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Can Ownership Limit the Effectiveness of EU Consumer Contract Law Directives?

A Suggestion to Employ a 'Functional Approach'

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***Abstract**: Does the acquisition of ownership form a strict barrier to the application of EU consumer contract law rules? In particular: does the acquisition of ownership prevent a national court from reviewing unfair terms in a mortgage agreement? The CJEU said so in its recent judgement C-598/15 Banco Santander, where a bank itself acquired a mortgaged apartment in a forced sale. We consider this a too formal way of reasoning. In order to make a constructive suggestion of a better suited methodological alternative, we contrast this view by applying a 'functional approach' as developed in property law (especially Nordic and American). A 'functional approach' deals with each type of conflict directly and on its own merits, by involving various kinds of arguments relevant for the specific conflict without making the decision depend on broad general concepts like 'ownership'. We conclude that this kind of approach offers an appropriate framework, in particular for the difficult task of determining the scope of the 'principle of effectiveness' of consumer contract law directives.*

***Keywords:** ownership, functional approach, Unfair Contract Terms Directive 93/13/EEC, principle of effectiveness, mortgage contract, enforcement procedure, EU consumer contract law*

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I. The *Banco Santander* Case as an Illustration

A. The CJEU's Use of 'Ownership' in a Consumer Contract Law Case

In its recent judgement on Case C-598/15 *Banco Santander* the Court of Justice of the European Union (CJEU)[1] had to deal with the question of whether the Unfair Contract Terms Directive (UCTD)[2] can be applied *after the enforcement of a mortgage contract* between a consumer and a bank *has already been completed*. In that particular case, the creditor-bank which had itself acquired the mortgaged apartment in a forced sale sued the consumer-debtor to vacate the apartment. The referring Spanish court, in short, asks whether it can disapply certain national rules of civil procedure in order to protect the consumer. This question is based on the referring court's consideration that national procedural law did not allow for an *ex officio* judicial review of unfair terms[3] in the foregoing enforcement proceedings and that the consumer-debtor had no possibility to raise a defence on the ground that certain terms in the mortgage contract were unfair within the meaning of the Directive.[4]

It is important to stress that, for the purposes of this article, we will not deal with the full set of facts of the *Banco Santander* case, nor will we deal with the full set of arguments taken into account by the Court in its decision. The focus will be on the role the acquisition of ownership – or in general the acquisition of a right *in rem* – should assume when deciding to apply, or not to apply, provisions to protect a consumer from the use of unfair contract terms. As far as relevant for that purpose, the facts of the case are as follows:

A consumer took a loan to buy an apartment and agreed to secure the loan by way of a mortgage (hypothec) over this dwelling. The mortgage contract, apparently based on standard forms provided by the bank, stated that if the mortgage should be enforced under specific extra-judicial enforcement proceedings, the bank should be authorised to sign the contract of sale of the mortgaged property in the name of the consumer. It also stated a fixed value on the basis of which the mortgaged apartment should be assessed in order to determine the starting price in the

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1 CJEU, Case C-598/15 *Banco SantanderSA v Cristobalina Sánchez López* ECLI:EU:C:2017:945. The judgement has not received much attention yet: There is an (uncritical) case note by Friedrich Graf von Westphalen, *Keine Anwendung der Richtlinie 93/13/EG (missbräuchliche Klauseln) im Rahmen der Verwertung einer hypothekarischen Sicherheit*, 3 ZEITSCHRIFT FÜR INTERNATIONALES WIRTSCHAFTSRECHT 75 (2018) and a short critical discussion provided in Wolfgang Faber and Astrid Graf-Wintersberger, *Zivilrecht und Internationales Privatrecht, Schwerpunkt Verbraucherschutz, in* JAHRBUCH EUROPARECHT 2018 (Günter Herzig ed., 2019, forthcoming).

2 Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95/29.

3 This refers to a vast body of CJEU case law, under which a national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. See, *e.g.*, CJEU, Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* ECLI:EU:C:2009:350; Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* ECLI:EU:C:2009:615; Case C-137/08 *VB Pénzügyi Lízing Zrt v Ferenc Schneider* ECLI:EU:C:2010:659; Case C-618/10 *Banco Español de Crédito SA v Joaquín Calderón Camino* ECLI:EU:C:2012:349, and many others. For the application of this principle in (various types of) enforcement proceedings, see, *e.g.*, CJEU, Case C-76/10 *Pohotovosť s. r. o. v Iveta Korčkovská* ECLI:EU:C:2010:685; Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* ECLI:EU:C:2013:164; Case C-470/12 *Pohotovosť s.r.o. v Miroslav Vašuta* ECLI:EU:C:2014:101; Case C-32/14 *ERSTE Bank Hungary Zrt. v Attila Sugár* ECLI:EU:C:2015:637; Case C-49/14 *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano et al* ECLI:EU:C:2016:98. An extensive discussion of this line of case law has recently been provided by ANTHI BEKA, THE ACTIVE ROLE OF COURTS IN CONSUMER LITIGATION – APPLYING EU LAW OF THE NATIONAL COURTS' OWN MOTION (2018); see also Kalev Saare and Karin Sein, *Amtsermittlungspflicht der nationalen Gerichte bei der Kontrolle von missbräuchlichen Klauseln in Verbraucherverträgen,* 2 JOURNAL OF EUROPEAN CONSUMER AND MARKET LAW 15 (2013).

4 See questions 1 and 3 as stated in CJEU, Case C-598/15 *Banco Santander* para. 27 and reformulated by the Court in para. 32.

auction.[5] As the consumer did not repay her debt, the bank initiated such an extra-judicial enforcement procedure before a notary, in which the bank itself was awarded the mortgaged property for about 60% of the assessed value stated in the contract. The consumer therefore continued to owe about € 13,500. For transferring the ownership of the mortgaged apartment to the bank, the notary drew up an instrument of sale. Without any involvement of the consumer, the bank signed as the consumer's representative as seller. The bank also signed on its own behalf as buyer. This was in accordance with the representation clause in the mortgage contract. Thereupon, the bank was registered as the apartment's new owner in the land register. In the following procedure before the Spanish court, the bank sought an order, based on its right of ownership, for surrender of the apartment and the ejection of the consumer from the dwelling.[6] The Spanish court turned to the CJEU.

The CJEU replied by first recapitulating general case law principles concerning the protection regime established by the UCTD. In particular, the CJEU noted that where a mortgage is enforced before a notary, the consumer must have a right, even at the enforcement stage, to challenge allegedly unfair contract clauses before a court.[7] Then, as one of the main aspects in its argumentation, the CJEU emphasised that a distinction must be drawn between the procedure enforcing the mortgage on the one hand and the present procedure before the referring court on the other, in which the bank sought to enforce its newly-acquired right of ownership.[8] The CJEU did observe that in the case at hand, the apartment owner (bank) is the same person as the mortgage creditor. However, the Court continued, any interested third party could have acquired the ownership in the course of the extra-judicial enforcement of the mortgage and could, as a result, have an interest in bringing proceedings for vacating the apartment. In such circumstances, "to allow the debtor who has granted a mortgage over that property to set up defences founded on the mortgage loan agreement against the transferee of that property, an agreement to which that transferee may nevertheless be a third party, would be liable to affect legal certainty in pre-existing proprietary relationships".[9] The CJEU found it decisive that the basis for the bank's claim before the referring court is its ownership right in the apartment, and not the mortgage contract: (only) in the latter case, the law had required an effective review of the potential unfairness of contractual terms even at the enforcement stage. Therefore, the Court held that the consumer, in the present case,

5 See CJEU, Case C-598/15 *Banco Santander* para. 20.

6 According to Article 250(1) no. 7 of the Spanish Code of Civil Procedure, the court shall rule claims, under a simplified procedure, "brought by the holders of real rights entered in the land register, for the enforcement of those rights against those who challenge or interfere in their exercise without any registered title justifying the challenge or interference". See CJEU, Case C-598/15 *Banco Santander* para. 7.

7 See CJEU, Case C-598/15 *Banco Santander* para. 38, referring to CJEU, Case C-32/14 *ERSTE Bank Hungary* para. 59. For an analysis of the latter judgement, see Wolfgang Faber and Eva Klampferer, *Zivilrecht und Internationales Privatrecht, Schwerpunkt Verbraucherschutz, in* JAHRBUCH EUROPARECHT 2016 281, 303 ff. (Günter Herzig ed., 2016). See also Andreas Piekenbrock, *Vollstreckungsunterwerfung und unionsrechtliche Klauselkontrolle,* 13 ZEITSCHRIFT FÜR DAS PRIVATRECHT DER EUROPÄISCHEN UNION 137 (2016), who, however, does not sufficiently address that the CJEU, in *ERSTE Bank Hungary*, in fact requires a possibility of judicial review in addition to the allegedly neutral role a notary plays in a private enforcement procedure.

8 CJEU, Case C-598/15 *Banco Santander* paras. 40–44.

9 CJEU, Case C-598/15 *Banco Santander* para. 45.

cannot rely on the provisions of the UCTD in order to prevent "the recognition and protection of the owner's real rights over that property".[10]

B. Our Aims and How the *Banco Santander* Case Will Serve Them

We argue that this kind of conceptual legal reasoning – the bank acquires ownership, which has effect against everyone, therefore it must be invulnerable against consumer contract law rules for the sake of legal certainty – is too formal an approach and actually distracts from the real problems at hand. As legal researchers our aim in this article is not to show that the CJEU has rendered a wrong decision. There are additional facts and procedural implications (see section I.C. below) that may shed a different light on the overall result. Our concern is a methodological one, and we will use those facts of the *Banco Santander* case that have been stated above in order to show that it would be possible to achieve more balanced solutions by employing an alternative methodological approach.

In the subsequent chapters, we will therefore introduce a so-called 'functional approach', which has been applied for decades in the property law systems of the Nordic European countries and in the United States. This will be done in a general way first and then be turned into a step-by-step instruction of how to apply such an approach to an individual case (chapter II.). We will then return to the *Banco Santander* case and try to demonstrate how this case – or rather the parts of the facts that we have identified as being relevant for our purposes stated above – can be analysed by applying this 'functional approach' step by step (chapter III.). By doing this, we hope that the potential benefits of making use of such an approach, not only in its original environment of property law but in particular when (national) property law clashes with EU consumer protection rules, which require to be applied effectively, will become apparent. This leads us to assert that applying a 'functional approach' actually offers an appropriate framework for determining how far this 'principle of effectiveness' arising from EU consumer contract law directives should reach in a particular case or, in other words, where to delimit its scope. Chapter IV., finally, carries the discussion one step further by drawing up the hypothesis that the EU law principle of effectiveness may actually require applying an approach that, at least, comes fairly close to the 'functional approach' we have by then presented and applied. This may provide an opportunity of actually sharpening the way of applying the principle of effectiveness itself to a certain extent. Chapter V. will add a few conclusive remarks.

C. Further Aspects of the Case, and What We Do Not Aim at

As mentioned above, we do not make use of the full set of facts and of all arguments presented in the CJEU judgement C-598/15 *Banco Santander*. In other words, we make use of a slightly adapted version of this case in order to make the – primarily methodological – points previously mentioned. In order to avoid possible misunderstandings, we will now clarify which aspects of the case we will not consider.

(i) In particular, we will not touch upon the CJEU's argument that, in contrast to the referring court's submissions, the consumer apparently did have opportunities to defend herself, on the ground

[10] CJEU, Case C-598/15 *Banco Santander* paras. 46 f. (quote from para. 47).

that the mortgage contract contained unfair terms, within the course of the mortgage enforcement procedure.[11] Whether this was the case or not is something we simply cannot assess. We therefore design 'our version' of the *Banco Santander* case as if the issue of complete consumer passivity did not arise,[12] and we will not get further into a discussion whether this argument has been raised rightly or not.[13] The reason is that this aspect is not directly relevant for the property law implications of the case, which are our primary concern.

Another simplification is that we will not deal with the fact that the consumer in the case was helped by a fund to stay in the apartment as a tenant for some time between the completion of the enforcement procedure and the bank's current claim for ejection.[14] This, too, is not directly relevant to the property law implications of the case, although this fact may theoretically offer a reason why the consumer had little incentive to make a claim, at an earlier stage, that the contract was unfair. In Advocate General (AG) Wahl's opinion, the aspect of this social tenancy agreement is, however, rather employed as an argument for not recommending an *ex officio* intervention.[15]

(ii) Also the way we deal with Spanish procedural law in this article requires some clarification: in general, we try to refer to Spanish procedural law in the same way as the CJEU and the Advocate General do it in their reasoning. This primarily means that the specific proceeding before the referring Spanish court serves the purpose of "safeguard[ing] the protection of real rights entered in the land register, irrespective of the means by which they were acquired".[16]

This, as such, is a correct description, but at the same time tells only half of the truth: Under the applicable Spanish rules of civil procedure, the procedure initiated by the bank to vacate the apartment[17] is a 'summary' procedure. This means that, first, the defendant's defences are limited to certain grounds entailed in an exhaustive list.[18] This list does not include a defence based on the invalidity of a contract term of the mortgage agreement, or the invalidity of the whole mortgage agreement, which formed the basis of the claimant's acquisition of ownership. However, the Spanish system of transferring ownership of both movable and immovable property is a 'causal' transfer system. This means that the transfer, including a transfer through a forced sale in an extra-judicial enforcement procedure, must be based on a valid underlying obligation to transfer (arising,

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11 See CJEU, Case C-598/15 *Banco Santander* para. 49, referring to AG Nils Wahl, Opinion on Case C-598/15 *Banco SantanderSA v Cristobalina Sánchez López* ECLI:EU:C:2017:505, para. 70.

12 The issue of consumer passivity has been dealt with, with somewhat different outcomes, in CJEU, Case C-40/08 *Asturcom* paras. 33 ff. (national court's duty to conduct *ex officio* review affirmed) and Case C-32/14 *ERSTE Bank Hungary* paras. 62 f. (principle of effectiveness held not to require counterbalancing complete passivity of the consumer).

13 There may be certain doubts arising from the principle of effectiveness because according to Article 444(2) of the Spanish Code of Civil Procedure, the defendant (here: the consumer) must, if the applicant (bank) so requests, *pay a deposit fixed by the court* before the defendant can challenge a claim brought under the specific procedure used for vacating the apartment (see CJEU, Case C-598/15 *Banco Santander* para. 8). The deposit to be paid in the present case was apparently € 10,000 (*ibid.*, para. 24). Where a claim for vacating her apartment has been brought precisely because the consumer could not any longer pay her dues, it is rather likely that she cannot raise the money for paying a deposit either.

