigate the extent to which other fundamental rights could be used to give housing a deeper constitutional dimension. The legislator does not provide guidance - the new Mortgage Credit Directive does not even mention Article 43 of the Charter.

However, the fact that Article 43 was not referred to does not mean that the AG and the ECJ were not aware of the constitutional dimension behind *Mohamed Aziz*. We are deliberately using the term 'hidden' constitutionalisation as the AG and the ECJ tend to build the constitutional dimension into their arguments. This is what comes closest to constitutional weighing in the Opinion of the AG, where she emphasises the consequences of the interplay between contract law and national proceedings. The ECJ confirms this reading but adds an even stronger constitutional element in stressing the overall purpose for which the credit has been granted: housing – the creation of a family home.[66]

A third set of questions on the relationship between the Charter of Fundamental Rights and European Private Law

Why did the ECJ not openly address constitutionalisation? It is true that the Directive 93/13/EEC, contrary to more recent consumer law directives, does not contain a reference to the Charter of Fundamental Rights. But is that the reason? It is certainly not. [67]

Our tentative argument is that the ECJ must be well aware of the risk to turn each and every private law conflict into a constitutional conflict. By keeping a low profile the ECJ is able to give weight to the constitutional dimension without opening a Pandora's Box – without paving the way for giving each and every private law conflict a constitutional dimension.[68]

But does this help? More and more preliminary references to the ECJ in private law matters – and not only in this field – contain a reference to the Charter of Fundamental Rights – most frequently to Article 47 on effective judicial

[66] ECJ, Case C-415/11, *Mohamed Aziz* [2013] at 33.
[67] More generally V. Kosta, Fundamental Rights in Internal Market Legislation, EUI phd 2013, http://cadmus.eui.eu/handle/1814/28041.
[68] It will be one of the most important challenges for legal doctrine to draw a line between normal private law cases and those that bear a constitutional dimension.

protection and Article 38.[69] It seems as if the human rights and fundamental rights dimension gains momentum in the pending references on mortgage proceedings in the aftermath of *Mohamed Aziz*. In *Macinský*[70] AG *Wahl* openly discussed the fundamental rights implications of national procedural laws and in so doing referred to the case law of the ECtHR.[71] He concluded: "Indeed, the loss of a family home is one of the most extreme forms of interference with the rights of the consumer. As respect for the home is a right guaranteed under Article 7 of the Charter of Fundamental Rights of the European Union, in the light of which Directive 93/13 must be interpreted, any person at risk of an interference of this magnitude should be able to have the proportionality of such a measure reviewed by an independent judicial body." It seems to be only a matter of time before the ECJ has to engage into constitutional weighing in private law. It will then gradually build what I would like to call 'constitutionalised European private law'[72] – this means an ever denser set of rules which bind not only the Member States and challenge their national private law systems, but also the private parties to a contract – for the moment, business to consumers contracts, but in all probability also business to business contracts.

Does the Charter of Fundamental Rights legitimise such a development, or do we need a political debate at the European and the national level? Does the standard formula in secondary community law - usually in the recitals to a Directive – suffice to open up the applicability of the Charter of Fundamental Rights? Or do we need much more – a kind of preventive impact assessment of the particular secondary community rules for their compatibility with the Charter? Let us

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[69] See the rather restrictive judgments in the case C-413/12, *Asociación de Consumidores Independientes de Castilla* 2014 ECR I-nyr (at 52 "Article 38 of the Charter cannot, by itself, impose an interpretation of that directive which would encompass such a right ") and case C-470/12, *Pohotovosť s. r. o.,* 2014 ECr I-nyr ("the principle of effectiveness does not preclude national procedural rules under which actions for an injunction brought by consumer protection associations must be brought before the courts where the defendant is established or has its address and whereby no appeal lies against a decision declining territorial jurisdiction handed down by a court of first instance." However, the Court did not make any reference to Art. 38 Charter). See also the pending cases in C-460/12, SKP and C-451/12, *Esteban Garcia*. See for further reference M. Safjan, in his key note lecture on Article 47 Charter of Fundamental Rights at the Annual European Law Conference 21st February 2014, Kings College London, spoke about 50% of all references which were referring to Article 47.

[70] Opinion of the AG Wahl in Case C-482/12, *Macinský,* 2014, at 82. The ECJ did not decide the case as the referring court had withdrawn its request for a preliminary reference.

