

Law - Jurisprudence - Science

Festgabe on the occasion of the Swiss Lawyers' Conference 2025 in Zurich

Editors

TILMANN ALTWICKER
ULRIKE BABUSIAUX
HELMUT HEISS
YOAN HERMSTRÜWER
ANDREAS THIER

with the collaboration of
RAHEL REICHLIN

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The importance of behavioural economic findings in decision-making

Illustrated by a case-related analysis on the concretisation of Art. 8 UCA

Yeşim M. Atamer / Maurus Furger*

* We would like to thank the members of the chair for their efforts in checking the footnotes. All hyperlinks contained in this article were last accessed on 17 January 2025.

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1. Introduction

Since the wording of the law *"always* represents *only* the *imperfect expression of the legislative thought to be reproduced "*[1] , the court has various instruments at its disposal by means of which it can concretise the potentially relevant legal norm to such an extent that an answer can be derived from it with regard to the facts of the case to be judged. This work of concretisation by the court is not a freely deci- sion-making process, but a largely methodologically determined process. The court must make a decision in accordance with formal and material guidelines, which must in particular fulfil the principles of the rule of law. Against the background of the repeated and increasing calls for an interdisciplinary orientation of legal [activity2] , the question arises as to how legal science and legal practice should deal with non-legal or interdisciplinary findings. According to GRUNDMANN, this question is *"one of the questions of fate,*
This question is, according to Grundmann, "one of the questions of destiny on which the innovative power, proprium and understanding of law and legal science are co-decided".[3]

With reference to a court decision concerning Art. 8 UCA, this article examines whether findings from behavioural economics may be included in civil proceedings and which aspects the court must take into account.
To this end, it will first be shown why the inclusion of findings from behavioural economics cannot take place without tension from the perspective of the law **(2.).** Subsequently, a court decision will be used as an example to illustrate the extent to which such findings can be of considerable relevance **(3.).** On this basis, it is then necessary to examine what methodological possibilities Swiss law offers the court to include behavioural economic findings in civil proceedings **(4.),** and how such an inclusion could have affected the example decision **(5.).** Finally, the opportunities and risks of a decision based on behavioural economics are assessed **(6.).**

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[1] MEIER-HAYOZ, in: Berner Kommentar, Kommentar zum schweizerischen Zivilrecht, Schweizerisches Zivilgesetzbuch, Einleitung, Artikel 1-10 ZGB, Bern 1962, Art. 1 N 132.

[2] See only ALTWICKER, Evidenzbasiertes Recht und Verfassungsrecht, ZSR 2019 I, p. 181 ff.; HAMANN, Evidenzbasierte Jurisprudenz, Diss., Tübingen 2014; HELLGARDT, Regulierung und Privatrecht, Habil., Tübingen 2016, p. 411; MEIER, Ein "More Realistic Approach"? Tübingen 2021; STARK, Interdisziplinarität der Rechtsdogmatik, Diss., Tübingen 2020; VON AAKEN, Rechtsdogma- tik als Sozialwissenschaft: Plädoyer für eine transparente Rechtslehre, in: Bezemek (ed.), Rechts- dogmatik, Stand und Perspektiven, Vienna 2023, p. 365 ff.

[3] GRUNDMANN, Pluralistische Privatrechtstheorie, Prolegomena zu einer pluralistisch-gesellschafts-wissenschaftlichen Rechtstheorie als normativem Desiderat ("normative pluralism"), RabelsZ 2022, p. 364 ff., 364.

2. Potential for tension in the application of law influenced by behavioural economics

3 Law and economics each have their own methods, models, specialist languages and objectives.[4] At the centre of law is legal dogmatics,[5] which is dedicated in particular to the organisation, interpretation and application of applicable law and develops concepts and principles for this purpose.[6] With dogmatics, law refers primarily to the *normative* element of law.[7] Economics, on the other hand, is primarily concerned with the production, distribution and consumption of goods and services; it is dedicated to describing and explaining reality.[8] At its centre is the question of how a society can utilise the scarce resources at its disposal as efficiently as possible.[9] The neoclassical economics commonly used today is based on the premise that allocative efficiency can be achieved through the market mechanism and functioning competition. It assumes that people generally act selfishly and rationally and use the market mechanism to maximise their benefit and negotiate the optimal contract for them, which corresponds to the model of *homo oeconomicus*.[10] The interplay of supply and demand leads to a market equilibrium in which no participant can be made better off through redistribution without making another worse off (Pareto optimum). If there is no market failure, there is no need for regulatory intervention in this system.

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4 MEIER (fn. 2), p. 16.

5 EMMENEGGER/TSCHENTSCHER, in: Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Schweizerisches Zivilgesetzbuch, Einleitung, Art. 1-9 ZGB, Bern 2012, Art. 1 N 475; HONSELL/MAYER-MALY, Rechtswissenschaft, 7th ed., Bern 2017, p. 18; SCHMID, Was ist die bewährte Lehre? Reflections on Art. 1 para. 3 CC, in: Ders. (ed.), Hommage für Peter Gauch, Zurich/Basel/Geneva 2016, p. 191 ff., 193; see also BK-Meier-Hayoz (fn. 1), Art. 1 CC N 428.

6 S. HONSELL/MAYER-MALY (fn. 5), p. 18; THOMMEN/ESCHLE, Was tun wir Juristinnen und Juris ten eigentlich, wenn wir forschen? Classical dogmatics versus empirical legal research as an innovative path, in: Meier/Zurkinden/Staffier (eds.), Recht und Innovation, Zurich/St. Gallen 2020, p. 3 ff., 7; SOMEK, Beantwortung der Frage: Was ist Rechtsdogmatik, in: Bezemek (ed.), Rechtsdogmatik, Stand und Perspektiven, Vienna 2023, p. 13 ff, 25; see generally KRAMER/ARNET, Juristi- sche Methodenlehre, 7th ed., Bern 2024, p. 1 ff.; LARENZ/CANARIS, Methodenlehre der Rechtswis- senschaft, 3rd ed., Berlin/Heidelberg 1995, p. 17 ff. (whereby legal doctrine is referred to as "jurisprudence", see loc. cit., p. 11).

7 HONSELL/MAYER-MALY (fn. 5), p. 18 f.

8 PETERSEN/TOWFIGH, Ökonomik in der Rechtswissenschaft, in: Towfigh/Petersen (eds.), Ökono- mische Methoden im Recht, 3rd ed., Tübingen 2023, N 1 ff., 17.

9 See generally KRUGMAN/WELLS, Economics, 6th ed., New York 2021, p. 8 ff.

10 On the above, SCHÄFER/OTT, Lehrbuch der ökonomischen Analyse des Zivilrechts, 6th ed., Berlin 2021, p. 107 et seq.

tem.[11] Classically, public goods, external effects, asymmetric information, monopolies and market power are recognised as types of market failure.[12]

The interdisciplinary sub-discipline of economics known as "behavioural 4
behavioural economics" is dedicated to researching *actual human behaviour* in an economic context using empirical findings from the psychology of perception, decision-making and memory.[13] The fundamental concern of behavioural economics is to determine the extent to which human behaviour is not comprehensive (in the sense of *homo oeconomicus*), but only consistently rational to a certain degree - and therefore predictably irrational or quasi-rational.[14] The realisation that the actual behaviour of individuals in certain situations systematically deviates from rational behaviour due to cognitive *biases* or misperceptions has led in recent decades to the assumption of a behavioural market failure, at least in such critical case groups (situationally), and therefore to the recognition of a need for regulation.[15]

This is one of the reasons why the behavioural economic analysis of the law has become so important in legal 5
The importance of the global economy has increased significantly.[16] Outside our national borders

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[11] On the above, KRUGMAN/WELLS (fn. 9), p. 16 f.