14 See AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 79.

15 See AG Wahl, Opinion on Case C-598/15 *Banco Santander* paras. 79–81.

16 CJEU, Case C-598/15 *Banco Santander* para. 42; cf. also para. 44.

17 The procedure is governed by Article 250(1) no. 7 of the Spanish Code of Civil Procedure.

18 As provided by Article 444(2) of the Spanish Code of Civil Procedure; cf. CJEU, Case C-598/15 *Banco Santander* paras. 7 f.

e.g., from a contract for sale).[19] Second, in this context, the 'summary' character of the procedure at hand means that the decision is not final; the judgement does not have the authority of *res iudicata*.[20] The summary character of the procedure reflects the rebuttable presumption that a property right in an immovable object exists and belongs to the person registered as its title-holder in the land register.[21] Therefore, the defendant may be forced to vacate the property under a judgement rendered in this summary procedure. But there still is a possibility to afterwards challenge the validity of the registered title-holder's acquisition of ownership in a 'plenary' procedure. A final decision on property issues can only be obtained in that latter type of procedure. If the registered title-holder's right of ownership is ruled to be invalid in that subsequent trial, this person will be deemed to never having been the rightful owner.

This second type of procedure, which alone decides on the validity of the acquisition, is not mentioned in CJEU's judgement; perhaps it has not been addressed in the referring court's application for the preliminary ruling. In any case, the CJEU does not deal with the question whether it would be in line with the UCTD's principle of effectiveness if the consumer had to leave the apartment in the first place but still had the chance to get it back in such a 'plenary' procedure. We will not deal with this question either, and base our article on the same simplification as appears to the readers of the CJEU case. This is not a problem in the light of our primarily methodological goals. But it should be noted that we, therefore, cannot (and do not) claim to present 'the right solution' for Spanish law.

The procedural clarifications made above are also important in another context. They should help to avoid drawing overly strict conclusions from the CJEU's reasoning for other European legal systems. The Court's argumentation has been developed against the background of what the Court understood to be Spanish (substantive and procedural) law,[22] and this involves the assumption that the law of civil procedure does not provide any chance to raise a defence based on the invalidity of the acquisition. Many other European laws do not have such provisions, and it is therefore not excluded that the CJEU might come to a different conclusion if the same set of facts were arising in another Member State. The Court, in an almost hidden move at the very end of its reasoning, seems to recognise this: It states that the judgement's result, *i.e.*, that Articles 6 and 7 UCTD are not applicable to proceedings such as those before the referring Spanish court, shall apply "*provided that* … the proceedings are *independent* of the legal relationship between the creditor and the consumer".[23]

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19 See Isabel González Pacanowska and Carlos Manuel Díez Soto, *National Report on the Transfer of Movables in Spain*, *in* NATIONAL REPORTS ON THE TRANSFER OF MOVABLES IN EUROPE, VOLUME 5 393, 537 ff. (Wolfgang Faber and Brigitta Lurger eds., 2011). We are grateful to these authors for having provided us with additional information on Spanish civil procedure law, which is reflected in this paragraph.

20 Article 447(3) of the Spanish Code of Civil Procedure.

21 See Article 38 of the Spanish Act on Hypothecs.

22 For the importance of considering the facts of the referred case when interpreting the CJEU's judgement, see Wolfgang Faber, *Auslegung von EuGH-Entscheidungen – Eine Annäherung anhand von Beispielen aus dem Verbraucherprivatrecht,* 139 JURISTISCHE BLÄTTER 697 (part 1) and 776 (part 2), at 707–709 (2017). This should arguably include national law in relation to which the CJEU develops its argumentation.

23 CJEU, Case C-598/15 *Banco Santander* para. 50 and in the final answer (italics have been added by the authors). Note that the "provided that" formula is equally present in the French version (*i.e.*, the original version) and in the Spanish version (the official language of the case before the CJEU) of the judgement, but has been translated falsely in the German version (using "because" – "da" in German – instead of "provided that").

(iii) Finally, it should be clarified that we will, in the subsequent chapters, promote the 'functional approach' for the purposes of the present article; that is, reconciling national property law rules with the UCTD's (or any other EU directive's) principle of effectiveness. It is not the aim of this article to require national property law regimes to change towards a 'functional approach'. For the purposes discussed in this article, a 'functional approach' can be applied in relation to any national property law regime.

The following will focus on the role property law concepts shall play, or shall not play, when determining the operating distance of the principle of effectiveness in EU consumer contract law.

II. A Functional Approach

There are many ways of understanding how property law concepts affect our modes of thinking. This is a topic in several academic fields, including philosophy, anthropology, economics and law.[24] The way we perceive our relationships and resources is to a large extent affected by the (various) concepts of ownership and the structures built around this concept. In this article we will approach the concept of ownership with what has been labelled the 'functional approach'.[25] We do so because we think that this functional approach can not only be applied to property law matters as such (the legal environment where much of this approach has been developed and applied) but also where issues of (national) property law clash with norms of EU law. Specifically, we consider it applicable where property law issues clash with the UCTD's demand for an effective review of potentially unfair terms in consumer contracts. The functional approach has been built around the conception that concepts in and of themselves should only to a limited extent influence the understanding of a legal issue.[26] Rather, the specific conflicts between different parties involved should be dealt with on their own merits, and concepts thereby assume the role of mere tools for communication. Hence we think that the functional approach can help to reveal instances in which the inconsiderate use of the ownership concept can affect legal thinking in ways that are potentially questionable from an EU law perspective.

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[24] See among numerous titles the anthologies PROPERTY RELATIONS: RENEWING THE ANTHROPOLOGICAL TRADITION (Chris M. Hann ed., 1998); MICHELE GRAZIADEI AND LIONEL SMITH, COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES (2017). Also, to just mention some of the classical works on property: JOHN LOCKE, TWO TREATISES OF GOVERNMENT (first published 1689, reprint 1947); GEORG WILHELM FRIEDRICH HEGEL, OUTLINES OF THE PHILOSOPHY OF RIGHT (T. M. Knox tr., 2008).

[25] For the term 'functional approach' see, in the English language, *e.g.*, Felix Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUMBIA LAW REVIEW 809 (1935); MARTIN LILJA, TRANSFER OF MOVABLE PROPERTY UNDER U.S. LAW DISCUSSED FROM A FUNCTIONAL PERSPECTIVE (2014); Claes Martinson, *The Scandinavian Approach to Property Law, Described through Six Common Legal Concepts,* 22 JURIDICA INTERNATIONAL 16 (2014); Claes Martinson, *How Swedish Lawyers Think about 'Ownership' and 'Transfer of Ownership', in* RULES FOR THE TRANSFER OF MOVABLES 69 (Wolfgang Faber and Birgitta Lurger eds., 2008); Wolfgang Faber, *Scepticism about the Functional Approach from a Unitary Perspective, in* RULES FOR THE TRANSFER OF MOVABLES 97 (Wolfgang Faber and Birgitta Lurger eds., 2008). In the Nordic legal discussion the word 'pragmatism' has also been used; see SVERRE BLANDHOL, NORDISK RETTSPRAGMATISME: SAVIGNY, ØRSTED OG SCHWEIGAARD OM VITENSKAP OG METODE (2005). Perhaps the approach should rather be described as the 'functionalistic approach' since this emphasises that it is a matter of describing a style of legal thinking, rather than describing that this way of thinking is actually more functional or better-working than other styles of legal thinking.

[26] As the reader may notice, we have here turned to call it "the" functional approach, although in the headings of this section we prefer "a" functional approach. We do this since our ambition is not to promote a certain approach to legal thinking because of its background, or because we think specific functional thoughts should be used in a specific manner. Rather, what we would like to show is how legal thinking can be developed in a direction inspired by functional thoughts, with a skepticism towards too much emphasis on conceptual thinking.

What we will explain in this chapter is, first, why functionalist approaches developed in Scandinavia and in the United States (section II.A.). This is not a historical exposé, but rather an explanation to how the aims of the functionalists are understood today. Against this background we will present a short step-by-step instruction of how the functionalist approach can be used when dealing with property law issues in general, or when property law and EU consumer law need to be considered in a particular case (II.B.). The fact that we use functional ideas is not an attempt to promote the functional approach as superior than any other approach to legal thinking.[27] Nevertheless, it can be used both for reflection and as a technical tool when trying to reconcile property law principles and EU consumer law.

A. Why a Functional Approach?

The development of a specific kind of legal thinking is of course a complex phenomenon to describe, even more so when this development concerns two different cultures. It is clear that both US and Scandinavian jurisprudence were influenced by the movement of legal realism in the early twentieth century. The legal realisms of the two cultures are, however, different.[28] At the same time legal realism does not fully explain why the functional approaches developed in any of these legal cultures.

We do not need to go into historical details here. What we want to explain is how, as to substance, functional ideas approach the concept of ownership and how they manage to deal with the same problems without focusing on such a concept:[29] One central idea of legal functionalism is that the ownership concept is not fit for connecting different kinds of issues to each other. Different relationships and their different legal issues should be kept apart. The different issues should be dealt with on their own merits. The concept of ownership should not be used to connect them. This can be illustrated by the following quote (describing pre-UCC American sales law):

> "Unless a cogent reason be shown to the contrary, the location of title will govern every point which it can be made to govern. It will govern, between the parties, risk, action for the price, the applicable law in an interstate transaction, the place and time for measuring damages, the power to defeat the other party's interest, or to replevy, or to reject; it will govern, as against outsiders, leviability, rights against tort-feasors, infraction of criminal statutes about sales, incidence of taxation, power to insure. The burden is put upon any individual issue to show why it should be honored by being severed from the Title-lump in any particular, and given individualized treatment. Now this would be an admirable way to go at it if the Title concept (or other basic integrated concept used) had been tailored to fit the normal course of a going or suspended situation during its flux or suspension. But Title was not thus conceived, nor has its

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27 Also, the functionalist approaches have, so far, not been developed to the extent they could have; see, for instance, ERLEND BALDERSHEIM, TIL TINGSRETTENS TEORI (2017); Claes Martinson, *Något om behoven av att underhålla och utveckla den nordiska (funktionalistiska) rättstraditionen – Segelbåtsfallet, in* FESTSKRIFT TILL GÖRAN MILLQVIST 461 (Lars Gorton, Lars Heuman, Annina H. Persson and Gustaf Sjöberg eds., 2019). Compare also Michael G. Bridge, Roderick A. MacDonald, Ralph L. Simmonds and Catherine Walsh, *Formalism, Functionalism, and Understanding the Law of Secured Transactions,* 44 MCGILL LAW JOURNAL 567 (1999).

28 See, *e.g.*, Gregory S. Alexander, *Comparing the Two Legal Realisms – American and Scandinavian,* 50 AMERICAN JOURNAL OF COMPARATIVE LAW 131 (2002).

29 For a description of general characteristics of legal functionalism see, *e.g.*, BLANDHOL, *supra* note 25, at 51–72. With regard to the concept of ownership, see also Alf Ross, *Tû-Tû,* 70 Harvard Law Review 812 (1956–1957).

> environment of buyers and sellers had material effect upon it. It remains, in the sales field, an alien lump, undigested. It even interferes with the digestive process."[30]

The quote, at least, illustrates the view that the *concept of ownership should not be used for solving a great variety of legal issues* involving different interests and different parties, in particular in transfer situations. When the rules for the transfer of ownership were designed, they were usually not tailored to perfectly solve all the issues that can possibly be linked to them. The quote, however, can also be read in the sense that the concept of ownership *should not be used for deducing legal consequences at all*. Considering both interpretations of the text above, another tool must be used for construing legal solutions. This tool – the 'real issue' – is addressed in the subsequent paragraph. But first we would like to reiterate that what we have previously stated does not, from a functionalist point of view, mean the term 'ownership' should necessarily be avoided or has no meaning whatsoever.[31] The functionalist approach simply entails that the concept of ownership is a relational and relative concept. If a legal solution to one legal conflict means that one party wins against the other, this could be described through the winner having or getting 'title', or them being awarded 'ownership'. However, it is important to note that this use of the concept means nothing more than the winner having priority over the other party. It does not mean that the winner gains a better position against any other possible party who claims priority on another legal ground.[32]

Instead of linking the solution of a conflict to the question of who has ownership, the idea is to deal with each issue on its own merits.[33] To do so, it becomes necessary to identify what the real problem of the case is. Functionalist lawyers often do this without much reflection and without specifically labeling the process, but when explaining this part to lawyers from other legal traditions, the term *identifying the 'real issue'* can be used.[34] The real issue, or the real problem, can be defined by identifying the typical interests that two parties typically have in the type of conflict at hand. This can be viewed as another side of the idea not to involve the ownership concept in the problem-solving as such: By identifying the typical clash of interests in the type of situation at hand, concepts are not used to define the issue. They become mere tools for communication and are understood in relation to the real issue. To illustrate what this means we will use two examples:

> Example 1: A seller (A) sold his car to a buyer under the condition that the car should "fall back to" the seller if the buyer did not pay the remaining price in time. The buyer (B) did not pay, but he sold the car to another buyer (C). Since the first seller (A) then understood the risk that the first buyer (B) would not pay, he sued the second buyer (C) to get the car back.

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30 Karl Llewellyn, *Through Title to Contract and a Bit Beyond,* 15 New York University Law Quarterly Review 159, 169 (1938).

31 To avoid any possible misunderstanding: 'ownership' (or 'title') does remain an important concept in the legal thinking in both the United States and in the Nordic countries.

32 See, *e.g.*, HENRIK HESSLER, ALLMÄN SAKRÄTT 18 (1973). Compare David Frisch, *Remedies as Property: A Different Perspective on Specific Performance Clauses,* 35 WILLIAM & MARY LAW REVIEW 1691 (1994).

33 See, for instance, Torgny Håstad, *Derivative Acquisition of Ownership of Goods,* 17 EUROPEAN REVIEW OF PRIVATE LAW 725 (2009).

34 See, *e.g.*, Martinson, 22 JURIDICA INTERNATIONAL 16, *supra* note 25.

In a case like this the real issue is the first seller (A) typically not wanting the car back. He wants to get paid. The second buyer (C) does, however, want to keep the car. Of course, C will prefer keeping the car without paying a second time, but even if this should turn out to be impossible – and if the claim that A has against B is smaller than the value of the car – C would prefer to pay A that amount, rather than handing over the car to A.[35] The real issue is, therefore, whether A's interest to get paid or C's interest to keep the car without paying should be given priority? Hence, the matter to decide is whether C should pay A what A has contracted for or whether C can keep the car without paying. (The party who loses can of course claim the loss from B, but there is typically a substantial risk that B will never be able to pay his debts.)

If we place this issue in the Swedish jurisdiction it would be solved by using the Swedish legislation on good faith acquisition. Due to the wording of the legislation, the easily available public Swedish car register and Swedish case law, the requirements for good faith are rather high. It is particularly hard to be in good faith when buying a car from a seller (B) who himself bought the car under a contract clause that gave the seller's seller (A) the right to terminate the contract if the car was not paid. The information concerning these contract clauses is available through the public vehicle register. Therefore, C would most probably be regarded to be in bad faith. Because of C's bad faith, the issue would probably be solved by obligating C to pay A the remaining price of what B should have paid, as well as giving A the right to take the car back if C does not pay.

