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TOWARDS A SUSTAINABLE INTERPRETATION OF STANDARD CONTRACT TERMS?

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2.1 Introduction

The relation between environmental sustainability[2] (hereafter: ES) and standard contract terms (hereafter: SCT) is far from obvious. They may be at odds with ES.[3] At the same time, however, they can also promote the integration of environmental objectives into the contract.[4] Contractual interpretation[5] and the control of content represent a potential anchor point for the integration of ES as an element 'external' to contractual parties' direct interests.[6] However, a strictly instrumental approach to the interpretative process – as well as of private law as a whole[7] – entails risks for freedom of contract and personal autonomy. It is thus essential to identify such heteronomous intervention.

Our descriptive, comparative,[8] and evaluative contribution builds on these preliminary findings through the lens of ES. First, we delve into the fairness and transparency requirements of the Unfair Contract Terms Directive[9] (hereafter: UCTD) (2.2). We then illustrate the control of the content of SCT in a progressive way from the perspectives of Swiss and Belgian laws (2.3), before concluding (2.4).

2.2 Unfair Contract Terms Directive

The UCTD is a significant (regulatory) legal instrument of European contract and consumer law in the field of SCT. Since its adoption in 1993, it has attracted a great deal of attention from both literature and the ECJ case law.[10]

A look at recital 6 of the UCTD makes it clear that its main purpose is to facilitate the completion of the internal market and to safeguard the 'citizen in his role as consumer'[11] when acquiring goods and services. Moreover, recitals 7 and 9 emphasize the sellers' and suppliers' 'task of selling goods and services', respectively, the 'protection of the economic interests of the consumer'.[12]

As such, ES seems absent to these considerations, which are limited to a strict *inter partes* relationship: the business as a stronger party and the consumer as a weaker one that needs to be protected against the use of unfair terms to achieve the necessary trust for the cross-border internal market to unfold its potential. This should not come as a surprise. Environmental protection and consumer protection were largely seen as non-integrated topics in the 1990s (and before) on an EU

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level.[13] Although such legal parochialism is still largely present today,[14] recent legislative proposals from the European Commission nevertheless seek to mitigate it, especially by the development of ecodesign rules,[15] as well as in the context of consumer sales and unfair commercial practices.[16]

Considering the current climate crisis, the question is then whether and, if so, to what extent the UCTD provides an interface for integrating ES considerations into the interpretation of SCT in B2C relations.[17] Bearing in mind that the national courts, considering the circumstances of each case, must determine if a contractual term meets the following requirements,[18] we will focus on two central aspects of the UCTD: fairness (Section 2.2.1) and transparency (Section 2.2.2).

2.2.1 Fairness

Article 3 UCTD is the general legal basis for assessing the unfairness of a contractual term which is opposed to the consumer. The concept of good faith is central. Additionally, Article 4 UCTD sets out other criteria to be taken into consideration when examining the unfairness of a clause, such as the nature of the goods or services for which the contract was concluded.[19]

As an objective concept, the notion of good faith in Article 3(1) UCTD relates 'to the question of whether, in light of its content, the contract term in question is compatible with fair and equitable market practices that take the consumer's legitimate interests sufficiently into account' and is 'closely linked to the (im)balance in the rights and obligations of the parties'.[20] In other words, the traditional focus is on the relationship between two contractual partners (and the protection of the weaker), without integrating external aspects such as ES.

But could an innovative (or '*eco-literate*'[21]) interpretation lead to the following alternative basic understanding: a market can only be fair and equitable if it integrates and supports ES? And, does the current climate crisis not jeopardize the 'legitimate interests of the consumer' by compromising the *conditio sine qua non* for the blooming of her very economic interests, i.e., a healthy, safe, and sustainable environment?[22] While such a progressive understanding of fairness is conceivable – although not undisputed by ways of judicial interpretation, at least on the national level[23] – its concretization requires, however, most certainly a paradigmatic change in the current understanding of the principles of the fairness review mechanism for SCT.

That said, an eco-literate understanding might be closer to reach than one might think. By referring to the 'solidarity among users' and 'an overall evaluation of the different interests involved',[24] recital 16 of the UCTD does not peremptorily rule out the relevance of collective interest in the process of assessing the fairness of a given term, moreover in close relation with the very requirement of good faith. And, although the judicial significance of Article 11 TFEU[25] (see also Article 37 Charter of Fundamental Rights[26]) as an integration clause remains in practice rather limited, the ECJ has in the past referred to this transversal clause (*Querschnittsklausel*) to consider ecological problems.[27] When confronted with the interpretation of indeterminate legal notions – good faith being a perfect illustration for moral values to enter the law of contract[28] – the integration clause serves as a standard of interpretation.[29] Therefore, as argued by Sjåfjell:

> (…) the Court [i.e. the ECJ] should to a greater extent and also ex officio focus on what the objective of sustainable development and the reference thereto in Article 11 TFEU entails with regard to a duty to integrate environmental protection in all EU laws – also in areas where environmental concerns traditionally have not been even considered.[30]

The reference in Article 11 TFEU to promoting sustainable development[31] is in this respect also not innocuous, as this very notion 'relies on the premise that environmental protection, economic

and social development are mutually compatible, rather than conflicting, objectives' (see also Article 3(3) TEU[32]).[33] The potential of integrating environmental considerations into the fairness assessment is thus already there; its concretization 'only' requires a change of perspective.

Moreover, based on the preparatory work related to the adoption of the current Article 11 TFEU, the Member States[34] have also expressed their intention that the provision is effectively applied across the board – consequently also to secondary EU Law as the UCTD – and not only to certain specific areas of competence such as agriculture, transport, and trans-European networks. In other words, the EU has an obligation to integrate environmental protection in other fields of competences such as its consumer policy (Article 12 TFEU) and the interpretation of the related legislation,[35] especially also the UCTD. However, although environmental protection had been declared by the ECJ as 'one of the community's essential objectives' already in the mid-1980s,[36] it is not yet the case for consumer law.[37] This is somewhat surprising: the wording of Article 11 TFEU expressly reflects its binding nature ('must be'), whereas other integration clauses such as in particular Article 12 TFEU are drafted in a less stringent manner ('shall be').[38] A literal interpretation of fundamental EU provisions thus already retains the need to integrate environmental protection when interpreting EU consumer (contract) law.[39]

Furthermore, Article 3(3) UCTD specifies the fairness control by referring to the UCTD's Annex containing a non-exhaustive list of terms which may be regarded as unfair. This indicative list substantiates the concept of good faith.[40] A term contained in that list is not *per se* unfair and must still be assessed against the criteria of Articles 3(1) and 4 of the UCTD.[41] Annex 1, lit. h (automatic extension of a contract of fixed duration), reveals to be interesting when approached through the lens of ES. An extension of the contract's duration is here not necessarily bad.[42] Think of a default extension towards a longer contractual period automatically increasing the typical two-year holding period of a smartphone to a four-year period, thus reducing the frequency of the consumer's entitlement to a new one and, consequently, the impact on natural resources.[43]

Hence, in view of the above general developments, it could at least be expected that the indeterminate concept of good faith provided by Article 3 UCTD, as well as the concept of fairness itself, are complemented by an 'ecological touch', especially when applied and interpreted by the ECJ.[44] For example, SCT which exclude the circular replacement of a good by a repaired, refurbished, or remanufactured one, even if such replacement meets all applicable conformity requirements and corresponds to the consumer's will, might be considered unfair; such an interpretation would be supported by Article 11 TFEU, with respect to both the Sale of Goods Directive[45] and the UCTD.