[12] Cf. on the concept of market failure in general and due to asymmetric information in particular DIEBOLD/RÜTSCHE, Wettbewerbsrecht und Marktregulierung, Vol. 1: Grundlagen, Zurich/Geneva 2023, § 1 N 165 et seq. and N 199 et seq.

[13] MEIER (fn. 2), p. 235; see generally ENGLERTH/TOWFIGH, Verhaltensökonomik, in: Towfigh/Peter- sen (eds.), Ökonomische Methoden im Recht, 3rd ed, Tübingen 2023, N 479 et seq.; SCHÄFER/OTT (footnote 10), p. 117 et seq.; on the history of the development and the central contents of behavioural economics in great detail HACKER, Verhaltensökonomik und Normativität, Diss., Tübingen 2017, p. 29 et seq., esp. p. 59 et seq.; see also DORALT, Langzeitverträge, Habil., Tübingen 2018, p. 181 et seq., esp. p. 184 et seq.

[14] ATAMER, Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer - Insights from Behavioural Law and Economics, Modern Law Review (2017) 80(4), p. 624 et seq, 629 f.; ENGLERTH/TOWFIGH (fn. 13), N 481 f.; HEINEMANN, Recht, Ökonomie und Rea- lität, in: Waldburger *et al.* (eds.), Law & Economics, Festschrift für Peter Nobel zum 70. Geburts- tag, Bern 2015, p. 21 ff., 27 f., 32; SCHÄFER/OTT (fn. 10), p. XIV f.; see in detail HACKER (fn. 13), p. 60 f., 71 ff.; also ATAMER, Regulatorische Alternativen zur gerichtlichen AGB-Kontrolle in Konsumentenverträgen, in: Hürlimann-Kaup *et al.* (eds.), Recht suchen, Liber comitum für Jörg Schmid, Zurich/Geneva 2024, p. 21 ff., 31 f.

[15] S. BAR-GILL, Seduction by Contract, Oxford 2012, p. 2 et seq.; HEINEMANN (fn. 14), FS Nobel, p. 32; ATAMER (fn. 14), MLR 2017, p. 636 et seq.; cf. also SCHÄFER/OTT (fn. 10), p. 143 et seq., 156 et seq.

[16] Thus HEINEMANN (fn. 14), FS Nobel, p. 27 f., 31; LOACKER, Verhaltensökonomik als Erkenntnisquelle für die Rechtsetzung, in: Verschraegen (ed.), Interdisziplinäre Studien zur Komparatistik und zum Kollisionsrecht, Vol. III, Vienna 2012, p. 45 ff.; MÜLLER, Aufgedrängte Fürsorge, Habil, Zurich/ St. Gallen 2024, p. 4 et seq.; basic descriptions are provided by ENGEL *et al.* (eds.), Recht und Verhalten, Tübingen 2007; FLEISCHER/ZIMMER (eds.), Beitrag der Verhaltensökonomie (Behavioural Economics) zum Handels- und Wirtschaftsrecht, Frankfurt a.M. 2011; SUNSTEIN, Behavi- oral Law and Economics, Cheltenham/Northampton (MA) 2023; TEITELBAUM/ZEILER (eds.), Research Handbook on Behavioural Law and Economics, Cheltenham/Northampton (MA) 2018;

The consideration of behavioural economics findings has already become established, particularly in the area of legislation and regulation.[17, 18] In the application of the law, however, it is and remains questionable to what extent it is possible and desirable to take such findings into account. This reluctance must be understood against the background that reality-based behavioural economics is in tension with the traditional, (purely) norm-oriented understanding of law-making, which sees *"interpretation as a value-free, purely logical thought process "*[19].[20] According to this understanding, the *reality* that forms the subject of behavioural economics could be included, if at all, at the stage of establishing the facts of the case.[21]

ZAMIR/TEICHMANN, Behavioural Law and Economics, Oxford 2018; ZAMIR/TEICHMANN (eds.), The Oxford Handbook of Behavioral Economics and the Law, Oxford 2014.

[17] For examples, see HACKER (fn. 13), p. 1 f.: e.g. introduction of the *Social and Behavioural Sciences Team* in Washington; activities of the *Behavioural Insights Team* in the British Cabinet; the European Commission's *Joint Research Centre*'s prescription of a behavioural economics turnaround; introduction of a *Nudge Unit* in Germany; also the OECD and the World Bank; see also LOACKER (fn. 16), p. 45 ff., esp. p. 64 ff.

[18] Swiss legislators are now also increasingly drawing on economic findings, particularly in the context of regulatory impact assessments. This is based on Art. 170 BV and Art. 141 ParlG and refers to the *ex ante review* of the economic impact of an enactment (see GLASER, Die Regulierungsbremse - effizient, aber undemo- kratisch? ZBl 2018, p. 66 ff., 70 f.; LIENHARD/MARTI LOCHER, in: Waldmann/Belser/Epiney [eds.], Basler Kommentar, Bundesverfassung, Basel 2015, Art. 170 N 20 f.; MÜLLER/UHLMANN/HÖFLER, Elemente einer Rechtssetzungslehre, 4th ed, Zurich 2024, N 57 et seq.; RÜEFLI, Gesetzesevaluation in der Schweiz: Entwicklung, Stand und Ausblick, LeGes 2022, Issue 3 No. 4, N 7 et seq.; see also the Federal Council's Guidelines for Regulatory Impact Assessment of Federal Legislative Proposals [RFA Guidelines] of 6 December 2019 [as of 1 October 2024]). For specific examples, see GERICKE/GILI, Regulierungsfolgenabschätzung am Beispiel der "grossen" Aktienrechtsreform, in: Weber *et al.* (eds.), Aktuelle Herausforderungen des Gesellschafts- und Finanzmarktrechts, Fest- schrift für Hans Caspar von der Crone zum 60. Geburtstag, Zurich 2017, p. 313 ff.; WEBER, Gedan- ken zum Regulierungsprozess im Finanzmarktrecht, in: Waldburger *et al.* (eds.), Law & Econo- mics, Festschrift für Peter Nobel zum 70. Geburtstag, Bern 2015, p. 457 ff, 460 ff.; further examples at <https://www.seco.admin.ch/seco/de/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Regulierung/regulierungsfolgenabschaetzung.html>; on such so-called *impact assessments* in the EU and Austria, see LURGER, Rechtsdogmatik und Interdisziplinarität, in: Bezemek (ed.), Rechtsdogmatik, Stand und Perspektiven, Vienna 2023, pp. 115 ff., 123.

[19] On this traditional view, but not defending it himself, MEIER-HAYOZ, Strategische und taktische Aspekte der Fortbildung des Rechts: Zur Frage nach den Grenzen richterlicher Rechtsset- zung, JZ 1981, p. 417 et seq., 418; see also ZÄCH, Tendenzen der juristischen Auslegung, ZSR 1977 I, p. 313 et seq., 313 et seq.

[20] Cf. also HEINEMANN (fn. 14), FS Nobel, pp. 22-26; on the relationship of law to economics in general PETERSEN/TOWFIGH (fn. 8), N 17; see also HARBARTH, Empirieprägung von Verfassungs- recht, JZ 2022, pp. 157 ff., 157 f.