The solution described is not in itself remarkable. What we would like to point out is that the concept of ownership is not at all used when dealing with the issue. Instead, the question of law to decide concerns only the real problem, or real issue. The real issue is the conflict of interests that typical parties like A and C have in such situations. With a functional approach lawyers do not care about who owns the car. Ownership is not important for creating a solution to the 'real problem'.[36]

> Example 2: Another example concerns the situation where a debtor (D) is not able to fulfil his obligations because of insolvency. When insolvency occurs, D has sold, but not yet delivered, goods to a buyer (B).

This situation can be understood as a matter of ownership: What the debtor does not own should not be drawn into his bankruptcy estate because the property of others should be handed over to them. Hence, the issue can be perceived as a question of whether the buyer had become the owner before the seller went bankrupt. From a functional perspective this is, however, not the way to think.[37] With a functional approach this case is not seen as an issue of ownership. One does not

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35 This is because C's overall loss will be smaller in that case.

36 This does not mean that lawyers who use the functional approach could not say that A won ownership if he wins the case. Actually the Swedish legislation, somewhat surprisingly, uses the word 'ownership' to describe the claim that A has and what A or C wins if they win. Since the word 'ownership' is understood relationally and relatively, the term is, however, only used to express priority in the particular type of relation. This can be illustrated by the fact that the circumstances of the Swedish Supreme Court decision NJA (Nytt juridiskt arkiv) 1975 p. 222 were the same as the circumstances in the example we have given. The case was probably accepted by the Supreme Court because the judges wanted to make a precedent concerning terminology. They wanted to decide how clear a contract must be concerning the seller's right of termination, and they decided that other words than 'ownership' were fully acceptable. The seller had written, in Swedish, that "the car shall fall back to me if payment is not made in time". For this particular case, see also Martinson, in RULES FOR THE TRANSFER OF MOVABLES, *supra* note 25, at 82–84.

37 See, *e.g.*, Torgny Håstad, *Äganderättens övergång i en gemensam europeisk rättsordning,* (2009) TIDSKRIFT UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND 327. Claes Martinson, *Ejendomsrettens overgang – Norden kontra verden, in* FÖRHANDLINGARNA VID DET 39:E NORDISKA JURISTMÖTET I STOCKHOLM 18–19 AUGUSTI 2011 821 (Kavita Bäck Mirchandani and Kristina Ståhl eds., 2012).

connect this conflict with other conflicts where the concept of ownership could be used. The insolvency conflict concerning the item that the buyer bought should be dealt with on its own merits. With a functional approach the category of problems like this is seen as an issue of priority. This category of problems, or category of conflicts, is called 'the buyer's protection from the seller's general creditors', and ownership is (ideally) not a part of how the problem is perceived.

The real problem, a functionalist would think, is the conflict of interests between the seller's creditors and the buyer. What the creditors want is to use the property in question to get a higher dividend in the bankruptcy proceedings. The buyer is one kind of creditor, and the difference is simply the buyer wanting the property as such. Since both sides cannot have what they want, the issue of priority must become a question of whether there are reasons for giving priority to a buyer at some point in time during a sales relationship. When contemplating this issue, a thorough functionalist effort would be to identify that the buyers who have not yet paid any part of the price seldom suffer from not being given priority. In those cases, the other creditors normally prefer the bankruptcy estate to proceed with the sales contract. Since the creditors want the estate to sell all property of the debtor, it is very practical to already have a buyer who is obliged to fulfil an existing contract and pay the agreed price. The real problem can therefore be narrowed down to an issue of priority for buyers who paid something in advance.[38] There is a similarity between those buyers and the seller's general creditors in that they all trusted the seller by giving him or her credit. The real problem can thus be formulated as whether a creditor, who is a buyer and therefore has a main claim for the delivery of specific goods and alternatively a claim to get compensation for an unfulfilled contract, should be given priority over the other creditors of the seller.[39]

Since the functional approach is a way of thinking, *the real issue* needs to be dealt with by the legislator, as well as by practicing lawyers in every-day legal practice. When there are established rules that fit the case at hand, the process can be narrowed down by using the legal template for the specific type of problem. When it comes to a case where an unclear issue of law appears, the application of the functional approach includes a constructive problem solving method, as we will explain in the following chapter.

B. How a Functional Approach Can be Applied

The previous section tried to explain fundamental features of the functional approach and illustrated this way of legal reasoning by means of two examples from the original ambit of this

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38 And, also, to buyers who were lucky to enter into the contract at a time when the market prices for the property in question were lower than the prices are at the time of bankruptcy. We simplify and leave these cases out. We also do not deal with *'actio Pauliana'* issues where the buyer got a low price and the contract therefore should be questioned by insolvency legislation.

39 We should point out that we describe a rather developed functional view on this issue here. If we look at what has been argued in, for example, Swedish legal argumentation, the issue has not been perceived like this. See our criticism of a particular underdeveloped view in Jens Andreasson, Wolfgang Faber, Shubhashis Gangopadhyay, Claes Martinson and Stefan Sjögren, *Prioritet för köpare – en fråga om tradition eller princip?,* 100 SVENSK JURISTTIDNING 709 (2015). For a policy-oriented debate of this issue see also Comments C(c) to Article VIII.–2:101 DCFR, in PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW – DRAFT COMMON FRAME OF REFERENCE (DCFR), FULL EDITION, VOLUME V 4396–4404 (Christian von Bar and Eric Clive eds., 2009). Compare also Håstad, *supra* note 33, at 735–736, who assumes that every buyer and seller would always agree to give the buyer priority.

approach, *ie*, (national) property law. In the present section, we will prepare for moving a step further. As outlined above, we believe that the functional approach can also provide an appropriate methodological framework for dealing with cases where national property law is confronted with potentially opposing norms of EU consumer contract law. In order to demonstrate this – while at the same time making the approach a useful tool for everyone – in this section we will describe how the functional approach can be used, by providing a kind of step-by-step instruction. Since there is not one 'official' functional approach upon which lawyers have agreed in terms of a general working method, the steps we suggest here are our own creation. We do, however, believe from our experience that these steps, or at least a similar description of the working process, would in essence meet with consensus among functionalist lawyers.[40]

> Step 1: Keep the relations between different parties apart and decide which relation should be dealt with first, without classifying them as a specific concept-linked type of legal relationship.

With a functional approach, the relations between different parties should be kept apart from each other. By dealing with each relation on its own it is easier to identify whether, and to what extent, there is a conflict between the parties of a specific relationship. This also helps – at later steps within the problem-solving process – to focus exclusively on aspects that are relevant for the specific relation at hand. We suggest not only to keep different party relations apart, but also to avoid immediately classifying these single party relations in terms of specific dogmatic concepts. Such a categorisation, for instance as a matter of sale, proprietary security, or tort, may of course be important for legal understanding, analysis and problem-solving, but the closer classification can take place at a later step. The point is that by keeping the classification open for the time being, preconceptions that easily follow from such classifications are kept at bay. Concepts connected to such a classification do not exert a decisive influence over the perception of the issue. Concepts should not influence more of the process than what has been thought through.

> Step 2: Identify the 'real problem' in the relation.

After deciding what relation to deal with, the second step is to analyse what the conflict consists of. The conflict, first, always relates to a specific set of facts, *i.e.*, the situation in which the parties are placed when the legal problem needs to be solved. Second, the interests of the parties need to be made clear. This involves the result a party wants to achieve and why this is the case. Third, it is important to pinpoint to what extent the different interests collide. The 'real problem' is this collision of interests. Again, to identify this real problem, the lawyer needs to think beyond the legal concepts that are regularly used to communicate. If concepts such as 'ownership' should happen to occur in the communication, they should be seen as relational and relative in terms of priority over the other party. This functionalistic scepticism towards legal concepts is, once again, useful to avoid the concepts influencing the analysis. It is the conflict of interests that needs to be dealt with. By not using a starting point where one party's position is defined by a legal concept such as 'the owner', it is easier to understand what the real problem is, and it is easier to solve without giving one party a preconceptual advantage.

> Step 3: Identify everything that is relevant to construct a solution, and make arguments out of all relevant aspects.

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40 Compare the ambition in Martinson, in RULES FOR THE TRANSFER OF MOVABLES, *supra* note 25.

When the real problem has been defined, the next step of the functional approach is to identify everything that seems relevant to deal with the problem. In this step it is useful to be open to perspectives, ideas and reflections concerning the real problem. *Norms* of different kinds should be noted. There are different kinds of normative propositions that may be relevant: Acts of legislation are one kind of dictum with a normative value, and so are, of course, judges' decisions. Another type of aspect that is potentially relevant for constructing a solution are *assumptions* about facts. Such assumptions are often used by lawyers, more or less consciously.[41] These assumptions need to be noted when making functionalistic reflections. One particular category worth highlighting is the assumptions on the consequences of the different solutions that are contemplated. Further, different kinds of *values* can prove relevant for developing a solution. Legal foreseeability, protection of a weak party, freedom of contract, etc, are values that lawyers usually contemplate when dealing with a specific conflict of interests. Everything that is considered relevant should be turned into arguments in this third step. By doing so, the lawyer has a collection of arguments to use when taking the fourth step.[42]

When using this third step in the EU law context, it may turn out that some aspects and arguments, such as the assumptions mentioned above, are considered to be more relevant in one Member State than in others. This should, however, not be a problem in the identification procedure of the third step.

What we describe here might seem to be a very complex procedure. However, it does not need to be complex. The complexity depends on the real problem at hand. If it is a so called clear question of law, there is little need to collect different arguments. However, where the real problem concerns the application of EU law in a national jurisdiction – and includes national legal thinking and national legal concepts that affect the interpretation of EU law[43] – the real problem is typically

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41 Such assumptions include, on a general level: assumptions on facts that are considered to form a 'typical case' (what does usually happen within a specific setting?); assumptions as to (typical or individual) interests and preferences of the parties; assumptions on how parties react to a course of events or a rule of law. On a more concrete level, an example concerning priority in bankruptcy would be assuming that every buyer and seller would always agree to give the buyer priority over the seller's creditors, because this seems like the only rational choice from the perspective the particular lawyer takes (compare the assumption made by Håstad reflected in note 39). Another concrete assumption is that anti-assignment clauses are harmful to society. That assumption is then combined with the assumption that freedom of contract is not efficient when it comes to anti-assignment clauses. To give some more general examples: lawyers often make assumptions on risks and frequency. These assumptions are very common since they are necessary to understand the relevance and significance of a case, both where it has already been decided or where it still needs to be decided. The 'floodgate' argument is a specific variation of a risk assumption. Another specific risk assumption concerns the possibilities of circumventing a rule, something that lawyers tend to overestimate (which is an assumption that we make, in turn). Also, a very common category of assumptions concerns transactions costs; although lawyers might perceive such costs as something else and describe them in other terms (such as: a solution or rule that is 'troublesome', 'unpractical', 'formalistic', etc). Some of the assumptions that lawyers make are recounted between lawyers for the purpose of making lawyers understand how a rule or a norm can be legitimised. This can create what has been described as the 'lawyers-created reality', see HANS-PETTER GRAVER, DEN JURISTSKAPTE VIRKELIGHET (1986).

42 Which norms, facts and values are used by lawyers as arguments is of course a comprehensive issue. What we describe here could be developed further to a large extent, including various views on what lawyers do, and on the closely related topic of what law is. For one explanation, see CLAES MARTINSON, KREDITSÄKERHET I FAKTURAFORDRINGAR 49–105 (2002). See also 'the fourth step' below.

43 Such as in the present *Banco Santander* case, where the question essentially is how far the need of effectively applying EU consumer protection rules goes in relation to specific national rules of property law and civil procedure law.

an unclear question of law. When dealing with unclear questions of law, it is useful to clarify your course of conduct and mode of thinking.

> Step 4: Weigh the different arguments and decide on how to use them by trying to put the decisive and most important ones together into an argumentation that justifies a solution.

After gathering arguments, as in the third step, the lawyer needs to mould them into an argumentation. This includes linking those arguments that either support or oppose each other, and giving priority to some arguments over others according to their relevance and weight. This process takes place in every legal decision-making.[44] There is no particular functional approach method in *this* respect. What we need to explain is rather that a functional approach brings the opportunity to contemplate all of the arguments gathered in the third step. This opportunity makes the process conscious. It also makes it easier to see the role that property law concepts are playing.

The idea of contemplating all potentially relevant arguments will not be considered strange by lawyers who are not used to applying a 'functional approach'. The ambition should only be that this process be a conscious one and that the case should not be decided in a simplistic manner, by mainly relying on concepts such as ownership. This, however, does not mean that concepts are excluded from the decision-making process altogether. The concepts used in norms need to be taken account of in the argumentation, if the norm should have normative effect. When used at this stage in the process, the real problem has, however, been allowed to have an important effect on how the problem is perceived, and thereby it also affects the understanding of the concept. The concept used in the norm is a tool to communicate the typical interest of a typical party and the norm needs still to be understood relationally and relatively.

Finally, there are some general things that can be said about the weighing process that is to be conducted at the fourth step. Firstly, the normative propositions such as statutes and precedent are of course attributed high normative value. However, when it comes to so called hard or unclear questions of law, such as in the *Banco Santander* case, the norms often do not address the real problem in a direct way. The process of 'interpretation' of the norms becomes difficult. Secondly, to include the other types of arguments, such as assumptions regarding the consequences a legal decision concerning the real problem can have, is a common part of the legal decision-making process, though a lawyer's consciousness of doing so may vary considerably. Assumptions like this do affect the legal thinking, as well as the understanding of a normative dictum, such as an act of parliament. A norm cannot be understood without an idea of what the reality the norm should govern looks like. When we, for example, try to learn a rule on the buyer's priority over the seller's creditors, we do not comprehend it until we understand that these rules (also) govern the risk of fraudulent behaviour by the parties. We therefore make assumptions on the level of risk or are told about such assumptions that other lawyers have already made. In the same way, a norm cannot be understood without values. A common value is that law should treat everyone equally and to fully understand a rule on the buyer's priority over the seller's creditors, we might need to see whether or not the rule can easily be circumvented.

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[44] It is well known that there are various ways of explaining how legal argumentation is constructed and how legal decisions are made. This is a common topic in legal theory. A common simplified explanation is that it is a matter of 'interpreting' the law. For a classical attempt to explain legal methodology, see, for instance, RUDOLF VON JHERING, GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG, PART II/2 322–445 (1st ed., 1858).

The functional approach includes these kinds of arguments, simply because they cannot be avoided. Instead of hiding the fact that these arguments have been a part of how the real problem was perceived and dealt with by the lawyer in question, the functional approach is (ideally) to reveal what role these arguments played. This can of course not be done completely in regard to all the arguments, both because time is limited and because it is difficult to fully understand one's own process of thinking. It is, however, useful to make an attempt with the most central arguments. With such an ambition, the lawyer will understand the role the thought process and the concepts have played better.