2.2.2 Transparency

Articles 4(2) and 5 UCTD provide the general legal basis for the transparency requirement. According to these provisions, SCT must be drafted in plain, intelligible language.[46] The ECJ has interpreted this requirement broadly: the consumer must be put in a position to evaluate the economic consequences of contractual terms ('awareness of the risks and dangers arising from the term').[47] But what about their ecological consequences?

At first sight, transparency on ES in B2C relations plays primarily a role from the perspective of the Unfair Commercial Practices Directive,[48] especially in the context of the fight against greenwashing under its Articles 6, 7, and 12, as well as 5(2) of this Directive.[49] On 30 March 2022, the EU Commission proposed to strengthen the information model by empowering the consumer to take environment-friendly choices when buying products by imposing a more explicit ban on greenwashing and planned obsolescence.[50] However, because they relate to commercial communication, marketing, and advertising, these considerations remain on a broader conceptual and practical level than transparency in the UCTD. Moreover, these market fairness aspects do not

relate – at least directly – to the economic interests of the consumer[51] and, especially, not to the economic consequences of contractual terms.

So, how to eventually integrate ES when assessing the fairness of a B2C contract term through the transparency requirement of the UCTD?

The first instrument that comes to mind is the rule set out in Article 5 UCTD. In case of doubt about the meaning of a term in an action involving an individual consumer (as opposed to a collective action, see Article 7(2) UCTD), the interpretation most favourable to the consumer shall prevail.[52]

But such a *contra proferentem* rule may prove contrary to ES in cases where the most favourable interpretation for the consumer is the least favourable for the environment. With reference to Dutch law (Article 6.238, paragraph 2, BW[53]), Pavillon illustrates this hypothesis with a commercial guarantee that confers the consumer a right to a replacement but that is ambiguous as to determine if the whole good or only the broken part is covered by this right. For the consumer, getting a completely new item is traditionally seen as the most favourable interpretation[54] although, from an ES perspective, it is (often) the least desirable one.[55]

For Pavillon, it could, however, be argued that the option that maximizes the lifespan of the purchased good and protects the consumer's right to a clean environment is to her advantage. Hence, the interpretation that favours the replacement of the broken part should prevail over obtaining a new good.[56] In a similar way, one might also consider that the contractual parties' mutual interest in ES excludes any doubt about the eco-literate meaning of the clause. The *contra proferentem* rule would thus be irrelevant here because such a 'sustainable' interpretation of the ambiguous clause is simply not unfavourable to the business (at least from a long-term perspective).[57]

Through the lens of ES, we will now present some aspects related to the control of the content of SCT (2.3).

2.3 Control of Content

In this third part, we will focus on the control of content mechanisms for SCT (*Inhaltskontrolle*) from the perspective of national contract law; there are at least three reasons why it is generally (also) relevant in this respect:

First, the UCTD[58] covers important but nevertheless limited aspects of the interpretation process in B2C contracts. All other relations, as well as the formation and the validity of the contract as such, are not specifically regulated by the UCTD but by national contract law.[59]

Second, national law may provide for other control mechanisms such as the admissibility of contractual terms with public policy, morality, or rights of personal privacy. The control of content can thus constitute an(other) interface for ES and the ecological analysis into private law.[60]

Third, even if there is a tendency on an EU level to strive towards full harmonization in areas of consumer (contract) law, the harmonized field remains limited and the role of national contract law is important.[61] In other words, comparative law – which especially also includes the law of non-EU Member States with similar or even the same legal and cultural backgrounds as EU Member States – has (also) a crucial role to play for ES on this level.

We will start by exposing the general relevance of collective interests for the control of content (2.3.1) and then expose some applications under Swiss and Belgian laws (2.3.2).

2.3.1 Collective Interests

One general aspect of interest is the treatment reserved to the inclusion of collective interests in the control of the content of SCT.[62]

What constitutes such a collective interest in the context of SCT? According to Baetge, collective (or general) interests are those which are to be understood as an expression of the common good of the state or society.[63] They must be distinguished from third-party interests (e.g., those of the creditors of a customer) as individual interests which, consequently, evolve on a lower conceptual basis.[64] Even if Baetge's developments in 2002 focused on specific anthropocentric situations where collective interests are deemed relevant,[65] it seems, however, rather undisputable that the achievement of ES to safeguard the very conditions of life is (also) a typical collective interest, if not the archetype thereof.

From a methodological perspective, the challenge is to identify how ES may eventually find its way through the glass ceiling of the otherwise traditionally relative contractual relationship. Or, in other words, to what extent may such collective interests be relevant to the control mechanisms of SCT? One way is to consider that safeguarding the collective values protected by fundamental rights is an issue concerning the third-party effect of those rights.[66] However, that is not necessarily a direct integration of collective interests in the context of the balancing of interests required by the specific control of the content mechanism of SCT.[67] It might in any case be rather controversial to allow the integration of external aspects here, as the balancing of interests is traditionally only – but nevertheless – seen as an instrument of social justice on the individual level of a contractual party.[68] At least where civil law expressly provides for a balancing of interests when assessing the validity of SCT (for Germany, e.g., §307 BGB[69]), the integration of ES as a collective interest is then still far from obvious.

In turn, this poses the question of alternatives that might frame such integration. We will attempt to shed some light by highlighting potential applications from the perspectives of Swiss and Belgian laws (2.3.2).

2.3.2 Applications

2.3.2.1 The Perspective of Swiss Law: The Role of General Control Standards Provided by Contract Law

Although being a non-EU Member State, Switzerland's law on unfair contract terms is nevertheless strongly influenced by the UCTD. Its approach to the control of the content[70] of SCT is, however, often described as being 'dualistic'.[71]

On the one hand, Article 8 UCA[72] – the provision influenced by the UCTD[73] – stipulates the unfairness of terms that are contrary to good faith and that create a significant imbalance between the rights and the duties stemming from the contract to the detriment of the consumer. As the UCTD, this provision only applies to B2C relations. What has been said above on the need for a more eco-literate understanding of the very concept of market fairness under the scope of the UCTD can thus be transposed to this context.

On the other hand, general rules of national contract law apply to the control of content tests on a non-specific level (i.e., not limited to B2C contracts). As such, however, explicit and specific legal control of content clauses like §307 BGB is unknown in Swiss contract law (see Articles 19 and 20 CO[74]).[75] Except for the situation of Article 8 UCA for B2C contracts, which indeed calls – in a specific B2C context – for some balancing of interests, reference must thus (also) be made to general control standards provided by contract law.

To be valid, SCT must especially respect public order ('public policy', Article 19(2) CO[76]). The notion '*encompasses all independent values and principles immanent to the legal order*'.[77] As for the principles of sustainable development and conservation of resources, they are expressly stated in Articles 2 and 73 of the Swiss Federal Constitution.[78] To my knowledge, however, no link has been made yet between these aspects related to ES and the control of content for SCT.

This does not come as a surprise. When confronting external interests to internal – private – interests in the process of interpreting SCT too,[79] an important difficulty arises: the guarantee of a private legal order is just as much in the public interest as the public order, of which it is an integral part.[80] This circularity makes it difficult to consider whether ecological aspects should prevail as public order. To be functional and internalized on the (national) level of the control of content in a context of global challenges induced by the climate crisis, public order may thus have to be extended more specifically to an emerging[81] ecological public order. Contrary to a so-called 'economical public order', which is jeopardized by the one-sided shifting of business risks to the consumer as aimed at by SCT,[82] such an ecological public order could, however, be a tool to implement current and future[83] external interests.