[21] This is discussed in detail in N 16 et seq. and N 29 et seq.

3. The relevance of behavioural economics for decision-making using the example of GTC clauses on the declaration of termination

Before examining in the next section whether the process of applying the law is actually closed to the inclusion of behavioural economic findings or whether a methodological basis can be developed that is also as compatible as possible with the traditional understanding of the application of the law, a court decision will first be used as an example to show that and to what extent there is a need to take such findings into account in practice.
there is a need to take such findings into account in practice.

A. Facts and decision of the district court Bülach

In an (unpublished) decision from the year 2022, the District Court of Bülach (among other things) 7
2022, the District Court of Bülach had to assess (among other things) the unfairness of a GTC provision (Art. 8 UWG).[22] According to this GTC provision, customers of a telecoms provider could only cancel their subscriptions via live chat or telephone, thereby removing the option of written cancellation.[23] In assessing the unfairness of this provision, the court ultimately decided whether
the court ultimately decided whether the user of the GTC was abusing its de facto power to shape the GTC in order to pursue its own interests in a significant and unjustified manner.[24]

The customer argued that the live chat was rarely available or that they did not receive an 8
answer, sometimes waiting on hold for hours on the phone or not even getting through to a customer advisor. The defendant, the customer further a r g u e s , is exclusively pursuing its own economic interests by restricting the cancellation options by trying to prevent cancellations as far as possible.[25] The customer's argument that the live chat is rarely available or that no answer is received, as well as the fact that long waiting times are confirmed on the telephone or that sometimes no one can be reached, were not or not sufficiently disputed.[26] However, the court does not consider it to be proven *"that the defendant* [...] *is using the live* chat *as a means to* prevent cancellations.

[22] We would like to thank Ms Daniela Mauchle (formerly Stiftung für Konsumentenschutz) and Dr Marc Wolfer for providing us with the decision of the District Court of Bülach.

[23] BezGer Bülach FV210068 of 22 December 2022; on this decision already ATAMER, Interes- senabwägung im Recht der Allgemeinen Geschäftsbedingungen, ZSR 2024 II, p. 345 ff., 374 ff.; on the problem in general, RUSCH, Formvorschriften zur Kündigung in AGB, recht 2024, p. 223 ff.

[24] BezGer Bülach FV210068 of 22 December 2022, E. V.

[25] On the above, BezGer Bülach FV210068 of 22 December 2022, E. IV., 1.2.

[26] BezGer Bülach FV210068 of 22 December 2022, E. VI., 2.1.

change in the cancellation formalities was solely for economic reasons [...], *especially since the plaintiff's submissions in this regard, which were disputed by the defendant, remained unsubstantiated".*[27]

9 The GTC user justified the introduction of the GTC provision mainly with the increasing number of convergent products and the associated sometimes complex linking of subscriptions and sub-subscriptions, which can result in combination discounts. In such cases, the cancellation of individual (sub)subscriptions can have an impact on the portfolio of other (sub)subscriptions and/or combination discounts, whereby customers are often not sufficiently informed about this. Prior to the introduction of the aforementioned GTC provision, major difficulties had arisen in over 250 cases per month due to incomplete, unspecified or incorrect cancellation letters, which had led to cancellation mishaps to the detriment of customers.[28] For cost reasons, it was also not possible to offer the option of both written cancellation and cancellation by telephone or live chat. In addition, the GTC clause is (also) to the advantage of customers, as the cancellation process is simplified and accelerated, customers receive immediate feedback and there is the additional possibility that customers will receive a "retention" offer.[29]

10 The court found that in this case, both the restriction of the right of cancellation - as the core point of the contractual relationship (qualitative criterion of materiality)[30] - as well as the frequent unavailability of the live chat and the long waiting times for telephone enquiries argued in favour of a significant disproportion of the GTC clause pursuant to Art. 8 UWG. The court considers the fact that a termination in direct exchange with the GTC user *"*appears *simpler and less error-prone for the customers in* that *questions can be clarified directly and individual solutions can be sought for the customers*" to be an argument against materiality and ultimately decisive.[31] In conclusion, the court notes *"that in the fast-moving, digitalised and increasingly complex industry in which the defendant* [GTC user] *is active, it is not possible for the customers to be informed directly.*

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27 BezGer Bülach FV210068 of 22 December 2022, E. VI., 2.2.3.2.

28 On the above, BezGer Bülach FV210068 of 22 December 2022, E. IV., 2.3.

29 On the above, BezGer Bülach FV210068 of 22 December 2022, E. IV., 2.4.

30 See, for example, HGer ZH HG210223 of 21 June 2023, E. 7.2.4.3; KOLLER, Art. 8 UWG: Eine Auslegeordnung unter besonderer Berücksichtigung von Banken-AGB, AJP 2014, p. 19 ff., 30; THOUVE- NIN, in: Hilty/Arpagaus (eds.), Basler Kommentar, Bundesgesetz gegen den unlauteren Wettbe- werb (UWG), Basel 2013, Art. 8 N 131.

31 On the above, BezGer Bülach FV210068 of 22 December 2022, E. VI., 2.2.3.2.

rin] *is active, it is quite obvious to adapt the cancellation modalities to the digital and complex needs".*[32] According to the court, there is therefore no improper use pursuant to Art. 8 UCA.[33]

B. Assessment of the facts from a behavioural economics perspective

If the elements of the facts described (i.e. the more difficult termination modalities) are viewed from a behavioural economics perspective, a connection to the so-called *status quo bias* is immediately apparent.[34] Empirical studies [show35] that people have a strong preference for the status quo.[36] According to
KAHNEMANN, KNETSCH and THALER, this bias can be attributed to *loss aversion* in combination with the *endowment effect*.[37] Loss aversion is the tendency of individuals to prioritise losses over gains.[38] In conjunction with this, they attach a higher value to things solely for this reason.

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[32] BezGer Bülach FV210068 of 22 December 2022, E. VI., 2.2.3.2.

[33] The decision was confirmed by the Zurich High Court (OGer ZH PP230005 of 19 July 2023). The Federal Supreme Court did not accept the subsequent appeal (BGer 4A_440/2023). Critical of the decision RUSCH (fn. 23), recht 2024, p. 226: *"In a strange mixture of concrete procedural formalisms and abstract fundamental questions, it denied a significant disproportion* [...]*."*

[34] Fundamental SAMUELSON/ZECKHAUSER, Status Quo Bias in Decision Making, Journal of Risk and Uncertainty, Vol. 1, 1988, p. 7 ff.

[35] See, for example, MILLER/SAHNI/STRULOV-SHLAIN, Sophisticated Consumers with Inertia: Long-Term Implications from a Large-Scale Field Experiment (27 January 2023) (available at: <https://ssrn.com/abstract=4065098>); BECKERT/SICILIANI, Protecting Sticky Consumers in Essential Markets, Review of Industrial Organization 2022, p. 247 et seq.; HORTAÇSU/MADANIZADEH/PULLER, Power to Choose? An Analysis of Consumer Inertia in the Residential Electricity Market, American Econo- mic Journal: Economic Policy 2017, 9(4), p. 192 et seq.; see also the studies mentioned in HACKER (footnote 13), p. 85 et seq.

[36] S. BECK, Behavioural Economics, Wiesbaden 2014, p. 163 f.; ENGLERTH/TOWFIGH (fn. 13), N 529 ff, esp. N 532; HACKER (fn. 13), p. 85 f.; SCHÄFER/OTT (fn. 10), p. 121 f.

