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*The True Story of the Active Role of Courts in Consumer Litigation:
Introduction to the Speech given by Etienne Rigal*

The following text is a testimony of an ordinary judge, Etienne Rigal, who was tired of deciding cases only on the grounds of the legal arguments that were invoked by the counsels of credit institutions, tired of seeing consumers not challenging unfair terms, not understanding what was happening to them. Facing the maze of laws, aimed at protecting consumers but little understood by the latter, consumers would simply fail to act. So judge Rigal decided to take an active stance, thus becoming not an activist but just a judge wishing to «have the right to make people respect [the law]»¹. Therefore, he randomly selected a case from the files regarding consumer loans piled up on the corner of his desk. This is how the story of the *Cofidis* case² began, one of the most famous cases brought by the “*ex officio* power” of the judge in consumer disputes as well as the second step in the development of a now well-established case law and legal theory of the Court of Justice of the European Union: the active role of courts in consumer litigation³. The speech that follows was delivered by Judge Rigal at the conference that took place in Cagliari on the 1st of June 2019, where it was simultaneously translated into Italian. In order to convey the very essence of the text, it was decided that it would be published in French. The following developments are a short introduction to his speech.

In his speech, Etienne Rigal explained why he sought an interpretation of Directive 93/13 on unfair terms in consumer contracts and he somehow delegated the process of taking a decision to someone else. The main reason

¹ E. CARRÈRE, *Other lives but mine* (translated by Linda Coverdale), London, Serpent's Tail, 2012.

² Case C-473/00 *Cofidis*, EU:C:2002:705.

³ A. BEKA, *The Active Role of Courts in Consumer Litigation. Applying EU Law of the National Courts' Own Motion*, Cambridge, Intersentia, 2018, Foreword by E. POILLOT, Introduction by E. RIGAL; *adde, inter alia*, E. MIŠČENIĆ, *The Effectiveness of Judicial Enforcement of the EU Consumer Protection Law*, in Z. Meškić, I. Kunda, D. Popović, E. Omerović (eds), *Balkan Yearbook of European and International Law*, Cham, Springer, vol. 2019.

was that, when deciding such cases, he sat as a single judge. In his opinion, the preliminary request submitted to the Court of Justice of the European Union reflects a personal decision, a personal vision of the case at issue. It puts the referring judge at risk since the interpretation given by the European Court will be binding not only upon the same judge but upon the whole domestic judiciary. Sitting alone, he was in search of “collegiality”. In the specific context of the *Cofidis* case, the preliminary request offered him the possibility to choose the panel he wanted to take part in when deciding the case as well as to request the Court of Justice to hand down an interpretation, thus making it possible to challenge the interpretation of the law given by his national supreme Court. The preliminary request that he submitted was carefully conceived and drafted with a University Professor and other first instance judges he decided to involve in the lengthy and complex process of posing a question to the Court of Justice of the European Union. One could wonder why he, as a judge, as someone whose profession is to decide cases, in a certain sense chose to delegate his decision to another Court. The answer is very simple. What Etienne Rigal expected from the European Court of Justice was not a ruling. He was asking the Luxembourg judges to confirm or override his interpretation of the law. This was no delegation. This was a request to share the power held as a judge, - that of interpreting the law. In Etienne Rigal’s view, law cannot but be the expression of “universalism”. It is inclusive of all individuals, it is the last resort for those who have nothing. The law is a living thing made for the living. In France, judges are told that statutory interpretation simply requires the identification of the literal meaning of the enacted words. As a consequence, French judges do not sufficiently refer to preparatory works. Yet, the objective, or at least one of the objectives of consumer law is to protect the weaker party.

Protecting and affording a fair treatment to citizens, this is, in Etienne Rigal’s opinion, the essence of what law should aim at in a democratic State. This was his state of mind when he sought for the interpretation by the Court of Justice of the European Union in the *Cofidis* case, a case that was, according to him, perfectly tailored for a teleological interpretation. Etienne Rigal was angry. The jurisprudence of the French Supreme Court (*Cour de cassation*) he should have followed in order to decide the case was clearly in breach of European law as it rendered the enforcement of the protection envisaged in Directive 93/13/EEC on unfair terms in consumer contracts excessively difficult. Indeed, the said jurisprudence did not ensure consumers’ effective protection. His anger was stronger than his fear, that

is, the fear that the European Court could take a different view and declare his interpretation ill-founded.