In the following we will illustrate how the perspective offered by the functional approach, and the four steps presented as a toolbox, can be used for analysing the CJEU Case C-598/15, *Banco Santander.*

III. An Analysis of the Case with a Functional Approach

A. A Closer Review of the Court's and the Advocate General's Reasoning

Before we start analysing Case C-598/15 *Banco Santander* in terms of a functional approach, some central aspects of the CJEU's reasoning in its judgement should be reviewed more closely. This includes a closer examination of the opinion delivered by AG Nils Wahl, because the Court quite evidently follows the AG's analysis in practically all core arguments which have been identified as relevant for our article.[45] The AG's argumentation has been abridged and, to some extent, rearranged by the judges, and they give a direct reference to the AG's opinion only with respect to one specific argument.[46] Nevertheless, in such a case, one can assume with a relatively high degree of probability that the CJEU 'follows' the AG's opinion in the sense that the judges in all likelihood identify with the more extensive analysis in the AG's opinion.[47] The purpose for highlighting the argumentation presented in *Banco Santander* in a more detailed manner is twofold: It will help to carve out aspects we have to refer to in later parts of the article, and to contrast this way of reasoning with the functional approach.

(i) One aspect, highlighted much clearer in the AG's opinion than in the Court's judgement, is that the core issue of a case like this is to delimitate the 'operating distance' of the general EU law *principle of effectiveness*.[48] Under this principle, provisions of national law must not "make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by

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45 Cf. above, chapter I.

46 Compare CJEU, Case C-598/15 *Banco Santander* paras. 39–49 to AG Wahl, Opinion on Case C-598/15 *Banco Santander* paras. 58–84 (for the one aspect where the judgement directly refers to the AG's opinion, see above, section I.C. *sub* (i) at note 11).

47 See Faber, *supra* note 22, at 776; see also Robert Rebhahn, *Nach §§ 6, 7 ABGB, in* 3. AUFLAGE DES VON DR. HEINRICH KLANG BEGRÜNDETEN KOMMENTARS ZUM ALLGEMEINEN BÜRGERLICHEN GESETZBUCH – ABGB §§ 1 BIS 43, at n. 123 (Attila Fenyves, Ferdinand Kerschner and Andreas Vonkilch eds., 3rd ed., 2014).

48 See AG Wahl, Opinion on Case C-598/15 *Banco Santander* paras. 34 ff., 45 ff., 82 and the conclusion drawn in para. 84. The Court mentions the necessity of providing 'effective judicial protection' in CJEU, Case C-598/15 *Banco Santander* para. 38, to which the subsequent examination of the procedural particularities of the case at hand ultimately relates.

European Union law".[49] Such provisions of national law may be those of procedural law, which evidently play a prominent role in Case C-598/15 *Banco Santander*. Given that most procedural aspects are not harmonised by EU legislation, they are, in principle, a matter for the national legal order of each Member State. However, this principle of procedural autonomy of the Member States is limited by the principle of effectiveness as stated above.[50] Yet the provisions of national law which are subject to the principle of effectiveness can also be provisions of substantive law.[51] We will get back to the implications of this principle of effectiveness further below.[52]

(ii) Second, a parallel reading of the AG's opinion and the CJEU's judgement shows that much of the argumentation focuses on drawing a quite clear distinction: a line is drawn between a scope where consumer protection provided by the UCTD applies, and where it does not apply. This is done on two different levels.

On the *level of procedural law*, the distinction is drawn between *two different 'types of procedures'*. One type (a) is proceedings brought with regard to the contractual relationship between bank and consumer, including, as the case may be, a procedure seeking for payment based on the credit contract, and proceedings *enforcing the outstanding debt* based on the parties' mortgage agreement. In the present case, the latter ultimately lead to the forced sale of the apartment. The other type (b) of proceeding is brought *'to give effect to a property right'*; in the present case: to force the consumer out of the apartment based on the bank's right of ownership.[53] It is pointed out in the argumentation that the whole body of existing CJEU case law on the effectiveness of Articles 6(1) and 7 UCTD covers, exclusively, credit obligations and (still) ongoing mortgage enforcement proceedings,[54] *i.e.*, proceedings of type (a) (which is true but naturally in itself does not allow the conclusion that the Directive cannot produce effects in other proceedings as well).

On this basis, AG Wahl observes that the procedure in the present case is not one of type (a) above, "in which it might still be appropriate to give a ruling as to the unfairness of the terms of a mortgage loan agreement previously entered into"[55] (which appears to imply the premise that within proceedings of type (b) it would not any longer be 'appropriate' to bother about unfair contract terms). Rather, it is submitted by the AG that "the sole object" of proceedings of type (b), as carried

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49 See, among many others, CJEU, Case C-415/11 *Aziz* para. 50; Case C-40/08 *Asturcom* para. 38. For an in-depth analysis of the principle of effectiveness in the case law of the CJEU, see, for instance, KATRIN KULMS, DER EFFEKTIVITÄTSGRUNDSATZ in particular at 43 ff. (2013); JULIA KÖNIG, DER ÄQUIVALENZ- UND EFFEKTIVITÄTSGRUNDSATZ IN DER RECHTSPRECHUNG DES EUROPÄISCHEN GERICHTSHOFS 43 ff., 105 ff. (2010); see also BEKA, *supra* note 3, at 31 ff.; Anthony Arnull, *The Principle of Effective Judicial Protection in EU law: An Unruly Horse?,* 36 EUROPEAN LAW REVIEW 51 (2011).

50 See the references *supra* note 49. For a closer analysis of the 'principle of procedural autonomy of the Member States', including its relationship to the principle of effectiveness, see CHRISTOPH KRÖNKE, DIE VERFAHRENSAUTONOMIE DER MITGLIEDSTAATEN DER EUROPÄISCHEN UNION (2013).

51 This can be illustrated, for instance, by the CJEU's case law on claims for damages for infringements of Article 101 TFEU (prohibition of prevention, restriction or distortion of competition), which were, for a long time, governed by national substantive law while the principle of effectiveness required certain effects regarding, *e.g.*, limitation periods and the extent of the compensation awarded (loss of profit plus interest); cf. CJEU, Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA and others* paras. 60 ff., 77 ff., 89 ff. These case law principles have later been codified in Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2014] OJ L349/1.

52 The principle of effectiveness will be addressed throughout this article; see, in particular, sections III.C.1., III.D.1. and 2. and IV.

53 See AG Wahl, Opinion on Case C-598/15 *Banco Santander* paras. 58–68. The Court takes over this dichotomy of different types of proceedings in CJEU, Case C-598/15 *Banco Santander* paras. 39–44.

54 AG Wahl, Opinion on Case C-598/15 *Banco Santander* paras. 43 ff., in particular paras. 54–56.

55 AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 58. See also *ibid.*, para. 62 and subsequent paras.

out in the case at hand, "is to give effect to a property right which has been duly registered"[56] (implying the premise that the registration was in fact a legitimate one, which is, however, not self-evident given that the acquisition of ownership under Spanish law generally requires a valid 'title' in the sense of a valid underlying obligation[57]). This leads AG Wahl to "think it is relatively clear that Directive 93/13 cannot be held to be applicable to the procedure at issue [i.e., a procedure type (b)], which relates to the verification of rights *in rem* with a view to the exercise of those rights, and not to the performance of a contract concluded between a consumer and a seller or supplier".[58] The Court adopts this procedural distinction in shorter words.[59]

On the *level of substantive law*, a parallel distinction is drawn between (a) *the mortgage contract* between bank and consumer *and the security right* based on this contract; and (b) the bank's *'right of ownership'* acquired as a result of the forced sale.[60] In a similar pattern, as has been observed in the procedural context above, this leads AG Wahl to conclude that, "since the contract supposedly containing the term presumed to be unfair … was exhausted by the definitive transfer of the immovable property …, it no longer appears relevant to examine the need to prevent or suppress the incorporation of such a term"[61] (disregarding, again, the possibility that under a 'causal' transfer system any defect in the underlying contract could prevent the transfer from taking place[62]). Further, as the AG puts it, to authorise the court to examine the fairness of terms of the mortgage agreement "would involve calling into question … a right *in rem*"[63] which could have been acquired by "a completely different entity".[64] Accordingly, in the view of AG Wahl, "it would appear to be contrary to the principle of legal certainty and security of property rights to call acquired rights of ownership into question, on the basis of effectiveness of Directive 93/13, when there is no longer any question of striking out an unfair term in a contract between a seller or supplier and a consumer which continues to produce effects."[65] The CJEU follows this assessment quite closely.[66]

This is a rather formal and concept-oriented way of reasoning: The procedure at hand is of a specific category – type (b), not type (a) –, therefore reviewing the potential unfairness of a contract term is not 'appropriate'. The character of the right involved – ownership – is of a specific nature

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56 AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 59.

57 For references regarding the 'causal' transfer approach, see *supra* note 19. With regard to the distinction between a 'summary' procedure and a final 'plenary' procedure in Spanish procedural law, please note the clarifications provided in section I.C. *sub* (ii) above. In the present case, the 'title' could be flawed by unfair contract terms or violation of general rules of representation. For the latter aspect, see sections III.A. *sub* (iii) and III.C.2. *sub* (iii) and (iv) below.

58 AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 68.

59 Cf. CJEU, Case C-598/15 *Banco Santander* paras. 39–44.

60 This becomes evident from a combined reading of AG Wahl, Opinion on Case C-598/15 *Banco Santander* paras. 73–75 and 82–84. See also paras. 58–68 (where the distinction regarding substantive law runs parallel to the procedural distinction discussed above).

61 AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 75. For the view that "the mortgage agreement is extinguished, together with the mortgage itself", upon the conclusion of the enforcement procedure, see also *ibid.*, para. 65.

62 Again, see section I.C. *sub* (ii) and note 19 above.

63 AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 82.

64 AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 83.

65 AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 84.

66 CJEU, Case C-598/15 *Banco Santander* para. 45, quoted *supra* at note 9.

(again, type (b)), therefore reopening the issue of unfair terms would undermine legal certainty by contesting a 'right *in rem*' involving potential effects on third parties. This way of reasoning certainly is open to various kinds of criticism, and some potential aspects have already been mentioned in brackets above. The point we would like to make in this article, however, is that certain concepts – types of proceedings and types of rights – stand in between the problem and its solution, and it is rather the use of these concepts that decides the case than an analysis of the interests of the parties involved. It is almost neglected that there are still only two parties involved.[67]

(iii) Furthermore, both the AG and the Court point out that, according to their view, there are no indications that any terms of the mortgage contract could actually be 'unfair' within the meaning of the Directive.[68] This is quite remarkable, for several reasons. The question of whether a particular contract term is actually unfair or not is not an issue for the CJEU to decide in the procedure at hand. Another reason is that the CJEU could arguably assume that the Spanish court actually had reasons for reviewing the potential unfairness of the contract. It should also be taken into account that in other European jurisdictions, already granting authority to the creditor (bank) to represent the debtor in private enforcement proceedings before the debt is due, is presumed to be void on account of circumventing the prohibition of the so-called *lex commissoria*.[69] Moreover, a contract concluded by way of self-contracting – as the sale of the apartment in the present case where the bank both acted as the buyer and as the representative of the seller – would be considered void or voidable under many European legal systems.[70] Spanish law may, however, be somewhat peculiar with regard to some of these aspects: According to Article 234 of the Mortgage Regulation,[71] the mortgage agreement must, in order for the specific extra-judicial enforcement procedure used in the present case to be available, fix the value of the immovable property used as the auction value and determine the person who will sign the sales contract as the representative of the mortgagor, and that the creditor itself may be nominated for this purpose. Hence, contract terms just reflecting these statutory provisions will not fall within the scope of the UCTD due to its Article 1(2). However, there still could be other unfair terms in the

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67 This is in fact observed both by the Court (CJEU, Case C-598/15 *Banco Santander* para. 45) and AG Wahl (Opinion on Case C-598/15 *Banco Santander* para. 83), but not considered relevant because it *could* also have happened that a third party had acquired ownership of the apartment.

68 See AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 71; CJEU, Case C-598/15 *Banco Santander* para. 48.

69 This view has been expressed, with regard to Austrian law, by OGH 5 Ob 295/01w ECLI:AT:OGH0002:2002:0050OB00295.01W.0115.000. Also, a clause granting the creditor discretion in determining the price for selling off collateral assets, or a term allowing to sell for a minimum price that is not the market value or at least the value to be achieved in a judicial enforcement procedure are considered void in that judgement. For a summary of related Austrian case law, see Wolfgang Faber, *§§ 1371, 1372 ABGB*, in ABGB PRAXISKOMMENTAR, BAND 6, at n. 9 (Michael Schwimann and Georg Kodek eds., 4th ed., 2016). – Rules prohibiting a so-called *lex commissoria* have spread from Roman law (see *Codex Theodosianus* 3, 2, 1) and are, with certain differences as to details, still very common in European jurisdictions; see, for instance: § 1229 BGB (Germany); § 37 Lag (1915:218) and § 37 Act 1929/228 (Sweden and Finland, respectively). Also French law originally contained a prohibition of *pacte commissoire* clauses (Article 2078 Cc, old version) but changed to a much more liberal approach in 2006 (Article 2348 Cc, present version).

70 See Article II.–6:109 DCFR and the national notes to this provision in PRINCIPLES, DEFINITION AND MODEL RULES OF EUROPEAN PRIVATE LAW – DRAFT COMMON FRAME OF REFERENCE (DCFR), FULL EDITION, VOLUME I 437–442 (Christian von Bar and Eric Clive eds., 2009). To what extent involving a public notary in the enforcement procedure (as has been the case under the respective Spanish rules in the *Banco Santander* case) may make a decisive difference can hardly be assessed without knowing the procedure in detail.

71 As quoted in CJEU, Case C-598/15 *Banco Santander* para. 14.

contract and, in particular, the assessment under another European legal system may be a different one.

(iv) What we have highlighted in this section shows to what extent the CJEU and the AG based their reasoning on a rather conceptual way of thinking. It also implies, as we have already shown in the introduction, that the concept of ownership played a decisive role. This does not mean that we think that the CJEU and the AG in reality limited themselves to such a line of thinking. Looking at the additional arguments we opted not to focus on in this article,[72] we think there is evidence that other ideas were also involved. However, for the analytical purposes of this paper, we would like to describe the specific part of the CJEU's argumentation, which our article focuses on, as a rather conceptual way of thinking. This gives us the possibility to contrast this way of thinking with a functional one, as we present in the next section.