[37] KAHNEMAN/KNETSCH/THALER, Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias, Journal of Economic Perspectives 1991, 5(1), p. 193 ff. The findings on loss aversion are part of the *prospect theory* developed by KAHNEMAN and TVERSKY, which shows that individuals often do not act rationally in decision-making situations under uncertainty (Prospect Theory: An Analysis of Decision under Risk, Econometrica 1979, Vol. 47, p. 263 ff.). This calls into question the basic assumption of neoclassical economic decision theory, which views *homo oecono- micus* as a rational utility maximiser. KAHNEMANN was honoured with the Alfred Nobel Memorial Prize in Economic Sciences in 2002 for these findings.

[38] ZAMIR, Law, Psychology, and Morality, The Role of Loss Aversion, Oxford 2015, p. 3 ff., esp. p. 15 f.; see also SCHMIES, Behavioural Finance und Finanzmarktregulierung, in: Engel *et al.* (eds.), Law and Behaviour, Tübingen 2007, p. 165 ff., 171.

because they have them.[39] In terms of contract law, this means that individuals are reluctant to look for new options, even if they are aware of the unfavourable terms of their contract, as these are associated with costs and the outcome remains unpredictable.[40] This is referred to as "*consumer inertia*".[41]

12 These findings are (at least) a partial cause of the fact that consumers are reluctant to give up contractual commitments, even if this would actually be in their interest from a rational economic perspective.[42] The inertia to switch is regularly exploited by providers to keep consumers in long-term contracts (*lock-in effect*).[43] For example, automatic contract renewal clauses,[44]

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[39] SUNSTEIN (fn. 16), p. 5; VON AAKEN, Das deliberative Element juristischer Verfahren als I n s t r u - ment zur Überwindung nachteiliger Verhaltensanomalien, in: Engel *et al.* (eds.), Recht und Ver- halten, Tübingen 2007, p. 189 ff., 197.

[40] Cf. also on *omission bias* and *regret aversion* BECK (footnote 36), p. 168 et seq.; Verbraucher- kommission Baden-Württemberg, Stellungnahme zum DE-Referentenentwurf eines Gesetzes für faire Verbraucherverträge vom 3. Dezember 2020, No. 55/2020, p. 3; BRÖNNEKE/SCHMIDT, Gutach- ten, Kündigung von Verträgen im Internet durch Verbraucher - Befund und rechtspolitische Vor- schläge, Verbraucherprobleme beim Kündigen von online geschlossenen Laufzeitverträgen, 29 February 2020, p. 15 et seq.

[41] SUNSTEIN (fn. 16), p. 7 f.; see also ATAMER (fn. 14), Liber comitum Schmid, p. 33.

[42] ATAMER (fn. 14), MLR 2017, p. 632; BECK (fn. 36), p. 166.

[43] The fact that companies make use of behavioural economic findings has been pointed out for some time, see for example ZAMIR/TEICHMANN (fn. 16), Behavioral Law and Economics, p. 305; see also SCHMIDT-KESSEL, Stellungnahme zum DE-Entwurf eines Gesetzes für faire Verbraucherverträge, p. 8 (available at: <https://www.bundestag.de/resource/blob/825870/3f10 35778773fc5ea0e9f92c8b00d395/stellungnahme-schmidt-kessel.pdf>).

[44] Such clauses are permitted under Swiss law subject to certain conditions (see KRAMER/PROBST/PERRIG, Schweizerisches Recht der Allgemeinen Geschäftsbedingungen,
2nd ed., Zurich 2023, N 863 et seq.; in this sense also BGer 4A_475/2013; critical of these MAISSEN, Die automatische Vertragsverlängerung, Diss., Zurich 2012, N 373 et seq.; RUSCH/MAISSEN, Automati- sche Vertragsverlängerungsklauseln in allgemeinen Geschäftsbedingungen, Recht 2010, p. 95 et seq. In 2013, a parliamentary initiative [13.426: Tacit renewal of service contracts. More information and protection for consumers] was submitted, which aimed to regulate such extension clauses [in particular the introduction of information obligations]. However, the Councils did not support the initiative). In comparative law, however, it is decidedly pointed out that such clauses become a major problem in terms of consumer protection law and the market economy (see COX/CARUSO, Silence as Consumer Con- sent: Global Regulation of Negative Option Contracts, 73 American University Law Review 2024,
p. 1611 ff., 1614 f. [*"This business model has both exploded and evolved in recent years, proliferating in sectors as diverse as food, sunglasses, massages, streaming content, and now even services that help you track and cancel your subscriptions"*], p. 1618 [*"The 'subscription economy' grew a whopping 435% between 2012 and 2021 and accelerated in the pandemic era*"] with numerous references; on the dangers that such automatic contract renewals entail, loc. cit, p. 1624 et seq.; on the regulations enacted by legislators worldwide to combat the problem, loc. cit,
p. 1639 ff.).

"Penalty fees" when changing contracts[45] or complicated procedures for contract cancellation[46] are classic methods used to gain a competitive advantage through switching costs or other switching barriers.[47] The EU legislator has already addressed this problem in the context of certain long-term contracts and adopted appropriate countermeasures such as a limitation of the minimum contract term, a restriction on contract switching fees and measures to facilitate contract switching.[48] In the USA, too, such regulations are now increasingly being introduced at both federal and state level.[49]

This type of hurdle also includes the restriction imposed by the user of the GTC in the decision

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of the District Court of Bülach also includes the restriction of the cancellation options to personal contact by telephone or live chat. In addition, this GTC provision opens the door to further obstacles in all colours and forms.[50] The

[45] See e.g. <https://www.nzz.ch/finanzen/bankgebuehren-schweiz-tipps-zum-teuren-transfer-von- depot-und-wertschriften-ld.1847962>.

[46] S. BRÖNNEKE/SCHMIDT (footnote 40).

[47] ATAMER (fn. 14), MLR 2017, p. 648; BAR-GILL (fn. 15), p. 206 f., 223 ff., 231.

[48] Cf. e.g. Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Art. 105: conditions for contract termination must not be dissuasive, minimum contract term must not generally exceed 24 months); Directive (EU) 2019/944 of the European Parliament and of the Council of
5 June 2019 with common rules for the internal electricity market (Art. 12[2] and 12[3] regarding switching fees, which can only be charged to household customers for fixed-term electricity supply contracts with a fixed tariff and must be proportionate); Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (Art. 9 et seq. on account switching).

[49] See with references Cox/Caruso (fn. 44), p. 1648.

[50] For example, the long waiting times on the phone or only partially functioning chats - which were cited by the customer in the district court's decision and remain undisputed. However, it is also reported that customers were referred from the *"live chat to the call centre* and [...] *both* [...] wanted *a reason for the termination"* (20 Minuten [online] from
10 October 2023: "Sunrise makes it as difficult as possible for customers to cancel", see also in the same article: *"First he wanted to cancel via live chat. There, the Sunrise staff asked for the reason for the cancellation. When the reader said he wanted to leave Switzerland, he was told that he would have to contact customer service by phone. The department responsible for this was not available in the chat. He called the hotline, where an employee again asked for a reason for the cancellation, otherwise it would not be possible"*). It can also be read that a customer hung up the phone at the word "cancellation" (see <https://community.sunrise.ch/u/Snorqi>) (for these examples, see also RUSCH [footnote 23], recht 2024, p. 226); see also Tagesanzeiger (online) of 6 September 2024: Konsumentenschutz klagt. September 2024: Konsumentenschutz takes Sunrise to court and wants to have inflation clause banned *("It often takes dozens of attempts for people wanting to terminate their contract to speak to someone - who then tries to sell them new products instead of simply accepting the termination* [...]*")*; SRF (online) of 4 May 2018: Absurd adjustment of general terms and conditions, Sunrise bans written termination.