Anger and fear are emotions, but they also play a part in a judge's ruling. Judge Rigal also feared that the efforts of the people who supported him in the process of seeking for a preliminary ruling – Bernadette Ferrarese, the university Professor who acted as his strategist, his colleagues – Juliette Devynck and Philippe Florès, who proof-read the request for interpretation he sent to the European Court of Justice – might collapse. During his speech, Judge Rigal proudly emphasised the collaboration he fostered and carried out with an academic, quite a rare circumstance in France, where the judiciary rarely meets the academia. He also recalled how much he owes to his Spanish colleague from Barcelona Dr Fernandez Seijo, who paved the way for a fairer interpretation of the law on unfair terms. Etienne Rigal also told the audience an interesting anecdote. In the first case (*Océano Grupo*) related to the question whether a national judge could raise of his own motion the issue of the existence of an unfair term in a consumer contract, referred to the European Court of Justice by judge Fernandez Seijo the French government had defended in its written opinion sent to the Court the possibility for the judge to do so, whereas in the *Cofidis* case, the French government took an opposite stance. Clearly, in the *Cofidis* case, it had become a matter of “national pride”. Years later, Etienne Rigal met one of the French government representatives who had drafted the French opinion, who told him how ashamed he had been to be forced to defend a viewpoint he did not share.

There is one last thing that deserves to be said, before letting the reader discover Etienne Rigal's beautiful text. The *Cofidis* case was only the beginning of a new approach, that of the active role of courts in consumer litigation, which became a landmark in the field of consumer law, leading Member States to adapt their procedural systems to the requirements of judges finally empowered to question the existence of unfair terms on their own motion⁴.

To briefly explain how the story started we must go back to 1998, when the case was decided⁵. An action had been initiated by a professional against consumers who purchased encyclopaedias by instalments and failed to pay all the sums due. The purchase contract included an exclusive jurisdiction clause in favour of the seat of the trader in Barcelona, a city where none of

⁴ France, for example, introduced new provisions in its consumer code. Article R-632-1 of the French Consumer Code now imposes a duty on judges to raise an issue on the existence of an unfair term of their own motion.

⁵ Joined cases C-240/98 and C-244/98 *Océano Grupo*, EU :C :2000 :675.

the defendants were domiciled. The referring court considered such a clause to be unfair, in which case it would have had to declare the action inadmissible. The preliminary issue was whether the court was actually empowered to make the finding of unfairness of its own motion. The European norm at stake, Directive 93/13/EEC on unfair terms in consumer contracts, did not provide for any such power of the judge. Nevertheless, the Court of Justice of the European Union took the view that «the protection provided for consumers by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts». This interpretation was grounded on the argument that «the aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair»⁶. Therefore, the Court considered that «effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion»⁷. The Court also resorted to article 7 § 1 of the Directive, as it requires Member States to implement adequate and effective means to prevent the continued use of unfair terms. Building on this case law, in the *Cofidis* case⁸ the Court further elaborated that «a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair». Etienne Rigal made his reference «after finding in *Océano Grupo* the means to challenge the course of domestic law». He, as Emmanuel Carrère, the novelist who made the *Cofidis* story famous beyond lawyers' circles wrote, discovered «the crucial move that

⁶ At point 26 of the case.

⁷ *Ibid.*

⁸ Case C-473/00 *Cofidis*, EU:C:2002:705.

[would] change the tide of the battle»⁹.

The question referred by Etienne Rigal in the *Cofidis* case regarded the conformity of a legal provision (former Article L-311-37 of the French Consumer Code - *Code de la Consommation*), with effective consumer protection. According to such provision, the actions brought before the first instance court (*tribunal d'instance*) had to be «raised within two years of the event which gives rise to them and are otherwise time-barred»¹⁰. Unfortunately for consumers, the French Cour de cassation had interpreted «the biennial foreclosure period in such a way as to cover not only actions by the creditor but also by the borrower, who could no longer contest, under the form of claim or defence, the credit contract on the basis of the breach of the legal formalities set out for the conclusion of the consumer credit contract. The starting date for the calculation of the biennial period was moreover determined as from the date of the conclusion of the contract. The wording and the systematic reading of the provision left doubts as to whether the plea of unfairness [of the contract term] should also be deemed to be covered by the foreclosure period»¹¹. As accurately analyzed by Dr. Anthi Beka in her book on the «Active Role of Courts in Consumer Litigation», the reference done by Etienne Rigal was therefore «a conscious move»¹² (not to say resistance) from a lower court «to change the course of the much criticized case-law of the *Cour de Cassation* and to ensure that it would not be applicable to the plea of unfairness»¹³. The reference made by the national court to the debarment from action when a plea of unfairness was raised, «appears to be a “Trojan” horse to strip consumer law of its protective scope»¹⁴. However, a purposive interpretation could reveal that the true purpose was to prevent accrual of interest and consumer over-indebtedness by inciting the creditor to act promptly and with due diligence.