B. Forming the Question Functionally

As outlined above, the first step in an attempt to deal with a case under a functional approach is to *keep the relations apart* and to decide on which relation should be dealt with first, without making classifications in terms of specific concept-linked types of legal relationships. In the *Banco Santander* case, there is one thing that immediately becomes apparent when trying to accomplish this task, namely that the conflict arises between the same two parties who originally concluded the credit contract and the mortgage agreement: the bank and the consumer-debtor. No third party has been involved up to the present stage. The situation, irrespective of what kind of right one may say the bank has meanwhile acquired, is a mere two-party situation. If the bank had transferred the apartment to a subsequent buyer, or another buyer had originally acquired the apartment in the forced sale, we would have another conflict to solve. But this is not the case. We need to keep the relationship between the consumer and the bank apart from other possible issues involving other parties.

The next step is to identify the 'real issue', or the 'real problem', in the relation we have identified. This involves *identifying the parties' interests* in a conflict situation like the one at hand, *i.e.*, in a setup constituted by specific facts. Looking at the typical interest of a consumer in such a situation, the consumer primarily wants to keep her home. The consumer wants this for both economical and emotional reasons. Looking at a bank's typical interests, the bank wants to earn a profit from the interest and fees it contracted for, and to use the apartment to limit the risk it has taken through this specific credit agreement. It is important to note that the bank typically just wants to limit its risk. Generally, the bank does not want the apartment to make a profit by selling it since this is not how banks are supposed to make profits. Banks are not supposed to have an ulterior motive to make profit from the customers' failure to fulfil their credit undertakings. Such motives are not in line with the role of a bank as a hub for the resource of credit in society.[73] This does,

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72 See above, I.C. *sub* (i).

73 There is, of course, a lot that can be addressed regarding the role of banks and the regulations that govern this role. To just make a few references we suggest: For a few short general remarks see, *e.g.*, John L Douglas, *The Role of a Banking System in Nation-Building,* 60 MAINE LAW REVIEW 511, 512–519 (2008). For a general legal description in the English language, see ROSS CRANSTON, PRINCIPLES OF BANKING LAW (3rd ed., 2018). For a perspective of the role

however, not mean that a bank can never have an interest to speculate in making profit by taking a consumer's home and selling it at a higher price. When identifying the real problem, the possible interest to make profit on customer failure needs to be considered, but it should not be seen as a legitimate interest. At this first immediate level the typical conflict of interests between the parties is, therefore, rather easy to identify. The consumer wants to keep the home. The bank does not want to have the consumer's apartment, but it wants to limit its risk and the apartment is necessary for reaching that goal.

From the consumer's perspective, however, the situation is somewhat more complex than we have suggested in the previous paragraph. Of course the consumer will primarily be interested in keeping her home. Nonetheless, this is a realistic goal only when she sees a chance to solve her economic problems to such an extent that she can pay off the bank. If it is already clear for the consumer that she will not be able to raise the money to discharge her obligations towards the bank, and that she therefore cannot manage to keep her home, the consumer's interest will be to get out of the situation with as little debt left as possible. This means achieving the highest possible price in the course of enforcement, and, apart from that, cooperating with the bank in order to be charged with as little costs as possible. Still, in reality the interest of the consumer may not be simply black or white. Between the two basic situations just described, there may be fifty shades of situations where it is more or less unclear for the consumer whether she can solve her economic problems and manage to keep her home, or not. In such situations, it may be impossible for the consumer to know what actually is best for her. In these cases, the interest of the consumer arguably is (a) not to become over-indebted and (b) to be able to get another home (owned, rented or otherwise, but a home). It might actually also be in the consumer's interest to (c) be able to protest against the bank's action for vacating the apartment – although this will make the process more costly – and to prolong her stay in the original apartment to see whether there is a way to solve her economic problems. That might be achieved by finding a job (if unemployed) or by having someone move in and share the rent, etc. Accordingly, in these 'unclear' situations, the consumer's interest is not limited to keeping the apartment or getting out of her obligations against the bank with the best possible economic result. The consumer's interests may also depend on other factors, such as the possibilities to get another home and the risk to become over-indebted. And given that things often are not clear, this may suggest, from the consumer's perspective, a solution that gives her some time to prolong the process.

As the case may be, it could also prove necessary to further shape the conflict situation by referring to specific additional facts which make up the characteristic problem.[74] When dealing with this issue in the present EU law context, we must also keep in mind that the CJEU, in a preliminary ruling, never actually decides the case but has to interpret a provision of EU law. This, too, can have an impact on the way questions are phrased in functional terms.

In the procedure before the referring court, the bank seeks to force the consumer to vacate the apartment. This – the question whether the bank can demand the consumer to leave the

of credit institutions in the EU, see THE SOCIAL RESPONSIBILITY OF CREDIT INSTITUTIONS IN THE EU – DIE SOZIALE VERANTWORTUNG VON KREDITINSTITUTEN IN DER EU – LA RESPONSABLILITÉ SOCIALE DES INSTITUTIONS FINANCIÈRES AU SEIN DE L´UE (Jan Evers and Udo Reifner eds., 1998).

74 Cf. Wolfgang Faber, Martin Lilja and Günther Kreuzbauer, *Employing Argumentation Analysis in the Discussion of Optimal Rules for the Transfer of Movables – Part 1: Description of the Problem and General Outline,* 1 EUROPEAN PROPERTY LAW JOURNAL 10, 22 and (in particular) 39 (2012).

apartment, immediately and forever – already forms a 'real issue' in terms of a functional approach. However, a closer look at the case and the necessity to view the problem from the perspective of the CJEU, *i.e.*, with the perspective of interpreting certain provisions of EU law, reveals that this way of framing the question does not yet describe the problem sufficiently. We know that the referring court's questions concern that court's ability, or even its duty, to review potentially unfair terms in the mortgage agreement between the bank and the consumer at the procedural stage their conflict has reached by now. An answer to this question does not necessarily decide whether the consumer can stay or has to go: If the consumer wins before the CJEU, this does not mean that the bank ultimately loses. A security agreement, by definition, provides the secured creditor a right to use the security object to get paid. The bank, in any case, will – and should – be able to do that. The question therefore is just whether the bank can act immediately by evicting the consumer and then use the apartment in whatever way that appears suitable, or whether the bank must wait until the judicial review of potentially unfair terms is completed. In the latter case, the bank can either proceed as intended (if no unfair terms are found) or may be required to follow the common procedure for the realisation of collateral (if contract terms relating to enforcement prove to be unfair). In any of these situations the consumer faces the immediate risk of being forced to leave. But during the time frame that occurs in the latter situations the consumer may perhaps raise the money to pay the bank. The latter possibility – judicial review allowed, unfair terms detected, enforcement therefore thrown back to ordinary judicial enforcement – means the consumer may even have a chance to keep 'her' apartment within her own patrimony, by paying off the bank.

To formulate the real issue, we first take into account that the CJEU is asked to give a normative answer in terms of interpreting a provision of EU law in a preliminary ruling procedure. Second, no CJEU guidance so far exists for situations where the consumer, at the procedural stage reached by now, actively requests the national court to review potentially unfair contract terms. Third, there is no such guidance either in cases where the consumer does not (but the court could still review the mortgage contract of its own motion). Thus, the CJEU could frame the 'real issue' with the purpose of delivering guidance for both of these situations.[75] The *'real issue' could then be formulated as follows*:

Should a judicial review of potentially unfair terms in a security agreement be excluded[76] once the security right in the consumer's apartment has been enforced and the creditor-bank itself has acquired the apartment in the forced sale, and therefore seeks to force the consumer out of the apartment?[77]

This question arises for situations (a) where the consumer itself asks the national court for such review, and (b) where the consumer remains passive and it would be on the national court to undertake such review of its own motion. In the latter situation, if the answer to the above question

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75 This would be a constructive approach with a view of providing as much guidance as reasonably possible within the frame set by the questions referred to the CJEU in the particular preliminary ruling procedure. It is clear, however, that the actual questions only address the latter situation in which the consumer remained passive.

76 This is the actual question of law to be decided by yes or no: Can (or must) the court still carry out such a review, or is this excluded?

77 This part of the question describes the specific situation which is characteristic for the case: Enforcement has taken place and the bank itself has acquired the collateral.

is that a judicial review of potentially unfair terms is not excluded, the additional question arises whether the court is merely allowed to act of its own motion or whether it is even under a duty to do so.[78] For both situations, the additional fact is submitted that, so far, neither did a court have to start such an assessment *ex officio*, nor did the consumer have a possibility to effectively initiate such an investigation.[79]

In other words, the real issue is whether there should be a limitation of the possibilities to examine the unfairness of a consumer's credit agreement, and whether this limit should be set precisely at the time when the creditor-bank acquires the apartment. If so, the effect would be equivalent to a rule of limitation (in the sense of a limitation of actions). This would be a quite relevant aspect, as will become apparent when we will involve the possible consequences of a decision in our discussion.[80] A decision, especially a preliminary ruling of the CJEU, becomes a future norm to be followed in other situations as well, and the decision is therefore a decision upon what norm should be created for cases like the one at hand.

Contrasting this way of forming the question with the analysis carried out by the AG and the CJEU, we can now also see *what is not the issue* under a functional approach: Actual or potential effects on third parties are not relevant for the formulation of the question because no third party is actually involved in the conflict. Nor are the concepts of 'ownership' or of 'rights *in rem*' needed to coin the question. The aspects that the stage of enforcement proceedings has already been left, and that the bank has acquired the apartment in the course of this enforcement, are mentioned, but it is not considered important for formulating the question whether the course of events involved procedures of type (a) or of type (b) as referred to in the previous section.[81]

An interesting remark concerning the move to clarify the 'real issue' is that the CJEU regularly does something similar. When the question referred by the national court does not offer a possibility to reply to in a meaningful way, the CJEU has often rephrased the question. The Court then uses a phrase like "in order to give a useful answer" to indicate that the judges have identified a more useful question to reply upon.[82] It would, therefore, not be a radical step for the CJEU to include a technique like the shaping of the 'real issue' into its everyday work.

C. How to Argue the Issue Functionally

We will now move on to step 3 as described in section II.B. The third step is to identify everything that is relevant to construct a solution and to turn all these aspects into arguments. We have limited the number of arguments that we present to what we think is enough to illustrate our point.

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78 These variations extend the question originally referred by the national court to several possible situations, in order to deliver broader guidance for the interpretation of Articles 6(1) and 7 UCTD.

79 Since the issue, in EU law terms, ultimately is delimiting the scope of the principle of effectiveness, a clarification like this has to be added.

80 See, in particular, section III.C.2. *sub* (iii) and (iv) below.

81 See section III.A. *sub* (ii). Note that under 'real' Spanish law, there actually may be a difference whether the procedure is 'summary' (where defences are restricted and a defect in the acquisition process cannot be raised) or 'plenary' (where the legitimacy of the acquisition of property rights may effectively be called into question). See section I.C. *sub* (ii) above.

82 See, *e.g.*, CJEU, Case C-122/17 *David Smith v Patrick Meade and others* ECLI:EU:C:2018:631 paras. 34–36; Case C-25/15 *István Balogh* ECLI:EU:C:2016:423 paras. 28–33; AG *Szpunar*, Opinion on Case C-135/15 *Hellenic Republic v Grigorios Nikiforidis* ECLI:EU:C:2016:281 paras. 54, 56. As to substance, the CJEU reformulated the questions referred to it also in the present Case C-598/15 *Banco Santander* para. 32; see *supra* note 4.

1. Normative Arguments

If available, relevant normative propositions of various kinds (EU legislation, national statutory provisions, court rulings, general legal principles and values) have to be taken into account for solving the 'real issue'. This may be an easy task if there is one applicable rule fully fitting to the case at hand. Regarding a case like *Banco Santander*, things are not as simple.

(i) There are, of course, relevant norms on the EU law level: Article 6(1) UCTD provides that unfair terms in consumer contracts shall not be binding on the consumer, and under Article 7(1) UCTD, Member States must ensure that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. On this basis, the CJEU has developed an extensive body of case law on the principle of effectiveness related to that Directive as well as on the national courts' duty to review potentially unfair contract terms *ex officio* in particular.[83] However, the mere existence of this normative material does not help much in solving issues such as in *Banco Santander* – precisely because the issue is the possible *limitation* of the 'power' these norms may exercise, or the scope they may apply to, in view of national (Spanish or other) norms potentially operating in the opposite direction. In the present Spanish case these national norms are such of civil procedure (defining a stand-alone type of procedure to enforce registered rights *in rem*) and substantive property law (awarding an 'owner' a certain degree of legal protection).

(ii) However, one can still try to concretise some characteristics – potential strengths or weaknesses – of these normative propositions. This will make it easier to deal with these normative aspects in the final weighing of arguments. Regarding the national (Spanish or other) rules on civil procedure and substantive property law, for instance, a closer analysis may reveal that these rules in themselves imply potential gateways for 'acquisition flaws' to creep in. A specific procedure for enforcing a right *in rem*, by putting the person so entitled into possession of the object, may or may not depend, as a prerequisite, on the rightful acquisition of said property right. This acquisition could depend on a fully valid obligation to transfer ('causal transfer'), which may prove lacking if clauses in the mortgage agreement that are material for the final forced sale turn out to be unfair. There may also be a second type of procedure available for retrospectively challenging the bank's acquisition, as apparently is the case in Spanish law.[84] All this can vary from system to system. As we have pointed out, we do not consider it to be our task to settle these questions for Spanish law, but we think the point is made that 'ownership', even if perceived in its most traditional way, can be vulnerable and that 'ownership', if required as a prerequisite in a specific type of civil procedure between two parties, serves a relational function.

In this context, another principle of EU law may also become relevant: the principle of equivalence. This principle often comes into play in relation to procedural rules of national law, but is not limited to this area. According to settled CJEU case law, rules on certain procedural aspects are, in the absence of EU legislation in the specific area, a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, these rules "must

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83 See *supra* note 3.

84 See I.C. *sub* (ii) above.

not be less favourable than those governing similar domestic actions (principle of equivalence)".[85] Transposing this principle into the present context could lead to the following conclusion: National law may provide that a transfer of ownership based on an obligation that turns out to be void or avoidable (under a provision of national law) is to be treated as never having taken proprietary effect (retroactive proprietary effect).[86] If such a rule of national law exists, the EU law principle of equivalence requires that, where a contract term in a consumer mortgage agreement forms the basis of a transfer of ownership to the acquirer-bank, and a national court finds this term to be 'unfair' and therefore not binding, this would have to trigger exactly the same proprietary effect as if a term forming the basis of the acquisition were found void under a provision of national law: the acquisition would have to be treated as ineffective from the outset. If the comparable provision of national law states that the invalidity of the contract term must be reviewed *ex officio*, the same must apply to the reviewing of a potentially unfair term in the sense of the Directive.[87]

(iii) Furthermore, an attempt of concretising the Directive's standards of effectiveness with regard to a natural person's need for appropriate housing will show that there is existing CJEU case law on the effectiveness of the UCTD, according to which the fact that the object of an enforcement procedure is the consumer's family home must be given specific attention. The Court maintains that the fundamental freedom of housing, as enshrined in Article 7 of the EU Charter of Fundamental Rights (respect for private and family life, home and communications) is to be taken into account when interpreting the UCTD.[88] This finding does not form a clear precedent; there are differences in that the *Banco Santander* case starts after the enforcement procedure has already been completed.[89] Still, one can note for further discussion that the fact that a person or family might lose their home is given specific weight by the CJEU when delimiting the effectiveness of the UCTD. This concretises the normative force of the rules stating that unfair contract terms must not be binding on the consumer, where the family home is at risk.