AGB-Verwenderin has thus - consciously or unconsciously - made use of the behavioural psychology approach of the *status quo bias*.[51] The district court's considerations not only contradict the behavioural economics findings set out above,[52] but also run counter to global legislative trends.[53] If the behavioural economics or comparative law findings had been taken into account in the decision-making process, the customer's chances of winning the case would have increased - this much can already be said at this point.

4. Possibilities for taking behavioural economics into account in the decision-making process

A. Preliminary question: Are behavioural economics findings important in the judicial application of law or the of the facts of the case?

14 There are various ways in which findings from behavioural economics research[54] can be incorporated into civil law proceedings. It is important to distinguish whether the need for inclusion is at the stage of applying the law or establishing the facts of the case.[55] The establishment of the facts of the case serves to collect the material for the proceedings. At this stage, the legally relevant events triggering the proceedings are determined.[56] The application of the law, on the other hand, describes the subsumption of a case under a specific legal norm, which generally requires an interpretation of or addition to the law.[57] In the knowledge that the distinction between the establishment of facts and the application of the law cannot always be made precisely in practice,[58] it has been assigned to the subsequent stages.

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51 With these words on the situation in Germany before the enactment of the Act for Fair Consumer Contracts (on this N 35) STIEGLER, Der Kündigungsbutton, VuR 2021, p. 443 ff., 443; see also ATAMER (fn. 23), ZSR 2024 II, p. 376.

52 On these already N 11 et seq.

53 See on these already N 12 and below N 35 and N 39.

54 When "such findings" are mentioned below, this refers to findings from the research field of behavioural economic analysis (of law).

55 For more details on this separation, SEE SCHEUERLE, Beiträge zum Problem der Trennung von Tat- und Rechtsfrage, AcP 1958/59, p. 1 et seq.

56 S. HURNI, in: Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Schweizerische Zivilprozessordnung, Bern 2012, Art. 55 N 4; SUTTER-SOMM/SEILER, in: Dies. (ed.), Handkom- mentar zur Schweizerischen Zivilprozessordnung (ZPO), Zurich 2021, Art. 55 N 1.

57 S. HONSELL, in: Geiser/Fountoulakis (eds.), Basler Kommentar, Zivilgesetzbuch I, 7th ed., Basel 2022, Art. 1 N 1.

58 See only MEIER-HAYOZ, Der Richter als Gesetzgeber, Habil., Zurich 1951, p. 1 f. fn. 3; WALTER, Tat- und Rechtsfragen, in: Fellmann/Weber (eds.), Der Haftpflichtprozess, Tücken der gerichtlichen Schadenerledigung, Zurich/Basel/Geneva 2006, p. 15 ff. 22 f.

The following explanations should be based on this. Whether and how such findings can be included in court proceedings is assessed according to different legal principles depending on whether they provide an answer to a question of law or a question of fact. For example, findings that serve to establish the facts of the case - i.e. facts - must generally be asserted, substantiated and proven by the party deriving rights from them (Art. 8 ZGB) (Art. 55 para. 1 ZPO).[59] If a fact is not asserted or substantiated at all, it is considered non-existent for procedural purposes.[60] However, if such findings relate to the application of the law, they are considered ex officio (Art. 57 ZPO). The court determines the applicable law on its own initiative and applies it to the relevant facts of the case without the parties having to invoke the relevant norms or explain their interpretation or additions.[61] This difference is also noticeable in appeals to the Federal Supreme Court. While the Federal Supreme Court comprehensively examines violations of the law, a finding of fact can only be challenged if it is obviously incorrect (or based on a violation of the law) (Art. 97 para. 1 BGG).[62] Obviously incorrect means arbitrary,[63] which means that the hurdles for an appeal concerning findings of fact are significantly higher than for an appeal concerning the application of the law.

In the decision explained above, the District Court of Bülach states that 15
a GTC clause with which the GTC user pursues its own interests in a significant and unjustified manner is abusive.[64] The court subsequently rejected the customer's arguments in this regard due to a lack of s u b s t a n t i a t i o n .[65] This reasoning shows that the court qualified the question of whether the GTC user is solely pursuing its own economic interests with the GTC provision as a question of fact and placed the burden of assertion, substantiation and proof on the customer. In our opinion, however, there are important reasons why this question should not be categorised as a question of fact, but rather as a question of law and, as a consequence
as part of the concretisation of Art. 8 UCA.[66] In this case, it would not be the customer who would have to bring the relevant findings into the process, but rather the court would have to obtain them on its own initiative *(iura novit curia)*.

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[59] GEHRI, in: Spühler/Tenchio/Infanger (eds.), Basler Kommentar, Schweizerische Zivilprozessord- nung, 4th ed., Basel 2024, Art. 55 N 2 et seq.; JUNGO, Zürcher Kommentar, Kommentar zum schweize- rischen Zivilrecht, Beweislast, Art. 8 ZGB, 3rd ed., Zurich 2018, Art. 8 N 24 et seq.

[60] GÖKSU, in: Arnet/Breitschmid/Jungo (eds.), Handkommentar zum Schweizer Privatrecht, vol. 1, 4th ed., Zurich 2023, Art. 8 ZGB N 12.

[61] BSK ZPO-GEHRI (fn. 59), Art. 57 N 4.

[62] There is talk of a limited cognition of the Federal Supreme Court (see BGer 5A_743/2021, E. 4.2; SCHMID, Was ist Prozessrisikoanalyse, ZZZ 2022, p. 140 ff., 144 f.).

[63] BGE 140 III 115, E. 2.

[64] P. N 7.

[65] P. N 8.

[66] p. N 19 ff.

16 The fact that behavioural economics is an empirical science and that its findings relate to actual human behaviour[67] does not argue against its classification as a legal issue. This is because, as the Federal Supreme Court recently clarified, the courts must establish and utilise so-called legal facts ex officio.[68] Legal facts are facts that are of a general nature and, in principle, relate to an unlimited number of cases. This is to be distinguished from the facts of the individual case, which only serve to clarify the facts of the case and relate exclusively to the specific individual case and the parties involved in the specific proceedings.[69] Such a distinction can also be found in American constitutional doctrine, for example, where the terms *legislative facts* are used for legal facts and *adjudicative facts* for facts of the individual case.[70] The need for this distinction must be understood against the background of a legal system that is also largely dominated by the principle of negotiation in public law. For example, it was considered inappropriate for a court to consider legal facts within the meaning of the principle of negotiation only if the parties have presented them when making decisions that shape the community far beyond the individual case and the parties involved.[71] Practice has therefore been adapted to the extent that legal facts are taken into account by the court regardless of the parties' submissions.[72] The German courts also distinguish between normative and subsumption facts in a similar way.[73]

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67 See already N 4 f.

68 S. BGer 6B_582/2017, E. 2.1.3; on this decision also ALTWICKER (fn. 2), ZSR 2019 I, p. 185 et seq.; KRADOLFER, Interdisziplinäres Wissen in der Rechtsprechung, in: "Justice - Justiz - Giustizia" 2022/4, N 11-13; SCHWENDENER, Ausgewählte Aspekte des Beweisverfahrens in eherechtlichen Prozessen nach ZPO, AJP 2024, p. 118 et seq., 124 et seq.