The main issue here is to determine if a violation of this ecological public order should at all lead to the nullity of the contractual content and, if yes, to what extent (and obviously if such a solution is proportionate with respect to the parties' autonomy as a cardinal principle of private law). Based on past applications of public order to the control of the content of SCT in Switzerland – insofar as this is even deemed acceptable – it seems currently rather difficult – if not utopian – to envisage such an outcome.[84]

In any case, the emergence and development of an ecological public order cannot rest on private law alone, because instrumentalization is not its only function.[85] For certain private relations previously identified as having significant potential for improvement in terms of ES, it may thus be more proportionate and efficient to intervene on a sector-specific basis[86] rather than by general – sometimes indeterminate – control standards. But, similarly, as for the principle of good faith, an ecological public order could nevertheless serve as a standard of interpretation and insist on the necessity of minimal ecological conduct also on the level of private law.

2.3.2.2 The Perspective of Belgian Law: Causa as a Complementary Tool?

An interesting national example of how to potentially deal in a progressive way with an ecological public order on the level of private law might be provided by Belgian law.[87]

In the context of the recent revision of Book 5 on the Law of Obligations (entry into force on 1 January 2023), Article 5.53 Belgian Civil Code[88] provides for the retention of the notion of *causa* as the motives that determined each party to conclude the contract ('indicia of seriousness'), if they are known or ought to have been known to the other party.[89] The *causa* is considered unlawful if contrary to public order (see Article 5.56 Belgian Civil Code). Of interest here is Article 1.3 Belgian Civil Code:

> a rule of law which affects the essential interests of the State or the community, or which establishes, in private law, the legal foundations on which society is based, such as the economic, moral, social or *environmental order, is of public order*.

For an eco-literate understanding of private agreements, such a conception of the *causa* – itself a controversial issue[90] – may have an interesting function.

From an ES perspective, could a reference to the *causa* permit a social control between contracts 'that are socially worth legal enforcement and those that should not receive legal protection' and thus 'reconnect contracts with the "whole"', especially with the 'true costs of the whole production process'?[91] And, should the parties more easily benefit from legal protection (i.e., enforceability or 'actionability'),[92] in a sense similar to a presumption of validity of their contract, if their agreement concurs 'with the well-being of the whole'.[93] Inversely, should an unsustainable contract be associated with a presumption of invalidity?

As Kryla-Cudna pointed out in relation to the principle of good faith,[94] it can indeed be argued 'that the principles of proper conduct accepted in the society nowadays require an account to be taken of environmental and sustainability concerns'[95]: could the same not be said of the individual motives of contractual partners from the perspective of the *causa*?

On the one hand, it would be an obvious exaggeration to declare a contract void for the purchase of an airline ticket on this basis,[96] but, on the other hand, it is undeniable that private law – including the interpretation of SCT – does not operate in a vacuum absolutely detached from environmental considerations. It is all about balance.

Obviously, one major difficulty is to determine, in a convincing way for practice and with clear objective assessment criteria,[97] which environmental externalities related to the contractual object can have an influence on the control of the contractual content. If so, it must also (still) be determined how and with what consequences for the contractual parties,[98] to avoid 'arbitrary and irrational results'.[99]

Given the urgency of the current climate crisis, it seems, however, at least worth (also) exploring progressive understandings of the *causa*. This may give courts a complementary approach to the ordinary rules on the validity of the parties' consent and the control of the legality of the contractual object,[100] especially when confronted with the implementation of external considerations related to ES in a specific case. Admittedly, such interpretations of the *causa* – as far as admissible – still need to be circumscribed in (much) more detail to eventually ensure their acceptance and predictability. And they are, of course, not politically neutral.[101] But neither is the rejection of the *causa* to promote the development of an 'efficient' and market-friendly legal framework whose effects and externalities are recognized by some as being also partially responsible for the current climate crisis.[102]

2.4 Conclusion

So, what to remember from our above general developments?

The inclusion of ES values into contract law indeed poses 'extraordinary problems to contract law scholars'.[103] The same is obviously true for the interpretation of SCT and especially the control of their content.

However, although Nature is unfortunately not always fair, the transition towards a greener understanding of the process of contractual interpretation might sometimes be closer to reach than one might think. For the interpreter of current law, setting apart the complex questions of whether this is or not (strictly) a political issue, it often 'only' requires a change of perspective and understanding of already existing rules and concepts such as fairness and the *contra proferentem rule* to foster ES on the level of contractual interpretation. EU law, also with respect to the UCTD, has the potential to be a driving force for change through an effective application of the integration clause that is Article 11 TFEU to B2C relations: this could also reconcile consumer protection with environmental protection, as areas that are still often seen as unrelated today.

That rather optimistic part being said, much conceptualizing work remains to be done too on the level of national law (i) to eventually integrate collective interests such as ES in a methodologically convincing way into the control of the content of SCT and (ii) to circumscribe the control of the content of SCT through instruments such as their adequacy to an ecological public order or even by exploring the 'old-fashioned taboo'[104] of the *causa*.

When assessing the interpretation of SCT through the lens of ES – without questioning the potential and importance of EU law – one can also discern the need for national – local – solutions

for what is in fact a global problem. This seems to indicate that the challenge of integrating aspects related to ES into the interpretation process of SCT is at least partially to be supported by national legislators too. This could also reveal a significant advantage rarely taken into consideration: the competition between national legal orders to identify the best possible solution with respect to eventually achieving ES in private law.

Ultimately, the general concept of ecological public order should nevertheless be similar or even identical in scope across different legislations (including European non-EU Member States). It is then rather a constructive coordination than a strict competition that will have to evolve to truly achieve an 'eco-literate' interpretation of SCT also on a transnational level.

Notes

1 Dr. Iur., Scientific collaborator at the University of Bern and Lecturer in Consumer and Contract Law at the University of Neuchâtel (Switzerland). I would like to thank Prof. Evelyne Terryn and Christof Koolen from CCM, KU Leuven, as well as the anonymous reviewers for their valuable feedback and suggestions on the first draft of this chapter.

2 Conceptualized as one of the three pillars of 'sustainable development', the two others being social and economic sustainability. On the so-called '*Drei-Säulen-Konzept*', A. Hellgardt and V. Jouannaud, 'Nachhaltigkeitsziele und Privatrecht' (2022) 222 *Archiv für die civilistische Praxis* 164, 167–170. See also A. Halfmeier, 'Nachhaltiges Privatrecht' (2016) 216 *Archiv für die civilistische Praxis* 717, 721–725 and R. Mahaim, 'Art. 73 Cst.', in V. Martenet and J. Dubey (eds), *Commentaire romand de la Constitution fédérale* (Helbing Lichtenhahn, Basel 2021) N 15.

3 For example, SCT can support environmentally detrimental practices (e.g., a commercial guarantee in which the right of replacement takes precedence over the possibility of repair – or even excludes it altogether – or clauses limiting a legal right to a free repair), C. Pavillon, *Herijking van consumenten-contractenrecht: duurzaamheid als nieuw ijkpunt?*, in C. Pavillon and W.H. van Boom, *Privaatrechtelijke bescherming herijkt*. *Preadviezen 2021 Uitgebracht voor de Vereniging voor Burgerlijk Recht* (Uitgeverij Paris, Zutphen 2021) N 75–77.