(iv) There are also further normative indications we can derive from the UCTD. It is clear from the Directive that, to assess the unfairness of contractual terms, regard must be given to the purpose of the contract;[90] that is, in the present case of a mortgage agreement, to provide security. It is also clear from Recital 16 UCTD that in order to be treated as dealing in good faith, the professional

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85 See CJEU, Case C-40/08 *Asturcom* paras. 38 and 49 ff.; see also, among many others, CJEU, Case C-76/10 *Pohotovosť* paras. 47 ff.; Case C-488/11, *Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV* ECLI:EU:C:2013:341 paras. 42 ff., all of them dealing with this principle in relation to the national court's duty to apply the rules implementing the UCTD *ex officio*. For a broader discussion, see, for instance, KÖNIG, *supra* note 49, at 92 ff.

86 As provided, *e.g.*, by Spanish law; see Pacanowska and Díez Soto, *supra* note 57, at 545 ff. See also Article VIII.–2:202(1) and (2) DCFR with Comment B and the national notes on these provisions in von Bar and Clive, *supra* note 39, at 4656 ff.

87 Compare, again, CJEU, Case C-40/08 *Asturcom* paras. 53 ff.

88 See CJEU, Case C-34/13 *Monika Kušionová v SMART Capital a.s.* ECLI:EU:C:2014:2189 paras. 62–66. Cf. also CJEU, Case C-415/11 *Aziz* para. 61 and Case C-169/14 *Juan Carlos Sánchez Morcillo, María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* ECLI:EU:C:2014:2099 paras. 38, 43.

89 This has been duly observed by AG Wahl, Opinion on Case C-598/15 *Banco Santander* paras. 58–68 (see *supra*, III.A. *sub* (ii)). Note, however, that we are not employing this difference as a decisive one from the beginning, but aim at taking it into account just as one aspect among many.

90 In the language of Article 4(1) UCTD, the "nature of the goods or services", "all the circumstances attending the conclusion of the contract" and "all the other terms of the contract" are to be taken into account; cf. Thomas Pfeiffer, *Art 4 RL 93/13/EWG, in* DAS RECHT DER EUROPÄISCHEN UNION, BAND IV: SEKUNDÄRRECHT, at n. 7 (Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim eds., 1999); Andreas Fuchs, *§ 307 BGB, in* AGB-RECHT, at n. 116 (Peter Ulmer, Hans Erich Brandner and Horst-Diether Hensen eds., 12th ed., 2016).

party must deal fairly and equitably and must take the other party's legitimate interests into account. As we have already discussed, the security provider's (consumer's) legitimate interest is that the secured creditor and the contract terms provided by the creditor seek to achieve the best price possible in the case the security right must be enforced.[91]

2. Arguments from Assumptions on Possible Consequences, Value-based Arguments etc

As mentioned above, the functionalist aim of identifying relevant arguments also involves dealing with potential consequences the possible solutions may trigger. This endeavour is often based on assumptions (given the future is uncertain and empiric evidence on standard causal relations is usually not available). Lawyers deciding or arguing a case have a high tendency to make assumptions such as this, even though they might do it subconsciously. In a functionalist thought process the ambition is to do it explicitly. We have identified a number of arguments of the kind we assume lawyers to contemplate in a case like *Banco Santander*. In this section we present them in an order that we hope is easy to follow.

(i) We would like to start by pointing out that the CJEU and AG Wahl themselves use such 'consequence-based arguments'. They point at the fact that it could create problems if other property right holders would run the risk of having their rights contested by an unfair term.[92] As mentioned above, this argument does not appear to be very valid when the bank itself has bought the property. The argument could, however, be interpreted as implying that the register should have high formal legitimacy in order to be trusted, since trust and lack of trust are important consequences. Still, this is not a real problem before someone else actually put trust in the register. With a more explicit analysis than what we can read from the CJEU and the AG, this becomes evident.

(ii) AG Wahl also forms an argument from the consequences of granting a possibility to challenge clauses in the mortgage agreement insofar as he expresses doubts whether such course of action would really create any benefit for the consumer: If the sale in the extra-judicial enforcement would consequently be ineffective, this would mean that the consumer would still be bound to the credit contract and the entire debt would be due at once.[93] This is correct. However, as has been pointed out before, this may still be within the consumer's interest, depending on how realistic it is for her to raise the money in time, even if there is a risk in the end there will be higher costs to cover, among other factors.[94] In this context, one may also say that it is evidently better from a consumer perspective to have a certain right, including the option not to exercise this right, than having no right at all. The option of not asserting one's right based on a free and informed consent to the term in question also applies in proceedings initiated by an *ex officio* intervention by the court.[95]

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91 See *supra*, III.B.

92 See CJEU, Case C-598/15 *Banco Santander* para. 45; AG Wahl, Opinion on Case C-598/15 *Banco Santander* paras. 82 f.

93 See AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 80.

94 See section III.B. on a consumer's interests in situations where it is not clear at the outset whether the money can be raised or not.

95 Cf., in this respect, AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 80, with reference to CJEU, Case C-472/11 *Banif Plus Bank Zrt v Csaba Csipai, Viktória Csipai* ECLI:EU:C:2013:88 para. 35; Joined Cases C-381/14 and

(iii) The following aspect is neither discussed in the CJEU's judgement nor in the AG's opinion, but certainly attracts a lawyer's attention. The bank was, by way of a contract clause, given power to represent the consumer 'as seller' in a forced sale.[96] At the same time, the bank was intended to be allowed to act 'as buyer' in that forced sale. The bank's possibility to represent the consumer creates a conflict of interests on the part of the bank,[97] which materialises in two related aspects: (a) A bank using such a contract term can, in lieu of other interested buyers,[98] acquire the apartment for a rather low price. If the real estate market improves later, the bank can sell off the apartment for a much higher price (the point in time for both transactions is exclusively determined by the bank), with the intention of keeping the surplus for itself. (b) If a bank, using self-contracting, acquires the apartment for a low price, this means that rather little money is cashed in by the forced sale and, in turn, the consumer's credit obligation will remain unpaid and due at a relatively high amount. On these grounds, the bank can further charge (more) interest, and it can ultimately use other means of enforcement, if available, to receive the money.

Now, if the ultimate decision for the 'real issue' was to exclude any judicial review of potentially unfair terms at the present stage of proceedings, this would operate as an incentive for banks to proceed just the way described above. This would not only imply the risks of self-contracting as stated in the previous paragraph, this course of conduct could also be used in a strategic manner to cover up even further potentially unfair terms. Evidently, this would run contrary to the Directive's intention to produce a deterring effect[99] in order to put an end to the use of unfair terms.

If, however, the 'real issue' is decided in favour of a judicial review to be carried out even at the present stage of proceedings, and if this review happens to reveal the unfairness of certain contract terms frequently used by banks, this may have a considerable impact on future contract practice in general. Banks will tend to adopt standard terms surviving the unfairness test imposed by the Directive. "To prevent the continued use of unfair terms in contracts" is in fact a major goal of the UCTD, explicitly highlighted in its Article 7(1) and repeatedly used as a prominent argument in the CJEU's case law in order to elaborate, in particular, on the dissuasive effect the Directive is intended to produce.[100] The latter is of course a normative argument, but as it builds upon consequences, it is mentioned in the present context.

(iv) Awarding the bank a chance to earn even more money than it could expect to earn under the credit contract does not comply with the role of banks in the credit system; at least such a

C-385/14 *Jorge Sales Sinués v Caixabank SA* and *Youssouf Drame Ba v Catalunya Caixa SA (Catalunya Banc SA)* ECLI:EU:C:2016:252 para. 25.

96 To this extent, the contract reproduces Spanish legal provisions and therefore does not fall within the ambit of the UCTD according to its Article 1(2); see *supra*, III.A. *sub* (i).

97 As mentioned above (*supra* note 70) we do not have sufficient knowledge of the precise role of the public notary in the specific Spanish enforcement procedure in order to assess to what extent the conflict of interests actually is to be seen as problematic in the specific case. But we tend to think the involvement of a notary does not render the issue completely unproblematic. In any case, the discussion provided in the text aims to show what kinds of problems self-contracting may raise in a setting like the *Banco Santander* case.

98 This risk may have been a substantial one in Spain during the financial crisis. It may have been difficult to find other potential buyers also because of the fact that the former owner (the consumer-debtor) still lived there and market participants anticipated it could be difficult to evict her.

99 See the next paragraph at note 100.

100 See, among many others, CJEU, Case C-618/10 *Banco Español de Crédito* paras. 68–71; Case C-26/13, *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* ECLI:EU:C:2014:282 paras. 78–84.

possibility is highly questionable.[101] There are of course many different ways to understand the role of the very complex institution of banks, but a possible way of explaining one part of the role of banks is to point at the stability they should provide. From this perspective they are supposed to gain from the margin of interest rates. A bank's expectation under a secured credit contract is to earn a profit from interest and fees, secured by a proprietary security. The function of a security right is limited to what is to be secured. Contract terms allowing the bank to acquire the collateral itself by way of self-contracting, at a potentially overly low price, and selling it off for a higher price without attributing the surplus to the security provider, are thus to be seen quite critically. If banks are allowed to speculate in the risk, or rather chance, of consumers' failure to discharge their credit obligations, this might affect the stability of the bank, and thereby the financial system. One part of the risk could be that banks start competing on the market by offering interest rates that are calculated from the possible surplus the speculation in consumer failure may generate. This has the positive effect of lower interest rates, but it also implies the risk that speculations of a bank do not work out as intended. From the perspective we use here, a bank's role is not to take speculative kinds of risks. The other part of the risk is that consumers in general may start to distrust the motives of banks. This can also potentially lead to distrust against banks when it comes to lending money to the banks. If consumers avoid using banks, the effect might be damaging for the financial system as a whole. What actually affects the trust in banks and the financial market is, however, something that still needs more research; so does the question of whether or not speculative behaviour of banks is beneficial. What we do know is that the concepts of stability and systemic risks are central concepts for our understanding of the roles of banks in the society.[102]

What we discuss here is based on the assumption that comparable clauses may have been used in many consumer mortgage contracts by many banks. The possible consequence we are pointing at is that contract terms allowing the bank to make profit on consumer failure may have unwanted effects at aggregate level. This is a rather clear argument in favour of deciding the 'real issue' in terms of also allowing a judicial review at a late stage of the bank's process of using the security to cover the debt. Such a decision would limit the risks we point at, although it would just be by blocking a rather small possibility for the banks to make such profit.

It is also relevant to consider the possible consequences of establishing such a norm through a court decision. When a norm is created by the judiciary, market participants do not get a transition period, as they usually do when norms are established through legislation. In this context, a

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101 Compare, on a normative level, Article 28(5) Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L60/34. However, this directive has not yet been applicable to the *Banco Santander* case; see the transitional provisions in Article 43(1) Directive 2014/17/EU.

102 See the definition in Article 3(1)(10) Directive 2013/36/EU of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L176/338; see also, *e.g.*, Philipp Hartmann, Olivier de Bandt and José Luis Peydró, *Systemic Risk in Banking after the Great Financial Crisis, in* THE OXFORD HANDBOOK OF BANKING 667 (Allen N. Berger, Philip Molyneux and John O. S. Wilson eds., 2nd ed., 2014, online 2015); SYSTEMIC RISK, INSTITUTIONAL DESIGN, AND THE REGULATION OF FINANCIAL MARKETS (Anita Anand ed., 2016, online 2017); Andrew G. Haldane and Robert M. May, *Systemic risk in banking ecosystems,* (2011) Nature 351 (Vol. 469).

problem could occur if any of the possible solutions to the 'real issue' could cause unexpected major losses for the banking industry at large. However, since the bank, in a setting like the *Banco Santander* case, would at least retain a proprietary security right for the same claim it originally had, we assume that no such major consequences are to be anticipated in this regard.

(v) Another assumption on risk concerns the security object. If a judicial review of potentially unfair terms is declared still possible or even necessary, the bank faces an additional risk that the apartment may deteriorate in value because of the simple fact that it is used every day and this causes wear and tear. This consequence, in principle, is very likely to occur. However, there is no equally tenable prognosis on how significant such deterioration would probably be. On the one hand, one could have reasons to assume that the consumer, if she is allowed to remain in the apartment, would take reasonable care of it. On the other hand, there may be reasons to assume, and even certain empiric support, that a person in economic distress is more likely to take bigger risks;[103] this might also affect the state of the apartment. Evidently, this makes it difficult to find an appropriate way of how to measure such (partly contradictory) assumptions. In a practical case before a (national) court, it may sometimes be possible to deliver particular evidence to make an assumption more specific or clarify its likelihood. After all, deciding the 'real issue' in terms of excluding any further mortgage contract review right away appears to be slightly preferable to the bank. However, the bank's main interest of at least keeping some sort of proprietary security for its claim is also served if the opposite decision were made. The economic value of the security may be somewhat lower, depending on further wear and tear. Further, the real estate market may develop in one or the other direction.

(vi) It should be kept in mind that the effect that a consumer who cannot pay will lose the object over which the security right has been created, is not unfair as such. The consumer's interest of keeping his or her home is, however, not the only interest the consumer typically has.[104] In case this goal cannot be achieved, a consumer, in the capacity of debtor and mortgagor, has an evident interest of achieving the best possible economic result once the apartment is lost. In the present case, this would mean achieving a better result than 60% of the (former) market value. Theoretically, this could be attained in different ways, including: retrospectively avoiding the forced sale and enforcing the mortgage under the ordinary judicial enforcement procedure (at a time when prices may have started to go up again after the financial crisis) or, if the bank is allowed to keep the apartment, by imposing on the bank an obligation to deduct any income gained from the apartment (by way of sale or renting out to a third person) from the consumer's remaining credit obligation.

(vii) Other arguments concerning the sale of the security object have to do with assumptions on how banks will act if they are still subject to an *ex officio* intervention by the court in the process of evacuation. Would banks then change their behaviour and never buy the mortgaged property themselves? Is it possible to assume that excluding banks from the market would lead to a less favourable outcome for the consumer, since the prices fall if there is one buyer less on the market? Would the banks instead use partner enterprises, who they ask to buy the security object? Would the possibility of *ex officio* interventions affect the interest in and incentive for special

[103] See, *e.g.*, REINHARD H. SCHMIDT, ÖKONOMISCHE ANALYSE DES INSOLVENZRECHTS 27 (1980).