69 Cf. on this distinction BGer 6B_582/2017, E. 2.1.2; ALTWICKER (fn. 2), ZSR 2019 I, p. 185 et seq. ("legislative vs. judicial facts"); DERS., Statistikbasierte Argumentation im Verwaltungs- recht, ZBl 2018, p. 619 et seq., 622.

70 Fundamental PROCTOR, Rethinking Legislative Facts, Notre Dame Law Review 2024, Vol. 99, p. 955 ff. (p. 976 ff. on the definitional approaches); see also ALTWICKER (footnote 2), ZSR 2019 I, p. 185; KOKOTT, Beweislastverteilung und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten, Habil., Heidelberg 1993, p. 40 f.

71 KOKOTT (fn. 70), p. 40 and p. 43.

72 PROCTOR (fn. 70), p. 963 et seq. (*"judicial notice"* [loc. cit., p. 963]).

73 KOKOTT (fn. 70), p. 40 et seq.; KONZEN, Normtatsachen und Erfahrungssätze bei der Rechtsanwendung im Zivilprozess, in: Schilken/Becker-Eberhard/Gerhardt (eds.), Festschrift für Hans Friedhelm Gaul zum 70. Geburtstag, Bielefeld 1997, pp. 335 ff.; SCHMIDT, Der Umgang mit Normtatsachen im Zivilprozess, in: Broda *et al.* (eds.), Festschrift für Rudolf Wassermann zum sechzigsten Geburtstag, Neuwied/Darmstadt 1985, p. 807 ff.; SANDER, Normtatsachen im Zivilpro- zess, Diss, Berlin 1998; also SEITER, Beweisrechtliche Probleme der Tatsachenfeststellung bei richterlicher Rechtsfortbildung, in: Grunsky *et al.* (eds.), Festschrift für Fritz Baur, Tübingen 1981, p. 573 ff., who still used the term "Rechtsfortbildungstatsache"; cautiously FOERSTE, in: Musielak/Voit (ed.), ZPO, 21st ed., Munich 2024, § 284 para. 3.

The terminology has not yet stabilised in Switzerland. While in some 17
contributions[74] as well as in a decision of the Second Civil Division of the Federal Supreme Court from 201775, the Federal Supreme Court uses the term "normative fact" in a similar context in a more recent criminal law decision from 2018.[76] In two further (criminal law) decisions, the Federal Supreme Court - with reference to the first decision - adhered to this terminology.[77] In terms of content, however, the Federal Supreme Court was unambiguous and defined legal facts as the *"case-independent, predetermined*[] *real-world*[] *(social*[], *economic*[], *scientific*[], *technical*[] *etc.) framework conditions for* ***the application of the law****"*.[78] This approach exists in parallel to the fact that
Swiss law already has a recognised methodological instrument under the title of realistic interpretation - to which the Federal Supreme Court also expressly refers in the same decision[79] - for taking account of "real-world conditions".[80] With regard to the introduction of such legal facts into court proceedings, it is stated that *"*[*t*]*heir determination and utilisation* [...] *in*

[74] WALTER, Die Rechtsprechung des Bundesgerichts zum Einleitungstitel des ZGB in den Jahren 2007 bis 2009 - Published in Volumes 133 to 135, ZBJV 2011, p. 222 ff., 245; WALTER, Die Recht- sprechung des Bundesgerichts zum Einleitungstitel des ZGB in den Jahren 2000 bis 2006 - Published in Volumes 127 to 132, ZBJV 2007, p. 725 ff., 756; BK-WALTER (fn. 5), Art. 8 ZGB N 98.

[75] BGer 5A_944/2016, E. 2.5.1.

[76] BGer 6B_582/2017, E. 2.1.2.

[77] BGE 148 IV 329, E. 5.1 a.E.: *"Under these conditions, it is indeed one of the tasks of the law to follow developments in the actual environment of a criminal offence and to take account of changes in everyday life (social, economic, technical, etc.) conditions (so-called legal facts; judgement 6B_582/2017 of 19 June 2018 E. 2.1.2) when interpreting the law"*; BGer 6B_34/2020, E. 4.1 a.E.

[78] BGer 6B_582/2017, E. 2.1.2 (emphasis added): *"A scientific study, on the other hand, does not reveal such facts of the individual case. Rather, it reveals so-called legal facts (realities). The term "legal facts" refers to the general conditions (social, economic, scientific, technical, etc.) of the application of the law that are independent of the individual case. Legal facts shape the area of application of a legal regulation and mark its natural limits (see e.g. judgement 2C_632/2016 of 6 November 2017 E. 3.6 and 4.3). Sometimes legal standards, such as those of a supranational nature, are also categorised as realia (e.g. BGE 140 V 385 E. 4.1 p. 392). In the form of statistical, legal-sociological, medical, etc. data, they form the basis for the definition. In the form of statistical, legal-sociological, medical, etc. data, they form the basis for defining a judicial standard* (*see e.g. BGE 141 V 281 E. 4.1.1 p. 297 and E. 5.1.1 p. 304* [...]*). Empirical-scientific data is also used to give content-related contours to undefined legal concepts (so-called realistic element of legal interpretation [BGE 126 III 129 E. 4 p. 138 with reference]; e.g. in BGE 142 III 481 not published E. 3.3 of judgement 5A_450/2015 of 11 March 2016."*

[79] BGer 6B_582/2017, E. 2.1.2: *"Empirical-scientific data are also used to give content to undefined legal concepts* (*so-called realistic element of the interpretation of the law* [...]*)."*

[80] For more details, see N 27 et seq.

the area of the application of the law "[81] and "*significant information* [is therefore] *included ex officio in the decision-making process".*[82]

18 The realisation that consumers do not act egoistically and rationally in certain situations, but can, for example, be quickly dissuaded from a termination plan that is economically in their interest by hurdles in the termination process,[83] affects not only the individual involved in the procedure, but potentially all consumers who are bound by the corresponding GTC clause. This realisation therefore constitutes a legal fact - as a social framework condition for the application of the law - which the court must include ex officio in its decision. How such findings can be incorporated into the process is shown below.[84]

B. Consideration in the context of judicial application of the law

a) Modo-legislatoris *concretisation* of legal norms

19 Firstly, the methodological challenges associated with the application of Art. 8 UCA must be addressed. Traditional methodology distinguishes between the interpretation of an existing legal norm and the judicial development of the law.[85] The term interpretation is used when a legal norm can be applied within its possible literal meaning *(intra verba legis),* whereas the judicial development of the law refers to cases in which the court goes beyond the literal meaning *(praeter verba legis)* or deviates from it *(contra verba legis).*[86] It is generally recognised today that there is no clear boundary between the interpretation of the law and the judicial development of the law.[87]

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81 BGer 6B_582/2017, E. 2.1.3.

82 Ibid.

83 P. N 11 f.; on behavioural economics in general N 4 f.

84 p. on the consideration of legal facts in the context of the realistic element, esp. n 28.

85 S. HASENBÖHLER, Richter und Gesetzgeber in der Schweiz, in: Frank (ed.), Unabhängigkeit und Bindungen des Richters in der Bundesrepublik Deutschland, in Österreich und in der Schweiz, Ergebnisse einer internationalen Richtertagung, 2nd ed., Basel 1997, pp. 99 ff., 107; KRAMER/ARNET (fn. 6), p. 63; BK-Meier-Hayoz (fn. 1), Art. 1 ZGB N 137 f.