4 For example, a non-individually negotiated term can enshrine duties of care, extra-quality guarantees, and other long-term obligations (e.g., service and return guarantees, obligations to update or repair within a reasonable period of time, and obligation to recycle or sustainable scrapping), C. Pavillon, 'Herijking van consumentencontractenrecht: duurzaamheid als nieuw ijkpunt?', in C. Pavillon and W.H. van Boom, *Privaatrechtelijke bescherming herijkt. Preadviezen 2021 Uitgebracht voor de Vereniging voor Burgerlijk Recht* (Uitgeverij Paris, Zutphen 2021) N 75. See also I. Bach and E.-M. Kieninger, 'Ökologische Analyse des Zivilrechts' (2021) 76 (22) *JuristenZeitung* 1069, 1096–1097 on '*Laufzeitklauseln*'.

5 R. Posner, 'The Law and Economics of Contract Interpretation' (2004) 83 *Texas Law Review* 1581, 1581–182: 'Contract interpretation is the undertaking by a judge or a jury (or an arbitrator […]) to figure out what the terms of a contract are or should be understood to be'.

6 On the influence for the interpretation of contracts of policy considerations related to the social, political, and economic organization of a society, as well as the protection of the weaker party, L. Kaehler, 'Policy Interventions via Contract Interpretation' (2014) 22 (5) *European Review of Private Law*, 641, <https://doi.org/10.54648/erpl2014054>. On 'Principles of Interpretation' with respect to 'a contract law accommodating sustainability clauses', V. Ulfbeck and O. Hansen, 'Sustainability Clauses in an Unsustainable Contract Law?' (2020) 16 (1) *European Review of Contract Law* 186, 192–194.

7 Our paper is based on the – not undisputed – preliminary assumption that private law can (also) be adequate and suitable for the implementation of ES aspects. For further details, I. Bach and E.-M. Kieninger, 'Ökologische Analyse des Zivilrechts' (2021) 76 (22) *JuristenZeitung* 1069, A. Halfmeier, 'Nachhaltiges Privatrecht' (2016) 216 (5) *Archiv für die civilistische Praxis*, 717 and A. Hellgardt and V. Jouannaud, 'Nachhaltigkeitsziele und Privatrecht' (2022) 222 *Archiv für die civilistische Praxis* 164.

8 The paper is not a truly comparative work in substance. However, apart from a particular personal proximity to these two legal orders, I find it interesting to specifically integrate elements of Swiss and Belgian laws for the following main reasons: (i) one country is a Member State of the EU, the other is not; (ii) the two countries have different and important linguistic communities; and (iii) while Swiss law is at the

crossroads of the German and French legal traditions, Belgian law is still strongly influenced by French law. Moreover, Belgium has recently adopted a new civil code, which contains provisions on the Law of Obligations. In contrast, Swiss law still applies its 1911 Code of Obligations.

9 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29-34.

10 This is not the place to review all these developments, whose origins at the European level date back as far as the 1970s. For a historical and comparative report, E. Hondius, *Unfair Terms in Consumer Contracts* (Utrecht 1987). See also, with further references, R. Schulze and F. Zoll, *European Contract Law* (3rd ed, Baden-Baden 2021) N 173–203 and N. Jansen, 'Introduction before Art. 6:201', in N. Jansen and R. Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press, Oxford 2018) N 1–4.

11 For the reverse paradigm of the 'consumer as a citizen' in the context of the circular economy, V. Mak and E. Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' (2020) 43 (1) *Journal of Consumer Policy* 227. See also T. Wilhelmsson, 'Consumer Law and the Environment: From Consumer to Citizen' (1998) 21 (1) *Journal of Consumer Policy* 45.

12 See also recital 16 with reference to the 'legitimate interests' of the consumer.

13 L. Krämer, 'On the Interrelation between Consumer and Environmental Policies in the European Community' (1993) 16 (3–4) *Journal of Consumer Policy* 455; C. Kye, 'Environmental Law and the Consumer in the European Union' (1995) 7 (1) *Journal of Environmental Law* 31; M. Hedemann-Robinson, 'EC Law, the Environment and Consumers: Addressing the Challenge of Incorporating an Environmental Dimension to Consumer Protection at Community Level' (1997) 20 *Journal of Consumer Policy* 1. See also F. Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18 (2) *Journal of Environmental Law* 185.

14 B. Sjåfjell, 'The Environmental Integration Principle: A Necessary Step towards Policy Coherence for Sustainability', in F. Ippolito, M.E. Bartoloni and M. Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) 109: '(…) EU policy-making is still influenced by the compartmentalisation that perpetuates the illusion that environmental protection can be left to environmental law, while other areas of law do not have to concern themselves with environmental protection'; E. Terryn, 'The New Consumer Agenda: A Further Step Toward Sustainable Consumption?' (2021) 10 (1) *Journal of European Consumer and Market Law* 1; A. Halfmeier, 'Nachhaltiges Privatrecht' (2016) 216 *Archiv für die civilistische Praxis* 717, 749–752.

15 For an in-depth analysis of these rules, A. Michel, *Premature Obsolescence: In Search of an Improved Legal Framework* (Leuven 2022) N 87–169.

16 On 30 March 2022, the EU Commission published new proposals to make sustainable products the norm <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_22_2013/IP_22_2013_EN.pdf> accessed 24 May 2023 and new consumer rights for information on the durability and reparability of products, as well as a ban on greenwashing <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2098> accessed 24 May 2023. On 22 March 2023, the EU Commission adopted a new proposal on common rules promoting the repair of goods <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1794> accessed 24 May 2023 and proposed common criteria against greenwashing and misleading environmental claims <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_1692> accessed 24 May 2023.

17 The answer to this question is obviously very complex and we can only touch on certain general aspects in the limited scope of this contribution. We will not address the issue through the control mechanisms provided by important harmonization and unification initiatives such as the Acquis Principles, the DCFR, or the CESL. For further details on unfair contract terms and these instruments (also with a comparative approach but without environmental considerations), R. Schulze and F. Zoll, *European Contract Law* (3rd ed, Baden-Baden 2021) N 177–203.

18 Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter et Ulrike Hofstetter*, ECLI:EU:C:2004:209; R. Schulze and F. Zoll, *European Contract Law* (3rd ed, Baden-Baden 2021) N 174. See also Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (Text with EEA relevance), OJ C 323/4, 22.

19 R. Schulze and F. Zoll, *European Contract Law* (3rd ed, Baden-Baden 2021) N 175.

20 Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (Text with EEA relevance), OJ C 323/ 4, 30.

21 To refer to the expression coined by U. Mattei and A. Quarta, *The Turning Point in Private Law – Ecology, Technology and the Commons* (Cheltenham and Northampton 2019) N 120: 'There is a vital need for a new ecologically literate legal culture to counteract, through counter-hegemonic interpretation (…)'.

22 For a similar argument with respect to private autonomy, A. Halfmeier, 'Nachhaltiges Privatrecht' (2016) 216 *Archiv für die civilistische Praxis* 717, 743: 'Derselbe Zusammenhang zwischen Freiheit und für sie notwendigen Bedingungen besteht auch im Hinblick auf Privatautonomie und das Prinzip der Nachhaltigkeit: *Die mit dem Nachhaltigkeitsprinzip angesprochene Sicherung der natürlichen Lebensgrundlagen ermöglicht gerade erst die dauerhafte Ausübung von Freiheit und Selbstbestimmung*. Eine Freiheit im Sinne eines «Rechts auf Lebensgrundlagenzerstörung» ist nicht sinnvoll zu denken'.