One argument that was invoked by some French scholars¹⁵ to support the interpretation of the Cour de cassation was that «the foreclosure is a way

⁹ E. CARRÈRE, p. 179.

¹⁰ The wording of the provision when the preliminary request was submitted was: «[...] The actions for payment that are brought before [the first instance] court by reason of default by the borrower shall be time-barred two years after the event giving rise to them occurred [...]».

¹¹ A. BEKA, p. 145.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*, at p. 146.

¹⁵ X. LAGARDE, *Forclusion biennale et Crédit à la Consommation. Réforme de l'article L.311-37 du Code de la Consommation*, *La Semaine Juridique, Edition Générale*, 2002, n° 4, I 106.

to constrain an act of bad faith (*mauvaise foi*) on the part of the consumer, in the case in which he might initiate an action of breach of the formal requirements for the formation of the contract years after the conclusion of the contract with the purpose of obtaining a free credit¹⁶. Although «the objective of combating bad faith being [was] legitimate as such»¹⁷, unfortunately «the restrictive interpretation of the application of the foreclosure period had actually led to unfair results»¹⁸. The interpretation of the moment from which the foreclosure two-year period starts running created «a different treatment between the creditor and the consumer»¹⁹. As a consequence, for the creditor the event giving rise to the dispute was the default on the part of the consumer. For the consumer instead, the triggering effect to raise the breach of the provisions set for her protection was the conclusion of the contract. From a more general perspective, the forfeiture period «was interpreted in such a way as to cover not only actions brought by the creditor but also actions by the borrower, who could no longer contest, either in the form of a claim or defence, the credit contract on the basis of the breach of the legal formalities set out by the law for the conclusion of the consumer contract».²⁰ This created a «procedural imbalance between creditors and consumers»²¹, severely criticized in academia but also by first instance judges because the «creditor could legally initiate action for payment after the elapse of the two-year foreclosure period, while at that stage it would be no longer possible for the consumer to contest payment on the basis of the breach of the legal provisions»²². As rightly pointed out by A. Beka, «this is a vicious effect of deviation from the rule *quae temporalia sunt ad agendum, perpetua sunt ad excipiendum*, which allows submissions that can no longer be adduced as claims to be invoked as a defence»²³. And such «a deviation is not justified with regard to non-sophisticated parties protected by consumer legislation»²⁴. At that time, another point needed to be clarified: that of the extension of the application of the two-year time-bar period also to the plea of unfairness of a contractual term. When referring the case to the European Court of Justice, Etienne Rigal also intended «to ensure that the objection of unfairness would

¹⁶ *Ibid.*, at p. 147.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*, at p. 147.

²⁴ *Ibid.*, at p. 148.

not be subject to the same procedural regime of foreclosure as the plea based on the breach of the provisions on the formalities of the conclusion of the consumer credit contract»²⁵. Should this have been the case, «the national law [would have jeopardised] the effectiveness of Union law on unfair terms»²⁶. As a consequence, the decision of the Court of Justice of the European Union «was given on the basis of the assumption that the foreclosure period also referred to the raising of the plea of unfairness»²⁷.

Judges Fernandez Seijo and Rigal opened fire on the inefficiency of domestic legal systems with regard to consumers' protection in the field of unfair terms²⁸. The decisions rendered by the European Court of Justice in the *Océano Grupo* and *Cofidis* cases encouraged first instance judges to refer preliminary questions of interpretation to the Court of Justice of the European Union. Spanish judges were particularly active in fighting procedural injustice through such means. Since the *Océano Grupo* case, the Court has rendered twenty-three decisions related to the procedural imbalance that struck Etienne Rigal and his predecessors and led them to combat such injustice through preliminary rulings on the ground of articles 6 and 7 of the 93/13/EEC Directive on unfair terms in consumer contracts²⁹. The active role of the Court then expanded beyond the scope

²⁵ *Ibid.*, at p. 149.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ He also sought a preliminary ruling in the *Aziz* case, C-415/11, EU:C:2013:164, a key decision in the field of consumer procedural law, on which see *inter alia* A. BEKA, pp. 130-142.