86 KRAMER/ARNET (fn. 6), p. 63.

87 Thus Meier-Hayoz (fn. 19), JZ 1981, p. 419: *"If one recognises that every judicial finding of law is a more or less creative process, one must also drop the fundamental distinction between interpretation and the filling of gaps";* see also DÜRR, in: Zürcher Kommentar, Kommentar zum schweizerischen Zivilrecht, Einleitung, Art. 1-7 ZGB, 3rd ed, Zurich 1998, Art. 1 N 277 ff. and N 405 ff.; BK-EMMENEGGER/TSCHENTSCHER (fn. 5), Art. 1 ZGB N 468; ESSER, Vorverständnis und Methodenwahl in der Rechtsfindung, Frankfurt a.M. 1972, p. 178; HASENBÖHLER (fn. 85), p. 107; MERZ, Auslegung, Lückenfüllung und Normberichtigung: Illustrated by the examples of the inadmissible invocation of formal invalidity and abuse

For example, cases in which only an open formulation ("normative factual element")[88] can be taken from the law cannot be assigned exclusively to one or the other area.[89] In these cases, the legislator has seen and regulated a specific legal issue, but has deliberately formulated individual factual elements (or the legal norm as a whole) so generally that they cannot be applied directly (even by interpretation), but first require further concretisation through judicial practice.[90] Within the scope of this concretisation, the court continues to decide *intra legem* and is therefore formally within the scope of the interpretation, but it has such considerable scope for interpretation that the instruments used in the classic interpretation of the [law91] are no longer sufficient to determine the meaning of the law and the court at least de facto carries out a judicial development of the law.[92]

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der Verjährungseinrede, AcP 1964, p. 305 ff., 331 ff.; HAUSHEER/JAUN, Stämpflis Handkommentar, Die Einleitungsartikel des ZGB, Art. 1-10 ZGB, Bern 2003, Art. 1 N 92; KRAMER/ARNET (fn. 6), p. 65; LARENZ/CANARIS (fn. 6), p. 187 f.; LOACKER, Haftpflicht und Billigkeitskorrektiv, Ein Beitrag zu den Härtefallklauseln im Recht der unerlaubten Handlung, Habil., Zurich/Geneva 2023, N 210; RÖTHEL, Normkonkretisierung im Privatrecht, Habil, Tübingen 2004, p. 21; WALTER, Zeitgemässe richterliche Rechtsfortbildung, recht 2003, p. 2 ff., *passim,* esp. p. 5; see also the evidence in ZIM- MERMANN, Juristische Methodenlehre in Deutschland, RabelsZ 2019, p. 241 ff., 257, 267; cf. also the observations of GAUCH, Argumente. Ein Geburtstagsbrief, recht 2000 (special issue for Wolfgang Wiegand on his 60th birthday), p. 87 ff., 94.

[88] The terminology follows KRAMER/ARNET (fn. 6), p. 74 (see p. 74 ff. for an exemplary list of such elements of the offence). The terminology, the classification of the content and the delimitation of the various normative elements of the offence are disputed in detail (for an overview of the opinions, see for example BK-HRUBESCH-MILLAUER [fn. 5], Art. 4 ZGB N 131 ff. and N 201 ff.).

[89] HASENBÖHLER (fn. 85), p. 107; see also EUGEN HUBER, System und Geschichte des Schweizeri- schen Privatrechtes, Erster Band, Basel 1886, p. 63, who states with regard to judicial discretion, general legal opinions and general equity that *"*[t]*he instruction given to the judge to use a certain source* [...] *here imperceptibly changes into the instruction* to *create the law himself if necessary".*

[90] Cf. for example BK-EMMENEGGER/TSCHENTSCHER (fn. 5), Art. 1 ZGB N 367; SHK-HAUSHEER/JAUN (fn. 87), Art. 1 ZGB N 90; BK-MEIER-HAYOZ (fn. 1), Art. 1 ZGB N 263; cf. on German law also RÖTHEL (fn. 87), p. 35 et seq.

[91] See FORSTMOSER/VOGT, Einführung in das Recht, 5th ed., Bern 2012, p. 576 et seq.; KRAMER/ ARNET (fn. 6), p. 66 et seq.

[92] GERMANN, Probleme und Methoden der Rechtsfindung, 2nd ed., Bern 1965, p. 120 f.; KRAMER/ ARNET (fn. 6), pp. 65, 88, 219; MEIER-HAYOZ, Lücken intra legem, in: Noll/Stratenwerth (eds.), Rechtsfindung, Beiträge zur juristischen Methodenlehre, Festschrift für Oscar Adolf Germann zum 80. Geburtstag, Bern 1969, p. 149 ff., 150; BIAGGINI, Verfassung und Richterrecht, Diss., Basel 1991, p. 90 f.; BK-EMMENEGGER/TSCHENTSCHER (fn. 5), Art. 1 ZGB N 367 f., 445; on German law RÖTHEL (fn. 87), p. 126 f.; RÜTHERS/FISCHER/BIRK, Rechtstheorie und Juristische Methoden- lehre, 12th ed, Munich 2022, N 836 et seq.; SANDER (fn. 73), p. 87; STROHN, Der Richter als Allround- Genie? - Rechtsfortbildung durch Anwendung nicht juristischer Fachbegriffe, ZHR 2014, p. 115 et seq., 117 et seq.

20 There are various manifestations of normative elements of the offence.[93] General clauses occupy a prominent position. A general clause is a normative factual element that constitutes the central regulatory content of a legal norm and is characterised by particularly qualified vagueness. Examples include the requirement of *"good faith"* under Art. 2 para. 1 CC or *"good morals"* under Art. 19 para. 2 CO.[94] Their meaning must be determined in an abstract manner using the legislative method.[95] The court must decide according to the rule that it would establish as a legislator (Art. 1 para. 2 alt. 2 CC).

21 A distinction must be made, at least terminologically, between those normative elements of the offence that instruct the court to decide on the basis of equity (Art. 4 CC, "discretionary concepts") and thus to make a decision that takes into account all the circumstances of the individual case.[96] Whether, in addition to the terminological distinction, a different methodological approach is also required depending on whether a general clause or a discretionary concept is being concretised is controversial.[97] In any case, the fact that, on the one hand, courts often focus on a discretionary concept even in the context of the actual legislative approach under Art. 1 para. 2 alt. 2 CC, but on the other hand, there is also a tendency towards generalisation in equity decisions, as the court must justify the decision in an objectively comprehensible manner.[98] This is all the more the case when general clauses contain discretionary elements in addition to undefined legal concepts.[99] It therefore seems convincing that, even if general clauses and discretionary concepts differ in their starting point and focus (at least in theory), they must be concretised in a similar, if not identical, way from a methodological perspective.[100]

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93 See footnote 88.

94 On the above, KRAMER/ARNET (fn. 6), p. 79 et seq.; BK-EMMENEGGER/TSCHENTSCHER (fn. 5), Art. 1 ZGB N 368.

95 KRAMER/ARNET (fn. 6), p. 314 f., 318 ff.; BK-MEIER-HAYOZ (fn. 1), Art. 1 ZGB N 31 ff. (the author deals with the topic of filling gaps, as he understands general clauses as gaps *intra legem* [see loc. cit., N 262 f. and N 266]); see also AUER, Materialisierung, Flexibilisierung, Richterfreiheit, Diss, Tübingen 2005, p. 144; BIAGGINI (fn. 92), p. 81 f.; F. BYDLINSKI, Möglichkeiten und Gren- zen der Präzisierung aktueller Generalklauseln, in: Behrends/Diesselhorst/Dreier (eds.), Rechts- dogmatik und praktische Vernunft, Symposion zum 80. Geburtstag von Franz Wieacker, Göttingen 1990, p. 189 ff., 196.