23 For German law, G. Wagner, 'Klimaschutz durch Gerichte' (2021) 31 *Neue Juristische Wochenschrift* 2256: 'Die für die Lösung des Klimaproblems erforderlichen diffizilen Allokations- und Abwägungsentscheidungen sind auf der politischen Ebene zu treffen und zu verantworten'.

24 The French and German versions of said recital state 'un moyen d'évaluation globale des *différents intérêts impliqués*' and, seemingly more restrictive for the same section, 'die Möglichkeit einer globalen Bewertung der *Interessenlagen der Parteien*'.

25 Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 326/47.

26 Charter of Fundamental Rights of the European Union, OJ C 326/391.

27 C. Calliess, 'Art. 11 AEUV', in C. Calliess and M. Ruffert (eds), *EUV – AEUV mit Europäischer Grundrechtecharta* (6th ed, Munich 2022) N 26 referring to Case C-17/90, *Pinaud Wieger Spedition GmbH v. Bundesanstalt für den Güterfernverkehr*, ECLI:EU:C:1991:416 and C-195/90, *Commission of the European Communities v. Federal Republic of Germany*, ECLI:EU:C:1992:219. See also, A. Hellgardt and V. Jouannaud, 'Nachhaltigkeitsziele und Privatrecht' (2022) 222 *Archiv für die civilistische Praxis* 164, 179. See also already M. Wasmeier, 'The Integration of Environmental Protection as a General Rule for Interpreting Community Law' (2001) 38 *Common Market Law Review* 159.

28 K. Kryla-Cudna, 'Sales Contracts and the Circular Economy' (2020) 28 (6) *European Review of Private Law* 1207, 1207–1214 with further references.

29 C. Calliess, 'Art. 11 AEUV', in C. Calliess and M. Ruffert (eds), EUV – AEUV mit Europäischer Grundrechtecharta (6th ed, Munich 2022) N 25 referring to Case C-513/99, Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy A v. Helsingin kaupunki and HKL-Bussiliikenne, ECLI:EU:C:2002:495. See also A. Hellgardt and V. Jouannaud, 'Nachhaltigkeitsziele und Privatrecht' (2022) 222 *Archiv für die civilistische Praxis* 164, 172: 'Begreift man Nachhaltigkeit in diesem Sinne als konkretisierungsbedürftiges Rechtsprinzip, das auf möglichst hohe rechtliche Realisierung drängt, kann es im jeweiligen rechtlichen Kontext vom Gesetzgeber durch Erlass spezifischer Regelungen sowie im Rahmen der Auslegung und der Interpretation von unbestimmten Rechtsbegriffen und Generalklauseln durch die Verwaltung und – für das Privatrecht von größerem Interesse – die Rechtsprechung Beachtung bzw. Anwendung finden'.

30 B. Sjåfjell, 'The Environmental Integration Principle: A Necessary Step towards Policy Coherence for Sustainability', in F. Ippolito, M.E. Bartoloni and M. Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) N 114.

31 B. Sjåfjell, 'The Environmental Integration Principle: A Necessary Step towards Policy Coherence for Sustainability', in F. Ippolito, M.E. Bartoloni and M. Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) N 106 rightly advocates that the sustainable development goal 'must be defined in light of natural science' to 'mitigate the problem of sustainability being an extremely overused and broad concept with multiple definitions'.

32 Consolidated Version of the Treaty on European Union, OJ C 326, 26.10.2012, pp. 13–45.

33 J. Nowag, 'The Sky is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and Its Intended Reach', in B. Sjåfjell and A.Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2015) N 1, 9.

34 For an analysis on the relation of art. 11 TFEU and the Member States of the EU, B. Sjåfjell, 'The Environmental Integration Principle: A Necessary Step towards Policy Coherence for Sustainability', in F. Ippolito, M.E. Bartoloni and M. Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) N 106, 116–121.

35 J. Nowag, 'The Sky Is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and Its Intended Reach', in B. Sjåfjell and A. Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2015) N 2, 8 11.

36 J. Nowag, 'The Sky Is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and Its Intended Reach', in B. Sjåfjell and A.Wiesbrock (eds), *The Greening of European Business under EU*

Law: Taking Article 11 TFEU Seriously (Routledge 2015) N 4 citing case C-240/83, Procureur de la République v. Association de défense des brûleurs d'huiles usagées, ECLI:EU:C:1985:59, para 13. Critical with the ECJ's approach in relation to the sustainability potential of art. 11 TFEU, B. Sjåfjell, 'The Environmental Integration Principle: A Necessary Step towards Policy Coherence for Sustainability', in F. Ippolito, M.E. Bartoloni and M. Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) N 109: '(…) the Court has not taken upon itself clearly enough the role art. 11 TFEU bestows upon it: to be a guardian of the planetary boundaries. There are even some contradictory statements in the case-law'.

37 Case C-681/17, *slewo — schlafen leben wohnen GmbH v. Sascha Ledowski*, ECLI:EU:C:2019:255, para 32, 34 and 39: 'striking the right balance between a high level of consumer protection and the competitiveness of enterprises', interpreting Directive 2011/83/EU on consumer rights. For a critical review of this judgement from the perspective of environmental protection, A. Michel, 'Matelas et vêtements dans le même sac?' (2020) 126 *Droit de la consommation – Consumentenrecht*, 34.

38 J. Nowag, 'The Sky Is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and Its Intended Reach', in B. Sjåfjell and A. Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2015) N 10.

39 As an example of such integration in the context of Council Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods the Sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136/ 28 (hereafter: Sale of Goods Directive), E. Van Gool and A. Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) 10 (4) *Journal of European Consumer and Market Law* 136, 145 suggest interpreting the 'disproportionality-test' in art. 13, paragraphs 2 and 3 of this Directive 'in a broader way that also takes the sustainability impact of a specific replacement and repair into account'. In their right opinion, this would here 'correctly reflet article 11 TFEU'.

40 R. Schulze and F. Zoll, *European Contract Law* (3rd ed, Baden-Baden 2021) 175.

41 Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt*, ECLI:EU:C:2012:242. See also Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (Text with EEA relevance), OJ C 323/4, 35.

42 Even though such a clause might – rightly so – be considered unfair, especially when this extension comes as a surprise for the consumer.

43 See I. Bach and E.-M. Kieninger, 'Ökologische Analyse des Zivilrechts' (2021) 76 (22) *JuristenZeitung* 1069, 1097: 'Bemerkenswert ist in diesem Zusammenhang allerdings, dass nicht nur kürzere, sondern auch längere Vertragslaufzeiten die Haltedauer von Handys erhöhen könnten: Bei einer Laufzeit von vier Jahren, würde der «Anspruch» auf ein neues Handy nur noch halb so oft entstehen wie bei der derzeit üblichen Zweijahresbindung. Dies spricht aus rein ökologischen Gesichtspunkten dafür, (auch) solche langen Laufzeiten AGB-rechtlich zuzulassen'. Such an interpretation obviously targets the 'smartphone as a status symbol' where 'many consumers buy a new device every two years and leave the old one lying around', see feedback from GISAD on the EU Commission's Initiative for Sustainable consumption of goods – promoting repair and reuse, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse/F2986034_en> accessed 24 May 2023.

44 J. Nowag, 'The Sky Is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and Its Intended Reach', in B. Sjåfjell and A. Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2015) 11 citing H.-P. Zils, *Die Wertigkeit des Umweltschutzes in Beziehung zu anderen Aufgaben der Europäischen Gemeinschaft: Untersuchungen zur Anwendung der Querschnittsklausel Art. 130r Abs. 2 Satz 2 EWGV im Gemeinschaftsrecht* (Decker, Heidelberg 1994) 27.