²⁹ This contribution only refers to cases decided before April 2020. Cases C-168/05, *Mostaza Claro*, EU:C:2002:705; C-243/08, *Pannon GSM*, EU:C:2009:350 ; C-40/08, *Asturcom Telecomunicaciones*, EU:C:2009:615 ; C-137/08, *VB Pénzügyi Lízing Zrt.*, EU:C:2010:659; C-76/10, *Pohotovost'*, EU:C:2010:685 ; C-472/10, *Invitel*, EU:C:2012:242 ; C-618/10, *Banco Español de Crédito*, EU:C:2012:349 ; C-397/11, *Jörös, Fővárosi Bíróság*, EU:C:2013:340; C-472/11, *Banif Plus Bank*, EU:C:2013:88; C-415/11, *Aziz*, EU:C:2013:164; C-488/11, *Asbeek Brusse and de Man Garabito*, EU:C:2013:341; joined cases C-537/12 et C-116/13, *Banco Popular Español*, EU:C:2013:759; C-348/14, *Bucura*, EU:C:2015:447; C-32/14, *ERSTĚ Bank Hungary Zrt.*, EU:C:2015:637; C-49/14, *Finanmadrid EFC*, EU:C:2016:98; C-377/14, *Radlinger and Radlingerová*, EU:C:2016:283; C-122/14, *Aktiv Kapital Portfólio*, EU:C:2016:486; C-168/15, *Tomášová*, EU:C:2016:602; C-568/14 à C-570/14, *Fernández Oliva*, EU:C:2016:828; C-421/14, *Banco Primus*, EU:C:2017:60; C-176/17, *Profi Credit Polska*, EU:C:2018:293; C-407/18, *Addiko Bank*, EU:C:2019:537; C-511/17, *Litner*, EU:C:2020:188 (case decided on March 11 2020), the latter case led the Court to somehow limit the scope of the *ex officio* power of the judge by deciding that «Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court, hearing an

of unfair terms. Directive 2008/48/EC on consumer credit³⁰, and more specifically articles 8 et 23 thereof, were also interpreted as imposing an obligation on national courts, that is, to examine, of their own motion, whether the creditor complied with his pre-contractual obligation to assess the consumer's creditworthiness³¹. Directive 99/44/EC on non-conformity led to two different approaches. While national courts are required of their own motion to determine whether the purchaser may be classified as a consumer within the meaning of that directive even if the purchaser has not relied on that status³², and therefore have the obligation to assess the purchaser's "consumer status", it appears that judges are only permitted to substitute of their own motion the reduction of the price, not sought by the consumer, for the rescission of the contract in case of non-conformity of the goods at issue, yet the latter is a power vested in them, not an obligation³³. Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises³⁴, Directive 87/102/EEC on consumer credit³⁵ and Directive 2005/29/EC on unfair commercial practices were also the battlefield with a view to achieving efficient consumer protection, yet the victories were less spectacular in this field. In the *Rampion and Godard* case, regarding Directive 87/102, national judges were only allowed «to apply of their own motion the provisions transposing Article 11(2) of Directive 87/102 into national law»³⁶. With regard to Directive 2005/29,

action brought by a consumer seeking to establish the unfair nature of certain terms in a contract that that consumer concluded with a professional, is not required to examine of its own motion and individually all the other contractual terms, which were not challenged by that consumer, in order to ascertain whether they can be considered unfair, but must examine only those terms which are connected to the subject matter of the dispute, as delimited by the parties, where that court has available to it the legal and factual elements necessary for that task, as supplemented, where necessary, by measures of inquiry» and «article 4(1) and Article 6(1) of Directive 93/13 must be interpreted as meaning that, while all the other terms of the contract concluded between a professional and that consumer should be taken into consideration in order to assess whether the contractual term forming the basis of a consumer's claim is unfair, taking such terms into account does not entail, as such, an obligation on the national court hearing the case to examine of its own motion whether all those terms are unfair».

³⁰ Repealing Directive 87/102/EEC.

³¹ Case C-679/18, *QPR Finance*, EU:C:2020:167.

³² Case C-497/13, *Faber*, EU:C:2015:357.

³³ Case C-32/12, *Duarte Hueros*, EU:C:2013:637.

³⁴ Repealed by the 2011/83/EU Directive on consumer rights, case C-237/08, *Martin Martin*, EU:C:2009:792.

³⁵ Repealed by the 2008/48/EU Directive on consumer credits. Case C-429/05, *Rampion et Godard*, EU:C:2007:575.