[71] ECHR, case no. 27183/04, *Rouskv. Sweden*, 2013, which concerned the public sale of the debtor's home and his eviction therefrom at the request of a public authority in respect of a claim for payment of a tax debt amounting to SEK 6 721 (approximately EUR 800) (see, in particular, the findings of that Court at §§ 91, and 137 to 139); and case no. no. 20082/02, *Zehentner v. Austria*, 2009, concerning the judicial sale of a private property to secure the recovery of a debt of approximately EUR 2 150 in a matter between two private parties, where the debtor was legally incapacitated and therefore unable to defend herself adequately against the claim (see, in particular, §§ 54, 59, 61, 75 and 7). See also the recent case ECHR, case no. n. *20577/05, Sace Elektrik Ticaret Ve Sanayi A. S. v. Turkey*, 2014, which concerned the compatibility of a national legislation imposing a a fine amounting to 10% of the value of the bid when a debtor unsuccessfully seeks to obtain the annulment of a public auction. The Court held that the legislation does not comply with art. 6 ECHR.

[72] Introduction to H.-W. Micklitz (ed.), Constitutionalisation of European Private Law, Collected Course of the European Academy of Law, European University Institute, Oxford University Press 2014, 1.

assume for a moment that such an impact assessment has been undertaken – what happens if the conflict has not been foreseen? Directive 93/13/EEC might serve as a wonderful example for the limits of such a test. It was adopted more than 20 years ago and nobody could ever have foreseen the reach of the scope of mortgage contracts and of mortgage enforcement procedures, which enable the eviction of house owners through safeguards in standard contract terms. The broad scope of application of the Charter, which includes secondary community law rules in the field of private law, formally enables and legitimises the ECJ to engage into such weighing processes. But what happens if the weighing becomes a standard practice and if the ECJ gradually but steadily starts to build an autonomous constitutionally 'safe' European private legal order which gradually substitutes national private legal orders?

III. THE ECJ AS A SOCIAL ENGINEER

There are hundreds and thousands of persons like *Mohamed Aziz* – not only in Spain, but, depending on the national legal context, also in Greece, in Hungary, in Latvia, in Portugal and in many more Member States where the impact of the Euro Crisis has not yet reached the courts.[73] *Mohamed Aziz* was a test case, one where the ECJ was faced with the social and the societal dimension of the current economic crisis. Some might even argue that the ECJ was confronted with the incriminated austerity policy imposed by the Troika on the rest of Europe. This is not the place to determine responsibility for the (mis)-management of the Euro Crisis. What remains is that the ECJ is seen by *Mohamed Aziz* and those who stand behind him as a court of last resort – the ultimate political actor whom people seem to believe and to trust and from whom they expect a solution. Neither their national governments, nor the other political actors at the European level – the European Commission, the European Parliament and the European Council – have been able to provide such a solution. In all the discussion about how to manage the crisis by preventing national banks from going bankrupt, politicians around Europe seem to have overlooked the effects of the crisis on citizens in their existence as human beings.

This is not the first time that societal actors are relying on the ECJ as a court of last resort to remedy social and societal deficiencies of the national and the European legal order. Similar stories could be told about the use of national and European courts to fight against the societal effects of Margret Thatcher's anti-social policy,[74] or to improve the enforcement of environmental protection rules[75], or last but not least to counterbalance the disastrous effects of the credit-

[73] (I have organised)I am organising a conference on the impact of the economic crisis on the over-indebtedness for consumers in November 2013 at the EUI, where we will investigate the differences between the nation states.

[74] See my case study on UK anti-discrimination law in The Politics of Judicial Co-operation in the EU – the Case of Sunday trading, Equal Treatment and Good Faith, 2005, Cambridge University Press

[75] See the different contributions in R. Macror, ed. Reflections on 30 Years of EU Environmental Law, 2006.

financed housing investments after the fall of the Wall.[76] Each field has its own story; each has its own success and failure rate.

However, there is one important difference between all the public interest litigation which has reached the ECJ so far and *Mohamed Aziz*: *the dimension of the conflict*. First of all, the conflict is not bound to one Member State. It concerns all Member States – the Euro countries, the non-Euro countries and even countries which are not members of the EU, like Iceland.[77] Secondly, the conflict is embedded into a crisis that shakes the foundations of the European legal order as such. In such a difficult political environment, the ECJ, and not even the full court but only its First Chamber, accepts the responsibility to provide guidance to the solution of a conflict with outmost economic and societal reach for Spain – but also beyond Spain. We do not need much fantasy to imagine that over-indebted consumers all over Europe will read the judgment carefully and will refer new cases to the ECJ. They will push the court ever harder, in particular if national courts and national political actors are not ready to react and to remedy deficits in national laws and national procedures. Thirdly, *Mohamed Aziz* reveals the shortcomings of opening up markets for mortgage credits to low-income consumers in the EU without establishing possible safeguards at the European level against the potential risks of private household debts for the economy at large, for example through an appropriate European mechanism on mortgage foreclosure and personal insolvency.[78]

The fourth set of questions on the legitimacy of the ECJ as the guardian of social justice

Does the ECJ have the required legitimacy to behave like a social engineer who corrects the failures and disinterests of the political elite that seemed to regard the loss of homes as some sort of a collateral damage?