45 For the admissibility of circular replacement with respect to this Directive, see E. Van Gool, A. Michel, B. Keirsbilck and E. Terryn, CCM KU Leuven Feedback to EU Commission Consultation on Sustainable Consumption of Goods - Promoting Repair and Reuse Legislative Initiative, 4 April 2022, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4211301> accessed 24 May 2023.

46 Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (Text with EEA relevance), OJ C 323/ 4, 25. See also recital 20: '(…) the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail'.

47 Cases C-96/14, *Jean-Claude Van Hove v. CNP Assurances SA*, ECLI:EU:C:2015:262 and C-26/13, *Árpád Kásler and Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282. This can be seen as '*an indirect effect of the role of reasonable expectations*', R. Schulze and F. Zoll, *European Contract Law* (3rd ed, Baden-Baden 2021) N 187–188.

48 Council Directive 2005/29/CE of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Text with EEA relevance), OJ L 149/ 22.

49 Greenwashing can be defined as the use of an untrue or unverifiable environmental claim (i.e., the 'practice of suggesting or otherwise creating the impression (…) that a good or a service has a positive or no impact on the environment or is less damaging to the environment than competing goods or services'). See Commission Notice, Guidance on the interpretation and application of Council Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (Text with EEA relevance), OJ C 526/ 1, 72–84.

50 Circular Economy: Commission proposes new consumer rights and a ban on greenwashing, <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2098> accessed 24 May 2023.

51 On the one hand, admittedly, the case of premature obsolescence is the most debatable in this respect, as it has also a direct impact on the economic interests of the consumer pushed to renew its acquisitions at a shorter deadline. On the other hand, by reducing the quality of the product, premature obsolescence can lower the price of the concerned products and hence make a given product more accessible (at least in the short run). It should be recalled here, however, that according to its art. 4(2), the UCTD 'does not serve to ensure that the consumer concludes a cost-effective contract', R. Schulze and F. Zoll, *European Contract Law* (3rd ed, Baden-Baden 2021) N 188.

52 Both the duty of transparency linked to the European fairness test and the *contra proferentem* rule as a traditional aspect of contractual interpretation are 'expressions of the general European principle of transparency', N. Jansen, 'Art. 6:206', in N. Jansen and R. Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press, Oxford 2018) N 1.

53 Burgerlijk Wetboek of 1992.

54 For example, V. Mak and E. Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' (2020) 43 *Journal of Consumer Policy* 227, 236 with reference to District Court Amsterdam 8 July 2016, ECLI:NL:RBAMS:2016:4197 and District Court Amsterdam 18 April 2017, ECLI:NL:RBAMS:2017b:2519. See also Glostrup District Court, Case number BS 10E-3689/2014, 9th December 2016. The Danish Court even stated that 'the fact that environmental concerns can speak for the recycling of reusable modules and components production in general, is not relevant in determining whether a replacement product complies with the agreement'. See <https://forums.macrumors.com/threads/danish-court-rules-apple-must-replace-mans-iphone-with-new-rather-than-refurbished-model.2020632/page-11> accessed 24 May 2023.

55 C. Pavillon, 'Herijking van consumentencontractenrecht: duurzaamheid als nieuw ijkpunt?', in C. Pavillon and W.H. van Boom (eds), *Privaatrechtelijke bescherming herijkt, Preadviezen 2021 Uitgebracht voor de Vereniging voor Burgerlijk Recht* (Uitgeverij Paris, Zutphen 2021) N 77.

56 C. Pavillon, 'Herijking van consumentencontractenrecht: duurzaamheid als nieuw ijkpunt?', in C. Pavillon and W.H. van Boom (eds), *Privaatrechtelijke bescherming herijkt, Preadviezen 2021 Uitgebracht voor de Vereniging voor Burgerlijk Recht* (Uitgeverij Paris, Zutphen 2021) N 77. At the same time, however, the author expresses doubts that such an interpretation is compatible with current mandatory interpretation rules.

57 C. Pavillon, 'Herijking van consumentencontractenrecht: duurzaamheid als nieuw ijkpunt?', in C. Pavillon and W.H. van Boom (eds), *Privaatrechtelijke bescherming herijkt, Preadviezen 2021 Uitgebracht voor de Vereniging voor Burgerlijk Recht* (Uitgeverij Paris, Zutphen 2021) N 77. Moreover, the *contra proferentem* rule does not apply when each meaning of the clause has approximately equal advantages and disadvantages for each party, P. Jäggi and P. Gauch, 'Kommentar zu Art. 18 OR', in W. Schönenberger and P. Gauch (eds), *Zürcher Kommentar zum Schweizerischen Zivilgesetzbuch, V. Band, Obligationenrecht, Teilband V 1b* (Schulthess, Zürich 1980) N 456. Thus, could one also argue that the interpretation leading to the obtaining of a completely new good – as it *in fine* involves equivalent 'external' drawbacks for each contractual party (i.e., the need to extract more resources to produce a new replacement good) – implies that there is no doubt about the meaning of the clause?