³⁶ Case C-429/05, *Rampion et Godard*, EU:C:2007:575. It should however be stressed

the Luxembourg judges responded negatively to the question of a Spanish court asking whether a law that does not provide for the review by the courts of unfair commercial practices, whether of their own motion or at the request of one of the parties, is contrary to Article 11 of that directive because that national legislation hinders or prevents review by the courts of contracts or acts which may contain unfair commercial practices. This judgement could certainly be perceived as a halt in the development of the theory of the active role of courts in consumer litigation³⁷. But we should recall that the Court is bound by the objective of the legislation it is called to interpret. From that standpoint, undisputedly Directive 2005/29 on unfair commercial practices does not have the same purpose as Directive 93/13 on unfair terms. Directive 2005/29 «is purely concerned with regulating the conduct of traders in their dealing with consumers»³⁸, and «consequently, the enforcement of the prohibitions in the [Directive] is viewed as primarily a matter for public bodies and other organisations with an interest in combating unfair commercial practices to take legal action and/or complain to a relevant administrative authority»³⁹. In contrast, Directive 93/13 «offers a good example of an insurance-like, welfarist approach to consumer protection»⁴⁰. Moreover, it provides a sanction for the infringement of its provisions, which is not the case with Directive 2005/29. Whilst Directive 93/13 seeks to address the inequality of power between the parties that is created by the unfair term, Directive 2005/29 only seeks to put an end to unfair practices, without an impact on the validity of the contract. This certainly shows the difference in said approaches. Besides, as previously observed, the CJEU recently took a rather socially sensitive approach to consumer

that the judge did not give the Court the opportunity to decide that there was an obligation to raise of his own motion the provision at stake, by not referring in the question posed to the Court to an obligation.

³⁷ Case C-109/17, *Bankia*, EU:C:2018:735.

³⁸ G. HOWELLS, C. TWIGG-FLESNER, T. WILHELMSSON, *Rethinking EU Consumer Law*, Routledge, 2018, p. 85. It should however be noted that the newly passed Directive 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules aims to improve the effectiveness of consumer protection by establishing criteria related to the penalties that should be imposed on rogue traders, meaning that the enforcement of Directive 2005/29 prohibitions is now viewed as a matter of EU interest. Therefore, the Court of Justice of the European Union could take a different interpretive approach in the future.

³⁹ *Ibid.*

⁴⁰ *Ibid.* at p. 131.

protection in a case regarding Directive 2008/48 on consumer credit⁴¹ by imposing on national courts the duty to raise of their own motion the issue of whether the creditor complied with his pre-contractual obligation to assess the consumer's creditworthiness. The decision is rather interesting because the EU's consumer policy in the field of consumer credit «has not necessarily been to increase credit consumption; rather it has sought to promote competition and ensure consumers have a transparent choice on fair conditions»⁴². The theory advocating the active role of courts in consumer litigations is still thriving.

With the *Océano Grupo* and *Cofidis* cases, the seeds of an effective procedural protection of consumers had been sown. And indeed, the battle fought by these judges has not only forged a Europeanized model of the legal framework for an active consumer protection by the courts, it has also stood as a pillar of procedural consumer law, touching upon a fundamental aspect of civil procedure. After the *Océano Grupo* and *Cofidis* cases, the narrative of consumer procedural law has evolved, and will continue to evolve, to incorporate the specific aspects of consumer law into the procedures themselves and how the same affects different types of proceedings (namely payment, insolvency and mortgage cases). And in fact, the theory developed by the Court of Justice of the European Union has transformed the judicial mind-set in different jurisdictions. It has revealed how seemingly technical, procedural rules can encompass a humanized perception of procedures. Behind the courts' procedural rulings, the *ex officio* theory allows citizens' true stories to unfold before the judges' eyes and allows courts, be they the Court of Justice of the European Union or a first-instance national court, to take on the role of "guardian of EU fundamental rights". The need for such a guardian, and the courts' assumption of that role, is more crucial than ever because the on-going crisis transcends finance and now strikes at the very pillars of the Member States' and EU's policies; the courts' application of this theory in consumer law makes it plain that, contrary to some frequently expressed opinions, EU law is not a disembodied set of rules interpreted by judges far removed from citizens' daily life. This is another of Etienne Rigal's victories, one that exceeds the technical aspects of the law, the happy ending of a true story.

⁴¹ Case C-679/18, *QPR Finance*, EU:C:2020:167.

⁴² G. HOWELLS, C. TWIGG-FLESNER, T. WILHELMSSON, p. 215.