[104] This aspect has already been touched *supra*, III.B. What we add here are more detailed deliberations as to the consumer's interest to achieve the best economic result if the credit debt cannot be paid.

arrangements under a general economic crisis? Might the effect be that consumers in general will receive less help from the state? Or maybe more help? How will private helping initiatives be affected? – These are all questions that are arduous to answer. To some people it may seem evident how a bank would behave if the court, or the consumer, could still intervene. It is, however, not easy to understand how all other aspects affect a decision to act in a certain kind of situation. Maybe the most probable change in behaviour would be that banks change their credit contracts, so that they seem less unfair from an EU law perspective (provided the contracts used by the particular bank actually contain unfair terms).

(viii) Yet another argument concerning how the bank might be affected is our assumption that the bank's interests would not be impaired substantially if a judicial review of terms in the mortgage contract was held to be still possible or even necessary at the present procedural stage. As previously mentioned, such a decision would not mean that the bank ultimately loses the possibility to sell the apartment.[105] If a judicial review of potentially unfair terms is allowed, the bank – depending on the outcome of that review – will either remain in its present position of being the 'owner' of the apartment, or will be restored in its former position as a security-right holder with a valid secured claim, in which case the options are that either the bank will be paid (if the consumer can use the time to raise the money) or the bank can enforce its security right, probably by way of traditional judicial enforcement. Since the bank's basic interest is to gain the money it contracted for,[106] all these possible courses of events serve that interest to a more or less comparable extent, with the reservation that any solution allowing the consumer to stay in the apartment, for the additional time any kind of proceedings may last, involves the additional risk for the bank that the apartment may depreciate as a consequence of this using.[107]

(ix) One can also form an argument from presumptive practical difficulties the consumer may face when a judicial review is no longer allowed at the present stage. Making the case depend on a strict procedural distinction among proceedings carried out between the same two parties[108] may potentially imply a significant risk that the consumer will miss the point up to which she would have to bring complaints on the ground of allegedly unfair terms. Note that the enforcement procedure before the notary is finalised without any involvement of the consumer (the bank acquired the apartment by way of self-contracting). Under such circumstances, the consumer might be unaware of the caesura between the two formally distinct procedures. Given that, under CJEU case law, consumers' unawareness of their rights awarded by EU law is considered problematic in terms of compliance with the principle of effectiveness,[109] this can support an argument against excluding any judicial review of unfair terms at the present stage.

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105 See *supra*, III.B.

106 Cf. *supra*, III.B.

107 See *supra*, III.C.2. *sub* (v).

108 The distinction is between the procedure between the contracting parties based on the mortgage contract on the one hand (proceedings 'type (a)' as categorised above) and proceedings – still, between the same contracting parties – based on the bank's meanwhile acquired 'right of ownership' on the other hand (proceedings 'type (b)'). Cf. *supra*, III.A. *sub* (ii).

109 For references, see III.D.2. below with note 121.

(x) Finally, there might be arguments regarding the development of the overall relationship between bank and consumer, disregarding the original terms of the contract. If the bank allows the consumer to stay in the apartment for a long time after the acquisition and therefore waits with evacuation proceedings, it may seem that the bank is not 'rewarded' for this kindness. This may be an argument that AG Wahl took into account, although he did not mention it explicitly.[110]

(xi) We do not claim that we have identified each and every aspect that may potentially be relevant for solving the 'real issue' in a case like *Banco Santander*. However, with the normative arguments (III.C.1.) and the further arguments listed in this section (III.C.2.) we think we have presented enough to illustrate our point: that a reasonable solution can be developed without making the case strictly depend on a concept like 'ownership'. We also hope that the arguments we have identified will not be considered peculiar, but rather as arguments that lawyers would have contemplated anyway when dealing openly and consciously with a comparable case.

D. Weighing of Arguments

The fourth and final step, as described in section II.B, is to weigh the arguments prepared in step 3. To achieve a solution to the 'real problem', the decisive and most important arguments are subjected to a final evaluation (if need be),[111] linked to and weighed against one another, and are finally put together in an argumentation to solve the issue. To do this it might be useful to recapitulate the 'real issue':

Should a judicial review of potentially unfair terms in a security agreement be excluded once the security right in the consumer's apartment has been enforced and the creditor-bank itself has acquired the apartment in the forced sale, and therefore seeks to force the consumer out of the apartment?[112]

As indicated above, there is no specific method or normative framework for carrying out the weighing process. We will therefore proceed as we consider it appropriate and, given that legal norms evidently require to be given specific weight in the process, start with them. Please remember that we are doing a researcher's task here and that we have limited the facts of the *Banco Santander* case to what seemed relevant for us to show how a functional approach would operate in contrast to formal-conceptual reasoning. We are, in other words, not deciding 'the real case'.

1. Another Evaluation of the Norms

A weighing process to decide the 'real issue' could start by again checking whether there is a norm or comparable normative proposition – in our case: a provision of EU law or an existing preliminary ruling by the CJEU – that addresses the 'real issue' in a direct way. If so, this norm would have to

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110 Compare AG Wahl, Opinion on Case C-598/15 *Banco Santander* para. 79.

111 In the present article, this evaluative task, to a relatively large extent, has already been accomplished in the previous sections in order to deal with the individual aspects where they arise.

112 Cf. III.B. above: Note that we have clarified there that this main question arises for different factual situations and can, depending on the answer to that main question, trigger additional questions as to whether a judicial review is to be carried out only upon the consumer's application or *ex officio*; and whether an *ex officio* review is merely allowed or even necessary.

assume a high priority in the weighing process. However, we already know that such a 'clear norm' of EU law does not exist for the issue to be decided in the present case.[113]

It is also clear that there are no provisions of national (in this case: Spanish) law which could claim to settle the issue once and for all. We have seen that the Spanish property law provisions on the acquisition of ownership depend on a valid obligation to transfer the ownership from the consumer to the bank in the course of the forced sale ('causal' transfer), and that the validity of this obligation may be questionable if the mortgage agreement was affected by unfair enforcement-related contract terms.[114] To what extent this dependency actually exits in a particular case would, first, depend on whether and which contract terms ultimately turn out to be unfair. Second, this would be the task of the national court to sort out according to the division of work between the national court and the CJEU in a preliminary ruling procedure.[115]

Regarding the Spanish procedural provisions, we have seen that the specific type of procedure for enforcing registered rights *in rem* is a summary procedure only, which does not have the effect of *res iudicata* and does not produce a final decision as to the rightful or wrongful acquisition of ownership by the bank; the latter is left to a 'plenary' procedure.[116] The conclusion to be drawn from this is, however, not self-evident. One could either argue that the inexistence of any right to invoke, in the summary procedure, the unfairness of terms of the mortgage agreement is not that detrimental for the consumer because she could still revise the result in a subsequent 'plenary' procedure. Or one could point to the fact that the apartment is the consumer's only present housing option and that this may speak strongly against forcing the consumer out of her home before the review of potentially unfair terms has been settled.[117] Given that we do not have sufficient knowledge of national Spanish procedural law, the exact weight these national provisions should be awarded in the weighing procedure must be left open here.

It will, however, be evident that the final assessment of these implications of national property law and procedural law would have a strong impact on the weight the national norms may assume in an 'absolutely final' weighing process. Further, it should have become apparent already from our previous discussion that the potential result regarding the 'real issue' may vary depending on which national legal system is concerned. It should, however, also be made clear that even if a specific national legal system provides that a transfer of ownership is perfectly independent from the validity of the underlying obligation,[118] and that the same is true for proceedings enforcing such a

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113 See section III.C.1.

114 See above, I.C. *sub* (ii).

115 Compare, among many others, CJEU, Case C-433/11 *SKP k.s. v Kveta Polhošová* ECLI:EU:C:2012:702 para. 22; Case C-297/88 *Massam Dzodzi v Belgian State* ECLI:EU:C:1990:360 para. 33.

116 See above, I.C. *sub* (ii).

117 Cf. *supra*, III.C.1. *sub* (iii) and the CJEU case law referred to in note 88.

118 At least at first sight this would hold true with regard to German law, which provides for an 'abstract' transfer of ownership, *i.e.*, a valid underlying obligation is not required for a transfer to take place, if only a valid 'real agreement' has been concluded between transferor and transferee. However, a transfer based on an invalid obligation would immediately trigger an obligation to re-transfer the property under unjust enrichment rules. See, for instance, Mary-Rose McGuire, *National Report on the Transfer of Movables in Germany, in* NATIONAL REPORTS ON THE TRANSFER OF MOVABLES IN EUROPE, VOLUME 3 1, 73 ff. (Wolfgang Faber and Brigitta Lurger eds., 2011). This obligation to re-transfer might still operate as a gateway for defects in the underlying obligation to break through as long as the parties are still the same.

right, the question whether these national provisions decide the solution to the case may still depend on the EU law principle of effectiveness.

Further, we can say that *if* a particular national legal system provides a 'causal' transfer as mentioned above, and *if* it should ultimately turn out that certain terms in the consumer mortgage agreement which are material for the non-judicial enforcement procedure are to be considered 'unfair' within the meaning of the Directive, there would be a quite strong argument from the EU principle of equivalence that the invalidity of the contract term should cause the transfer of ownership to be ineffective. The reason is that the same effect would be triggered if the invalidity of the contract was caused by a rule of national law.[119] This is, in itself, not really a functional way of reasoning; but given that functional argumentation is intended to include all normative premises the case may involve, this kind of EU-law driven argument is taken account of. In any case, this argument can start only when it has been clarified that certain contract terms are 'unfair'; it does not contribute to the question of unfairness itself, nor does it contribute to the assessment of the ambit of the effectiveness principle, which forms a separate and additional requirement.

2. Weighing Some of the Normative and Consequence-based Arguments

The arguments we weigh in this subsection are mainly from III.C.1. *sub* (i)–(iii) and III.C.2. *sub* (i) and (iii). One of these arguments claims that it is necessary to limit the consumer's possibilities to have contract terms reviewed because a third party who trusts the register might otherwise be affected. We have already pointed out that this is a weak argument for those cases where there are only two parties involved. The argument could, however, be interpreted in another, more favourable, way to make it useful. It could be interpreted as an argument for implementing one general rule (such as: 'Once the acquirer is registered, this cannot be challenged') without exemptions. Such a solution may be said to have the advantage of simplification. This would, however, be a quite unusual rule. To have different rules concerning a two-party relationship and a third-party relationship is indeed very common. There need not even be a good faith solution involved.

A rule without any exception may also cause problems in the relationship between the two parties to the original mortgage agreement. One aspect, as previously mentioned, is that according to the CJEU, a person's need for housing has to be given specific weight when interpreting the UCTD, notably when delimiting the appropriate scope of the effectiveness principle.[120] Further, the enforcement procedure before the notary was finalised without any involvement of the consumer and the latter is therefore likely not to be aware that there are in fact two formally distinct procedures. This observation can be linked to further CJEU case law according to which the fact that the consumer "is unaware of or does not appreciate the extent of his rights" can have a substantial impact on the assessment that procedural rules fail to comply with the Directive's principle of effectiveness.[121]

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[119] See *supra*, III.C.1. *sub* (ii).

[120] See *supra*, III.C.1. *sub* (iii), with references in note 88.

[121] See, to this effect, CJEU, Case C-415/11 *Aziz* para. 58; Case C-618/10 *Banco Español de Crédito* para. 54; Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Rocío Murciano Quintero and others* ECLI:EU:C:2000:346 para. 26 (all regarding the UCTD and the national court's duty to review contract terms *ex officio*). See also CJEU, Case C-32/12, *Soledad Duarte Hueros v Autociba SA, Automóviles Citroën España SA* ECLI:EU:C:2013:637 para. 38 regarding Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees (Consumer Sales Directive) [1999] OJ L171/12.

Further, on a very general level, there seems to be little reason why bringing a complaint on the ground of unfair contract terms should no longer be possible for the consumer if it is still only the consumer and the professional who are parties to the conflict. If only these two parties can be affected by deciding the conflict, a formal change in the bank's 'type of right' and in the 'type of procedure' should arguably not form a sufficient barrier against the Directive's entire purpose of awarding consumers protection against unfair contract terms applied by the other party.

Considering that the UCTD intends to create a deterring effect towards professionals,[122] the decision of the conflict at hand should certainly not operate as an incentive for professionals to put an end on the courts' ability to review unfair terms (by acquiring collateral on their own). Rather, there should be an incentive for the professional to achieve the highest proceeds possible when the enforcement of a security right turns out to be necessary.[123]

3. Weighing the Arguments Concerning Risks

Some arguments we have presented concern the bank's risk that the value of the apartment may deteriorate through use during the additional time a judicial review of unfair terms would take.[124] These arguments do, however, not suggest that this possible increase of risk is significant. The same risks are present also in general, including cases where the sale of the security object takes some time for whatever other reason there may be.

Other kinds of risks have to do with the role of banks in general; we have referred to them as systemic risks.[125] When weighing arguments on systemic risks it is of course important to understand that these are arguments on an aggregated level. They do not directly match the arguments on the party-to-party level, and they, therefore, need to be treated as arguments from another level when it comes to a specific kind of problem in a case such as *Banco Santander*. This, however, does not mean that they are unimportant in regard to the possible effects of a judicial decision in a general context. If the financial system in a certain jurisdiction allows a lot of possibilities for banks to fulfil ulterior motives, besides the role they are given, a single decision that does or does not limit such possibilities can potentially be important.

We think that the risks described are relevant and that they point towards also allowing a judicial review at a late stage in the bank's process of using the security to cover the debt. However, since these arguments concern the aggregate level we need to be careful. We should not let these arguments gain weight unless we also assume that high enough number of consumers will be concerned that an effect on the macro level sets in. The assumed consequences are only one set of arguments out of many that need to be considered.

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122 Cf. *supra*, III.C.2. *sub* (iii), with references in note 100.
123 Cf. *supra*, III.B.
124 See *supra*, section III.C.2. *sub* (v) and (viii).
125 See *supra*, section III.C.2. *sub* (iv).

4. Weighing the Arguments Concerning Possible Change of Behaviour

As stated above, it is partly difficult to predict how banks will adapt their future behaviour depending on the decision on the 'real issue'.[126] We have already pointed out that we assume the most probable change in behaviour, if a judicial review at the present stage of proceedings were allowed, would be that the banks change their mortgage contracts so that they seem less unfair from an EU law perspective.[127] This is an argument for allowing a review of the contract. The arguments that point in the opposite direction are, however, also plausible. We do not know how the banks will behave and how they will redesign their contracts. Yet it is important that we do not see a clear probability for a redesign of contract terms that is less desirable from either a consumer or market related perspective.