58 Which is of minimal harmonization (art. 8 Directive).
59 Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (Text with EEA relevance), OJ C 323/4, 19: 'Other national rules that may apply to cases involving unfair contract terms include general provisions of contract law, in particular on the formation and validity of contracts, as well as the rules of procedure for proceedings before national courts. Such questions are not specifically regulated in the UCTD but may have a significant impact on its application'.
60 On the importance of the control through the general clause of §307 BGB in German law, I. Bach and E-M. Kieninger, 'Ökologische Analyse des Zivilrechts' (2021) 76 (22) *JuristenZeitung*, 1069, 1096–1097.
61 H.-W. Micklitz, 'The Full Harmonization Dream' (2022) 11 (4) *Journal of European Consumer and Market Law* 117, 117, 118, 121: 'The messy field of private/consumer law is the present and will be the future. This is exactly the private law beyond the nation state. "United in diversity" is the basis on which European integration is built'.
62 For the assessment of collective interests under the control of content provided by §307 of the German BGB (but without ES considerations), D. Baetge, 'Allgemeininteressen in der Inhaltskontrolle – Der Einfluss öffentlicher Interessen auf die Wirksamkeit Allgemeiner Geschäftsbedingungen' (2002) 202 *Archiv für die civilistische Praxis* 972, 973; A. Fuchs, '§307 BGB', in Ulmer/Brandner/Hensen, AGB-Recht (13th ed, Köln 2022) N 133–139; M. Wendland, '§307 BGB', Staudinger BGB, §§ 305–310; UKlaG – AGB-Recht 1 und Unterlassungsklagengesetz, (18th ed, Sellier/de Gruyter 2019) N 151. See also I. Bach and E.-M. Kieninger, 'Ökologische Analyse des Zivilrechts' (2021) 76 (22) *JuristenZeitung* 1069, 1097 (with ES considerations).
63 D. Baetge, 'Allgemeininteressen in der Inhaltskontrolle – Der Einfluss öffentlicher Interessen auf die Wirksamkeit Allgemeiner Geschäftsbedingungen' (2002) 202 *Archiv für die civilistische Praxis* 972, 973.
64 D. Baetge, 'Allgemeininteressen in der Inhaltskontrolle – Der Einfluss öffentlicher Interessen auf die Wirksamkeit Allgemeiner Geschäftsbedingungen' (2002) 202 *Archiv für die civilistische Praxis* 972, 973.
65 Such as contractual penalty clauses for a specific German trust institution (*Vertragsstrafeklauseln der Treuhandanstalt*), defence clauses against bid rigging in public contracts (*Abwehrklauseln gegen Submissionsabsprachen in öffentlichen Vergabeverträgen*), section clauses concerning the use of cadaver parts for scientific research and education (*Sektionsklauseln*) and form-based consent to the transfer of personal data (*Formularmäßige Einwilligung in die Weitergabe persönlicher Daten*).
66 That is, the civil judge's obligation to observe fundamental rights when specifying general clauses.
67 E. Kramer, 'Art. 19-20 OR', in A. Meier-Hayoz (ed), *Berner Kommentar, Bd VI, 1. Abteilung, Allgemeine Bestimmungen, 2. Teilband, Unterteilband 1a, Inhalt des Vertrages, Kommentar zu Art. 19-22 OR* (Stämpfli, Bern 1991) N 163: 'Die Generalklausel der öffentlichen Ordnung kann darüber hinaus als Aufhänger dienen, um verfassungsrechtliche Wertungen in die Kontrolle des Vertragsinhalts einfließen zu lassen; dies hauptsächlich i. S. Einer «mittelbaren» Drittwirkung von Grundrechten' (…); M. Wendland, '§307 BGB', Staudinger BGB', §§ 305–310; UKlaG – AGB-Recht 1 und Unterlassungsklagengesetz (18th ed, Sellier/de Gruyter 2019) N 151: 'nicht aber um ein «Interesse» der Gemeinschaft im Rahmen der Interessenabwägung'. See also, A. Hellgardt and V. Jouannaud, 'Nachhaltigkeitsziele und Privatrecht' (2022) 222 *Archiv für die civilistische Praxis* 164, 198 on the indirect effect of art. 20a of the German Grundgesetz.
68 M. Wendland, '§307 BGB', Staudinger BGB, §§ 305–310; UKlaG – AGB-Recht 1 und Unterlassungsklagengesetz (18th ed, Sellier/de Gruyter 2019) N 151. See also A. Fuchs, '§307 BGB', in P. Ulmer, H. E. Brandner and H.-D. Hensen (eds), AGB-Recht Kommentar, §§305–310 BGB – Besondere Vertragstypen – UKlaG (13th ed, Köln 2022) N 136. Stating the need for a stricter control of content in B2C contracts under the aspect of public order, E. Kramer, 'Art. 19-20 OR', in A. Meier-Hayoz (ed), *Berner Kommentar, Bd VI, 1. Abteilung, Allgemeine Bestimmungen, 2. Teilband*, *Unterteilband 1a, Inhalt des Vertrages, Kommentar zu Art. 19-22 OR* (Stämpfli, Bern 1991) N 165.
69 Bürgerliches Gesetzbuch of 1896.
70 For a general analysis of the control of content under Swiss Law, D. Hug, La formation du contrat de consommation: entre régime général et approche sectorielle – analyse et perspectives en droit suisse (Basel/Neuchâtel, 2020) N 1754–1849.
71 P. Pichonnaz, 'Art. 8 LCD', in V. Martenet and P. Pichonnaz (eds), *Commentaire romand, Loi contre la concurrence déloyale* (Helbing Lichtenhahn, Basel 2017) N 30.

72 Federal Act of 19 December 1986 against Unfair Competition (CC 241; 'Bundesgesetz gegen den unlauteren Wettbewerb', 'Loi fédérale contre la concurrence déloyale').
73 P. Pichonnaz, 'Art. 8 LCD', in V. Martenet and P. Pichonnaz (eds), *Commentaire romand, Loi contre la concurrence déloyale* (Helbing Lichtenhahn, Basel 2017) N 117.
74 Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations (CC 220: 'Obligationenrecht', 'Codedesobligations').
75 E. Kramer, 'Art. 19-20 OR', in A. Meier-Hayoz (ed), *Berner Kommentar, Bd VI, 1. Abteilung, Allgemeine Bestimmungen, 2. Teilband, Unterteilband 1a, Inhalt des Vertrages, Kommentar zu Art. 19-22 OR* (Stämpfli, Bern 1991) N 123: 'Der praktisch wichtigste und in Art. 19, 20 einzig geregelte Aspekt einer Kontrolle der Vertragsfreiheit ist die Inhaltskontrolle. Die in Art. 19 I verheissene Freiheit, den Inhalt des Vertrags «beliebig» festzustellen, wird (gleich wie in Art. 641 I ZGB die Eigentümerfreiheit) bereits im selben Satz («innerhalb der Schranken des Gesetzes»!) dementiert. Dieses Dementi wird in Art. 19 II und Art. 20 I durch Nennung der massgeblichen Kontrollkriterien konkretisiert, Kriterien, die (abgesehen vom speziell gelagerten Fall der anfänglichen Unmöglichkeit) jeweils die Funktion haben, die (in Art. 20 angeordnete) «Elimination» solcher Verträge zu begründen, in bezug auf die es «der Staat… nicht zulassen» kann, «dass aus» ihnen «Rechte geltend gemacht werden» (…)'.
76 The provision states that 'The law excludes the parties' agreements only when it lays down a strict rule of law, or when a departure from its text would be contrary to morality, *public policy* or rights relating to the personality'.
77 O. Guillod and G. Steffen, 'Art. 19/20 CO', in L. Thévenoz and F. Werro (eds), *Commentaire romand, Code des obligations I, Art. 1-529 CO* (Helbing Lichtenhahn, Basel 2021) N 66. This is, however, a protean definition, which is not always easy to define, E. Kramer, 'Art. 19-20 OR', in A. Meier-Hayoz (ed), *Berner Kommentar, Bd VI, 1. Abteilung, Allgemeine Bestimmungen, 2. Teilband*, *Unterteilband 1a, Inhalt des Vertrages, Kommentar zu Art. 19-22 OR* (Stämpfli, Bern 1991) N 151 ff.
78 Federal Constitution of the Swiss Confederation of 18 April 1999 (CC 101: 'Bundesverfassung', 'Constitution fédérale').
79 As such, SCT remain a matter of contract law (*Vertragstheorie*). For Swiss law, E. Kramer, T. Probst and R. Perrig, *Schweizerisches Recht der Allgemeinen Geschäftsbedingungen* (Bern 2016) N 241; D. Hug, *La formation du contrat de consommation : entre régime général et approche sectorielle – analyse et perspectives en droit suisse* (Basel/Neuchâtel, 2020) N 1427.
80 H. Becker, 'Art. 19 OR', in H. Becker (ed), *Berner Kommentar, Allgemeine Bestimmungen, Art. 1-183 OR* (Stämpfli, Bern 1941) N 24.
81 For an analysis of this emergence under French Law, A. Stevignon, *Le climat et le droit des obligations* (Paris 2022) N 288–293.
82 E. Kramer, 'Art. 19-20 OR', in A. Meier-Hayoz (ed), *Berner Kommentar, Bd VI, 1. Abteilung, Allgemeine Bestimmungen, 2. Teilband, Unterteilband 1a, Inhalt des Vertrages, Kommentar zu Art. 19-22 OR* (Stämpfli, Bern 1991) N 158.
83 In relation with an intergenerational contract theory, C. Poncibò, 'A Contract Law for Future Generations' (2020) 2 (2) *Revija Kopaonicke skole prirodnog prava*, 35.
84 See E. Kramer, T. Probst and R. Perrig, *Schweizerisches Recht der Allgemeinen Geschäftsbedingungen* (Bern 2016) N 277.
85 See A. Hellgardt and V. Jouannaud, 'Nachhaltigkeitsziele und Privatrecht' (2022) 222 *Archiv für die civilistische Praxis* 164, 182: 'Regulierung tritt neben andere Funktionen des Privatrechts, wie insbesondere den Interessenausgleich, der wesentlich der Verwirklichung der Privatautonomie dient und nach wie vor unbestritten die zentrale Aufgabe des Privatrechts darstellt', also with further references to divergent opinions.
86 For example, in the context of sales law, by adopting a legal right to repair for the buyer, which is currently still inexistent in Switzerland even in a B2C context.
87 Strictly speaking, the chosen example is not related to the 'control of content' of SCT (but rather to the 'contract formation', see G. Christandl, 'Art. 2:101 (1)', in N. Jansen and R. Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press, Oxford 2018) N 1. Nevertheless, the *causa* might highlight a complementary tool for an eco-literate analysis of the contract, as will precisely be discussed in the following paragraphs.
88 Code civil Belge du 4 avril 2019.
89 <https://www.lachambre.be/FLWB/PDF/55/1806/55K1806001.pdf> and <https://www.lachambre.be/FLWB/PDF/55/1805/55K1805001.pdf> both accessed 24 May 2023. See also G. Christandl, 'Art. 2:101