Let us recall that the positions of both the Spanish Government and the European Commission favoured the interests of Caixa over *Mohamed Aziz*. The Spanish Government tried everything to challenge the admissibility of the reference – often with cynical arguments. It was argued that the questions which had been referred were 'irrelevant' for the mortgage enforcement proceedings.[79] Similarly, the European Commission had no difficulties in stressing the legality of the acceleration clause to protect the interests of the lender in a fast and efficient enforcement procedure. [80]

[76] H.-W. Micklitz, The Relationship between National and European Consumer Policy – Challenges and Perspectives, Yearbook of Consumer Law 2008, Ashgate 2007, 35-66

[77] M. Elvira Mendez-Pinedo, Overview of European Consumer Credit Law, Protection of Consumers with Foreign Currency Mortgages in the Aftermath of the Icelandic Crisis (University of Iceland 2010)

[78] I. Ramsay, Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Policy in the EU, in H.-W. Micklitz/I. Domurath (eds.), Consumer Debt and Social Exclusion in Europe, Ashgate 2014.

[79]ECJ, Case C-415/11, *Mohamed Aziz* [2013] at 33.

[80]ECJ, Case C-415/11, *Mohamed Aziz* [2013] at 34.

Can we identify a parallel between the ECJ and the Warren Court in the US? It should be recalled that the Warren Court did not only pave the way for class actions to overcome segregation between white and black, but also for class actions in the field of consumer protection for which the famous Federal Rule 23 had not been conceived in the beginning. Is *D. Keleman* right to argue that the EU is drifting towards public interest litigation?

IV. Preliminary conclusions

There is no easy solution to the deficits in the reasoning of the ECJ. Our argument throughout the analysis has been that the Court should openly address the questions and the deeper layers behind the questions. This alone would allow the ECJ to more clearly define its own role and not to endanger its well-established legitimacy. But how could this be realised within the existing structure of the ECJ? Is a reform of the ECJt needed? We are not opening the debate on the pros and cons of dissenting options. We are looking for short-hand solutions – for ways and means to remedy the deficits more or less on the spot, immediately.

Within the existing structure, the plea for more openness towards the deeper layers of the facts would mean a change in the minds of the judges – in redefining their self-understanding and reconsidering their role in sensitive litigation. Is this manageable? Even more importantly, is it desirable? Would it not undermine the role and function the ECJ has gained over more than 50 years? It is true that not least under pressure from the academic – and maybe even the political (?) – environment, the ECJ's judgments have become more sophisticated and much more reason-based? But the ECJ is still far removed from what we have been arguing for, taking *Mohamed Aziz* as the starting point for the analysis. Pushing the Court further might endanger the complicated balancing process within the ECJ, which always has to speak with one voice.

For the time being, it seems that the Advocate General is the natural institution to which the argument promoted in this paper could be addressed. The AG enjoys much more freedom and could devote more attention to the political, economic and social dimension of the case – both vertically in relationship to the referring Member State and its court and horizontally to the 27 other Member States and their courts. These two dimensions must and should be kept distinct from each other.

In the vertical dimension, the concrete facts of the case – the political, economic and social circumstances in which the case is embedded – are crucial. It is only on the basis of carefully reconstructed facts that the consequences of EU law for the referring court, for the country from which the reference came, for the democratic institutions in that country and for the national society and economy can be highlighted and considered. We do not mean that the AG should engage into a fully-fledged impact assessment – a kind of 'Folgenabschätzung' –, but we

argue in favour of giving more attention to the facts behind the case and the implications of whatever the ECJ might decide.

In the horizontal dimension, the task of the AG is even more challenging and more complicated. The AG would have to look at the 'transnational' dimension of the case. *Mohamed Aziz* is a Spanish case, but citizens from other Member States – more or less all those who were hit by the economic crisis most drastically – suffer from the same or from comparable problems. The facts behind the case would have to be 'horizontalised'. Such an approach would create more work for the AG, it would make his or her life more difficult and it would require a socio-legal reconstruction of the case at issue. However, if this could be realised, such a new way of opinion-writing and reasoning could and hopefully would contribute to increase the legitimacy of the ECJ's judgments.