5. Contemplating the Arguments Concerning the Overall Situation

The last arguments we would like to involve concern the overall situation of the case. One aspect is that the bank might have been 'kind' to the consumer, for example by letting him or her stay in their apartment for a long time after the acquisition. According to Article 4(1) UCTD, this aspect should not be considered in the unfairness test, since it occurs after the contract was concluded. However, when taking into account the overall situation in a specific case, it might seem unrealistic to look away from such a fact. Accordingly, if the law requires disregarding this aspect, it is easier to do so after explicitly pointing out that this fact is in reality a part of the picture, although it should not be considered for specific legal reasons.[128]

Another aspect of the overall situation is the question of whether it would be better for the consumer if the apartment was sold as quickly as possible. It is simply hard to know whether the outcome of an unfairness assessment makes the overall situation better for the consumer. There are a number of uncertainties, concerning for example the possibilities to sell the apartment for a higher price, and these uncertainties make a decision for or against trying the unfairness test risky for the consumer. It may be necessary to contemplate this when considering the circumstances at hand, but it is not an argument against a review as such.

Concerning the overall situation we do, in summary, not see that these aspects should be decisive in the *Banco Santander* setting.

6. A Possible Result of the Weighing Process

Getting to the final step of the weighing process, we would like to stress once again that we are not in the position to decide the 'true' *Banco Santander* case, as it has been referred to the CJEU. A first reason is that we have simplified the case by picking some important elements and disregarding others.[129] A second reason is that, as legal researchers, our intention is to show something of more general relevance. What we claim to show with this article is that there are reasons to consider the

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126 See *supra*, section III.C.2. *sub* (vii) and, to some extent, *sub* (iii).

127 See, again, sections III.C.2. *sub* (iii) and (vii).

128 It can be noted that there is legislation in some jurisdictions that allows subsequent events to be a part of the unfairness assessment; see for example § 36 Swedish Contract Act (*Avtalslagen*), and the equivalents in the other Nordic countries.

129 See *supra*, section I.

thought process suggested by the 'functional approach' when it comes to solving legal issues concerning (national) property law and EU consumer law.

To illustrate this, we have, in the course of our analysis, disqualified some of the bearing arguments that were used by the CJEU and the AG. We have also developed arguments that point in the opposite direction. On balance, and within the limited facts we have opted to base our research task on, the arguments for solving the 'real issue' in favour of the consumer seem to prevail.

Where the conflict is still only between the consumer-mortgagor and the bank as the acquirer of the former security object, a judicial review of potentially unfair terms in the security agreement need not at all be excluded. A possible result of the analytic process we have described is rather that such a judicial review should be allowed where the consumer herself asks the court to conduct it. There should arguably even be a duty on the national court to review the contract terms of its own motion where the following two conditions are met: First, the general preconditions for such *ex officio* review must be met – in the words of the CJEU: where the national court "has available to it the legal and factual elements necessary for that task".[130] Second, adopting such a duty would require that there has not yet been any adequate possibility for the consumer to raise objections herself or for a court to start a review of its own motion[131] (or the previous court failed to comply with its duty).

The main arguments for this solution are that the bank's interests are impaired to a very small extent, whereas the consumer can potentially benefit considerably and the general goal of preventing the continued use of unfair terms is served in the best way possible.

To what extent national law can exercise a limitative effect on this functioning of the Directive does not depend on whether the bank has acquired 'ownership' in a two-party conflict like in *Banco Santander*. Rather, variations as to the 'operating distance' of the Directive may, for instance, follow from the degree of a transfer's dependency on the underlying obligation under national law (causal transfer system or other). Interestingly, this feature of national property law – *i.e.*, taking into account a defect in the contract between the two parties involved – appears to be an aspect of rather relational character.

IV. Impact on the Understanding of the EU Law Principle of Effectiveness

We hope that the foregoing analysis managed to show that solving the issue raised in *Banco Santander* does not require drawing heavily on dogmatic concepts such as 'ownership', 'rights *in rem*', or specific types of procedures as established by national law. Rather, approaching the issue functionally suggests that formal categorisations of rights or procedures should not dominate the argumentation, particularly where they would become relevant only in a conflict between these two parties who happen to be the addressees of a specific EU consumer contract law directive. The approach we have applied narrows down the discussion to the parties involved and the interests that are actually at stake. At the same time it attempts to broaden the discussion to any kind of

[130] See, among many others, CJEU, Case C-40/08 *Asturcom* paras. 53 and 59.
[131] Cf. the formulation of the 'real issue' with its variations (a) and (b) *supra*, III.B. at note 78.

argument potentially relevant within the narrow issue, and to provide a methodological framework for weighing these arguments against each other. The goal pursued in this weighing process, in a case like *Banco Santander*, is to determine a proper scope and effect of the principle of effectiveness, in order to achieve the goals of the UCTD in an appropriate manner.

The issue we want to address in this final chapter of our article goes one step further. The issue is whether at least in a case like this one, that is, in a mere two-party relationship, EU law itself might actually *require* applying an approach which comes relatively close to the functional approach applied above. In particular, the principle of effectiveness appears to display a number of features resembling elements of the functional approach. In turn, reflecting on the functional approach might contribute to a better understanding, or even a further sharpening, of the application of the principle of effectiveness. Actually, it has been pointed out repeatedly that the vagueness presently displayed by the principle of effectiveness should be reduced.[132] Evidently, to sharpen such a central principle is a comprehensive issue. The following observations and suggestions do not take the form of an in-depth discussion. Rather, they are intended to form a starting point for further research, and for debate.

A. Normative Support for a Functional Approach in EU Law

To begin with, the Court commonly states that every case in which the question as to whether a national procedural provision infringes the principle of effectiveness arises "must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies".[133] In other words, *context and function do matter*. There are also clear indications in CJEU case law that the Court, referring to the principle of effectiveness, turns against putting decisive weight into distinctions based on concepts and categorisations. For instance, the Court has declined an argumentation based on a formal distinction between 'licence' versus 'sales' contracts when dealing with the rule of exhaustion in copyright law.[134] In other cases, which formally depend on the interpretation of a certain statutory notion or concept, the principle of effectiveness has been deployed for interpreting this notion flexibly in order to achieve the effects pursued by EU law.[135] Further, it has been observed that the Court's case law on the principles of equivalence and effectiveness reveals an approach of weighing procedural principles of national law against the goals of EU law. Based on this this understanding, any severe interference with the procedural autonomy of a Member State must be justified by particularly central interests of EU law.[136] This very much resembles the idea of balancing different

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[132] See, *e.g.*, Michael Dougan, *The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before the National Courts, in* THE EVOLUTION OF EU LAW 407, 420 (Paul Craig and Gráinne de Búrca eds., 2nd ed., 2011); KRÖNKE, *supra* note 50, at 230. For further references, but less critical in her own assessment, see also KULMS, *supra* note 49, at 185 ff.

[133] See, for instance, CJEU, Case C-32/14 *ERSTE Bank Hungary* para. 51.

[134] See CJEU, Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* ECLI:EU:C:2012:407 para. 49. The observation that the mere denomination of the 'type of contract' cannot be decisive in the eyes of the CJEU is made by Christian Baldus and Thomas Raff, *Richterliche Interpretation des Gemeinschaftsrechts, in* ENZYKLOPÄDIE EUROPARECHT, BAND 6: EUROPÄISCHES PRIVAT- UND WIRTSCHAFTSRECHT 153, 202 (note 179) (Martin Gebauer and Christoph Teichmann eds., 2016).

[135] For a most recent example, see CJEU, Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy* ECLI:EU:C:2019:204 paras. 43–51, regarding the concept of 'undertaking' within the meaning of Article 101 TFEU. The potentially conflicting concept of 'legal persons' (compare the referring court's concerns in para. 15) was not considered decisive in solving the case.

[136] KÖNIG, *sura* note 49, at 240 ff.

normative propositions within a functional approach as outlined above. For example, a national procedural provision specifying the principle of *res iudicata* may be weighed against the principle of effective application of EU rules.[137] Further, the CJEU has stressed in certain cases that in order to safeguard the effective functioning of EU law, it is essential that conflicting interests of individuals can be weighed against each other, having regard to all aspects of the case; and that provisions of national (procedural) law that do not allow such weighing of interests may fail to comply with the principle of effectiveness.[138] This weighing of the parties' interests, again, resembles a feature of the functional approach. This example also shows that the strength the principle of effectiveness ultimately assumes is heavily influenced by the balancing process.

B. Possible Contributions by the Functional Approach

To what extent may the functional approach contribute to the understanding and application of the principle of effectiveness? As we have just illustrated, balancing different normative propositions, including the principle of effectiveness itself, and weighing the interests of the individual persons involved in the particular conflict, can already be said to form part of the CJEU's methodological toolbox for applying the principle of effectiveness. This has not always been fully clear, partly due by the Court's own formulation that national courts are under an obligation to ensure that "full effect" (or similar) must be given to EU law,[139] which may have been understood in terms of a one way preference rule.[140] The functional approach presented in this article, and its ability to reach balanced solutions in a reflected manner, suggests that this kind of weighing process should be fostered and further developed.

In addition, we believe that steps 1 and 2 of the functional approach as presented in section II.B. – keeping the different relations apart and defining the real issue without being occupied with dogmatic concepts – could be particularly helpful when applying the principle of effectiveness. One major benefit of these tools is gaining a clear picture of *what is relevant*, and what is not. Similarly, these tools may prove extremely useful for identifying *to what extent different cases* brought before the CFEU *are comparable*. This is an important task, given that EU law principles, like the principle of effectiveness, are developed by case law in a step-by-step-process. This usually involves the Court repeating its own statements when deciding a new case on the same matter.

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[137] See CJEU, Case C-2/08 *Amministrazione dell'Economia e delle Finanze, Agenzia delle Entrate v Fallimento Olimpiclub Srl* ECLI:EU:C:2009:506 paras. 28–31 (weighing a specific interpretation of a provision of the Italian Civil Code against the effectiveness of EU VAT provisions). For a closer analysis of the 'balancing' or 'weighing' approach applied in this case, see KRÖNKE, *supra* note 50, at 198 ff., 328 ff. See also, as to substance, CJEU, Case 453/00 *Kühne & Heitz NV v Productschap voor Pluimvee en Eieren* ECLI:EU:C:2004:17 paras. 24–27.

[138] See, *e.g.*, CJEU, Case C-536/11 *Donau Chemie AG and others* ECLI:EU:C:2013:366 paras. 35 ff., regarding third-party undertakings' access to files of judicial proceedings brought for infringements of EU competition law. Building on that decision's reasoning, see also CJEU, Case C-365/12 P *European Commission v EnBW Energie Baden-Württemberg AG, Kingdom of Sweden, Siemens AG, ABB Ltd* ECLI:EU:C:2014:112 paras. 104–109, 132; and, regarding the process of weighing up different interests in proceedings for interim relief, CJEU, order in Case C-162/15 P-R *Evonik Degussa GmbH v European Commission* ECLI:EU:C:2016:142 paras. 103–115 (in particular para. 111).

[139] See, for instance, CJEU, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* ECLI:EU:C:1991:65 para. 30.

[140] Cf. KRÖNKE, *supra* note 50, at 201 ff. For a detailed analysis of case law development, see THOMAS VON DANWITZ, EUROPÄISCHES VERWALTUNGSRECHT 476 ff. (2008).

However, these statements are also repeated when the matter of the new case resembles the old one to a limited extent only. The Court needs to start from somewhere. This, evidently, creates a risk that generalisations consolidate (as usually desired by lawyers), while differences as to the facts and interests involved tend to be overlooked. Steps 1 and 2 help to sharpen a lawyer's awareness of these differences and the ability to transform them into (different) legally relevant questions, or 'real issues', with potentially different impacts on the principle of effectiveness.

V. Conclusive Remarks

This article has dealt with potential conflicts that may arise between national property law and EU law; in particular, with the requirement of effective application of the UCTD. According to several substantial segments of argumentation presented by the CJEU in its recent Case C-598/15 *Banco Santander*, the acquisition of 'ownership' of a mortgaged property in a forced sale may form a strict barrier to the review of potentially unfair contract terms in the mortgage agreement. We have attempted to show that this perception of the conflict between different norms (national versus European) is heavily determined by a thinking process built on the concept of an absolute right of 'ownership'. We have suggested using a 'functional approach' instead. This approach was, first, presented in an abstract manner and by way of a step-by-step instruction. Second, we have tried to exemplify this approach by applying it to a factual setting similar to the *Banco Santander* case. We hope that we have, thereby, managed to show that this functional approach offers an appropriate methodological framework to deal with the potentially conflicting norms and the interests of the parties involved in the conflict. We also hope it has become apparent that a functional approach fits rather well into the argumentative process of the CJEU when it comes to determining the appropriate scope of the principle of effectiveness of consumer contract law directives.

What we have presented here are suggestions, a methodological contribution of academics to the common goal of enhancing judicial decision-making. We did *not* show that the CJEU decided the *Banco Santander* case in the wrong way. As mentioned, we did not base our analysis on the full set of facts, nor did we delve into the full complexity of Spanish procedural law (which the CJEU did not do either).[141]

However, it is important to stress that the result achieved by the CJEU *should not be overestimated* when viewed from the perspective of other European legal systems. As pointed out in the course of our analysis, the Court's argumentation does not include the idea of a 'causal' transfer of property rights, under which the acquisition of ownership may be flawed, and hence be rendered ineffective, because of unfair contract terms in the underlying mortgage agreement. Neither does the Court's judgement offer any direct guidance for procedures under other national laws where the claimant is required to prove the rightful acquisition of ownership (as under the traditional *rei vindicatio*): the specific Spanish summary procedure applied in the present case does not offer any possibility to raise the issue of the claimant's rightful acquisition.[142] Had this aspect been different,

[141] See section I.C.
[142] See sections I.C., III.A. *sub* (ii) and III.C.1. *sub* (ii).

much more would speak for a solution where the (flawed) acquisition of ownership does not provide closure.

There are three more clarifications we would like to add. First, the functional approach employed in this article can be applied *irrespective of* how a specific *national property law regime* is designed. It is true that the approach is inspired by substantive Nordic and American laws, but this does not make it incompatible with other substantive property law regimes, including those where the concept of absolute rights *in rem* plays a central role. The kind of problem discussed in this article is, after all, not one of national property law. The problem emerges at the intersection of national property law and the requirement of effectively applying EU consumer contract law, where the question arises to what extent and at which point the one can limit the other. This is a matter of balancing. The functional approach is a tool for carrying out a balancing process in an open and reflected manner.

Second, following this argumentation, it should be stressed that promoting a functional approach for the process described is *not a (hidden) attempt to change national property laws* that have not adopted this approach. National law may retain or adopt whatever approach national lawmakers prefer.[143] Our only intent is to show that the functional approach's way of reasoning and structuring problems is a useful method where the EU law principle of effectiveness clashes with national law.

Third, the fact that we have applied the functional approach to a mere two-party situation inspired by the *Banco Santander* case should not be understood as an indication that this approach would, as such, be limited to two-party situations. It could, with advantage, also be used in settings where a third party is involved. Then the 'real issue' would be a different one.

[143] See also section I.C. *sub* (iii).