(1)', in N. Jansen and R. Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press, Oxford 2018) N 17.

90 Against the requirement of a *causa,* E.G. Lorenzen, 'Causa and Consideration in the Law of Contracts' (1918–1919) 28 *Yale Law Journal* 621, 644. It is interesting to note that French law on the contrary recently abandoned cause 'as a further requirement for contract formation', G. Christandl, 'Art. 2:101 (1)', in N. Jansen and R. Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press, Oxford 2018) N 17.

91 R. Feldkamp, A. François and L. Cornelis, 'Le droit privé au service d'une société durable : rêve ou réalité démocratique ?', in A. Van Hoe and G. Croisant (coord.), *Droit et durabilité/Recht en duurzaamheid, Actes publiés à l'occasion du colloque du 6 mai 2022 organisé par la Revue de droit commercial belge* (Bruxelles 2022) N 105, 142; U. Mattei and A. Quarta, *The Turning Point in Private Law – Ecology, Technology and the Commons* (Cheltenham and Northhampton 2019) N 93, 110, 119.

92 E.G. Lorenzen, 'Causa and Consideration in the Law of Contracts' (1918–1919) 28 *Yale Law Journal* 621, 625.

93 U. Mattei and A. Quarta, *The Turning Point in Private Law – Ecology, Technology and the Commons* (Cheltenham and Northhampton 2019) 93: 'In an ecological perspective, the parts are legally protected only as long as they concur with the well-being of the whole, so that a strong interpretation of internal limits to unrestrained selfishness such as causa is needed, not its abolition in a disruptive vision of a winner-takes-all society'.

94 The principle of good faith, however, is wider than the doctrine of *causa*. See K. Kryla-Cudna, 'Sales Contracts and the Circular Economy' (2020) 28 (6) *European Review of Private Law* 1207, 1215 points out: 'Since the principle of good faith is considered to apply at all stages of the life of a contract, including the stage of the exercise of the remedies for a breach (…)'.

95 K. Kryla-Cudna, 'Sales Contracts and the Circular Economy' (2020) 28/6 *European Review of Private Law* 1207, 1214–1215. See also E. Van Gool and A. Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) 10 (4) *Journal of European Consumer and Market Law* 136, 145 with reference to giving a 'sustainability-driven interpretation to the principle of good-faith'.

96 See <https://www.lachambre.be/doc/FLWB/pdf/55/1805/55K1805004.pdf> accessed 24 May 2023: '(…)Il est toutefois impossible d'interdire les voyages en avion par le biais d'un article du Code civil. Le droit privé régit en effet les relations micro-économiques, tandis que le droit public est de nature macro-économique et confère au législateur le pouvoir d'action dont il a besoin. Le Code civil joue seulement un rôle de facilitateur'.

97 For example, L. Zampori and R. Pant, 'Suggestions for updating the Product Environmental Footprint (PEF) Method', *European Commission, JRC Technical Reports*, 2019, <https://eplca.jrc.ec.europa.eu/permalink/PEF_method.pdf> accessed 24 May 2023.

98 For example, should an 'unsustainable' term lead to the nullity of the whole contract, or to a partial nullity with the retention of its 'sustainable' terms, respectively, to the reduction of the 'unsustainable' clause? The same difficulties arise with respect to the UCTD. Based on the interpretation of the UCTD, the principle is setting aside unfair contract terms and a prohibition of revising them, with further ECJ case law references, Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (Text with EEA relevance), OJ C 323/ 4. But could and should an unfair contractual term be substituted by national law to eventually integrate ES considerations stemming from national law into the parties' right and obligations when the continuity of the contract is not possible without the unfair term? See Case C-26/13, *Árpád Kásler and Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282 (an unfair term can under circumstances be substituted by a supplementary provision of national law); C-260/18, *Kamil Dziubak and Justyna Dziubak v. Raiffeisen Bank International AG*, ECLI:EU:C:2019:819 (no substitution of an unfair term with national rules of general nature) and C-80/21 to C-82/21 *E.K., S.K. v. D.B.P and B.S., W.S. v. M. and B.S., L.S. v. M.*, ECLI:EU:C:2022:646 (no interpretation of the parties' wishes when substituting an unfair term).

99 E.G. Lorenzen, 'Causa and Consideration in the Law of Contracts' (1918–1919) 28 *Yale Law Journal* 621, 644: 'The codes of Brazil, Germany, Japan and Switzerland, in omitting the requirement of a causa or consideration as an essential element of a contract, have in the estimation of the writer placed the subject of contracts upon a proper scientific basis and have freed it from doctrines which lead either to great confusion or to arbitrary and irrational results'.

100 See E.G. Lorenzen, 'Causa and Consideration in the Law of Contracts' (1918–1919) 28 *Yale Law Journal* 621, 633. See also <https://www.lachambre.be/FLWB/PDF/55/1805/55K1805001.pdf> accessed 24 May 2023.

101 The requirement of the *causa* also fulfils a policy function, G. Christandl, 'Art. 2:101 (1)', in N. Jansen and R. Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press, Oxford 2018) N 17. This remains the case if one discusses the need to abolish it or to (re)adopt it for environmental purposes.

102 U. Mattei and A. Quarta, *The Turning Point in Private Law – Ecology, Technology and the Commons* (Cheltenham and Northhampton 2019) N 119: 'This (i.e., the removal of the *causa*) was deemed an obstacle for the development of a "market-friendly" legal framework where corporations can benefit from environmental and social subsidies in their depredation of the global commons'. See also N. Graham, 'Teaching Private Law in A Climate Crisis' (2021) 40 (3) *University of Queensland Law Journal* 403 on the 'significative role of private law in facilitating the conditions of climate change'.

103 C. Poncibo, 'The Contractualisation of Environmental Sustainability' (2016) 12 *European Review of Contract Law* 335, 338 and further reference to K.P. Mitkidis, 'Sustainability Clauses in International Business Contracts', Den Haag (2015). See also E. Fisher, E. Scotford and E. Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 *The Modern Law Review* 173.

104 U. Mattei and A. Quarta, *The Turning Point in Private Law – Ecology, Technology and the Commons* (Cheltenham and Northhampton 2019) N 93.

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