96 BSK ZGB I-FOUNTOULAKIS/HONSELL (fn. 57), Art. 4 N 10; GERMANN (fn. 92), p. 356; BK-HRUBESCH-MILLAUER (fn. 5), Art. 4 ZGB N 364; KRAMER/ARNET (fn. 6), p. 315 f.; BK-MEIER-HAYOZ (fn. 1), Art. 4 ZGB N 12 and N 18; RIEMER, Die Einleitungsartikel des Schweizerischen Zivilgesetz- buches, 2nd ed., Bern 2003, § 4 N 150.

97 S. Fn. 100.

98 BSK ZGB I-FOUNTOULAKIS/HONSELL (fn. 57), Art. 4 N 10; GERMANN (fn. 92), p. 356 f.; BK-Meier-Hayoz (fn. 1), Art. 4 CC N 19-21.

99 See BK-HRUBESCH-MILLAUER (fn. 5), Art. 4 ZGB N 213, cf. also N 135 et seq., 198 et seq.

100 For identity KRAMER/ARNET (fn. 6), p. 315 et seq., esp. 318: *"As a result, no difference in the basic methodological orientation can be recognised depending on whether the need for concretisation of the judicial*

b) Need for concretisation of Art. 8 UWG

Art. 8 UCA stipulates that *"anyone who uses general terms and conditions that provide for a significant and unjustified imbalance between contractual rights and contractual obligations to the detriment of consumers in a manner that violates good faith"* is acting unfairly. The unfairness required for a content review pursuant to Art. 8 UCA, in the context of which the elements of *"substantial", "unjustified" and "in breach of good faith"* are examined in combination, constitutes a general clause.[101] This is because, on the one hand, unfairness as the test step qualifying the imbalance embodies the central regulatory content of Art. 8 UCA, and on the other hand, it - or rather

The general clauses - and the normative elements of the offence on which they are based - have a particularly qualified openness.[102] However, terms such as *"substantial", "unjustified" and "in breach of good faith"* are also elements of the offence that need to be filled in, which qualify the disproportion and thus may require equity-oriented considerations according to the circumstances of the specific case (Art. 4 CC).[103] However, if the task of concretisation - as explained [above104] - is understood in parallel for general clauses and statutory references to judicial discretion, a methodologically coherent approach is also possible within the framework of Art. 8 UCA. This is because the court must also carry out an abstract unfairness test in the individual action, in parallel to the collective action pursuant to Art. 10 UCA.[105] Problematic GTC clauses are used across the board in the respective industry, so that the criteria used in the substantive and legal assessment of the unfairness of the GTC clauses can be applied to the entire industry.

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decision is based on Art. 1 para. 2 or Art. 4 ZGB"; DIENER, Das Ermessen (Art. 4 Z.G.B.), Ein Beitrag zur allgemeinen Rechtslehre, Diss., Wald 1920, p. 85: *"Aus der Gleichartigkeit im Wesen der beiden Artikel ergibt sich auch eine Gleichartigkeit in ihren Folgen";* ZK-DÜRR (fn. 87), Art. 4 ZGB N 92 f., 98-100, esp. N 93: "*And this* [the only difference] *is ultimately irrelevant* [...]*";* BSK ZGB I-FOUNTOULAKIS/HONSELL (fn. 57), Art. 4 N 10 *("identical");* in favour of similarity: GERMANN (fn. 92), p. 356 *("largely balanced");* more reserved RIEMER (fn. 96), § 4 N 151; insofar as **a.M.**, as a strict separation in the interpretation is advocated BK-EMMENEGGER/TSCHENTSCHER (fn. 5), Art. 1 ZGB N 448-450 (however, this separation is relativised under certain circumstances, see N 469); BK-HRUBESCH-MILLAUER (fn. 5), Art. 4 ZGB N 235, 364.

[101] ATAMER (fn. 23), ZSR 2024 II, p. 356; KOLLER (fn. 30), AJP 2014, p. 27 f.; KRAMER, Das unfertige Gebäude der AGB-Inhaltskontrolle im schweizerischen Recht, recht 2023, p. 181 ff., 183, 188; see also F. BYDLINSKI (fn. 95), Symposion Wieacker, p. 189.

[102] Namely HEISS, in: Heizmann/Loacker (eds.), Dike-Kommentar, Bundesgesetz gegen den unlauteren Wettbewerb, Zurich/St. Gallen 2018, Art. 8 N 190: *"Armut an Leitkriterien", "Rechtsunsi- cherheit wird soart zum Strukturmerkmal des neuen Tatbestandes"* (emphasis removed); KOLLER (fn. 30), AJP 2014, p. 27: *"formulated in an extraordinarily open manner";* very cautious in this regard, Message on the Amendment of the Federal Act against Unfair Competition (UCA) of 2 September 2009, BBl 2009 6151, p. 6179: *"certain openness".*

[103] ATAMER (fn. 23), ZSR 2024 II, p. 356; see also BSK UWG-THOUVENIN (fn. 30), Art. 8 N 115, which states that abusive behaviour can only be determined on the basis of an assessment.

[104] S. N 21.

[105] See ATAMER (fn. 23), ZSR 2024 II, p. 363 et seq. with numerous references.

The arguments to be developed by the court must apply equally to other consumers bound by the corresponding GTC, i.e. they must be capable of generalisation. This is also a consequence of the principle of legal equality, to which the court is bound.[106]

23 The court must therefore use the legislative method to create a rule according to which the case can be decided. Methodologically, this involves the formation of groups of cases that can be used to guide future decisions.[107] A look abroad shows that various legislators provide the courts with such rules in the form of lists of examples of unfair terms.[108] Swiss competition law also has such lists, for example in Art. 3 UCA, where examples of unfair competitive behaviour are listed in accordance with Art. 2 UCA. To date, there is no such list for monitoring the content of general terms and conditions. Provisions such as Art. 141 para. 1bis, Art. 256 para. 2 lit. a, Art. 288 para. 2 lit. a CO and Art. 8a UCA, which identify unfair terms, have remained an exception.[109] As a result, the courts have a *"central task of legal policy concretisation "*[110].

24 In this context, the court must carry out a two-stage concretisation:[111] The first step is to determine how the rights and obligations of the contracting parties should ideally be distributed in the situation governed by the GTC clause in question. The aim here is to determine the objectively balanced situation and the relevant standard of valuation for this type of contract. The aim is to determine a normative model, i.e. the regulation that would be applicable to the relevant facts without the disputed GTC clause. Dispositive legal rules are primarily used as a standard of comparison.[112] In the absence of such rules, the court must make an appropriate distribution of rights and obligations in accordance with the nature of the contract and thus develop the reference standard itself.[113]

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[106] BK-HRUBESCH-MILLAUER (fn. 5), Art. 4 ZGB N 336 ff.; KRAMER/ARNET (fn. 6), p. 316; BK-Meier-Hayoz (fn. 1), Art. 4 ZGB N 21.

[107] See STROHN (footnote 92), ZHR 2014, p. 122.

[108] See for the EU the Annex to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; for Germany §§ 308 f. BGB; for Austria § 6 KSchG.

[109] In addition, there are some mandatory legal norms that always apply - regardless of whether they have been deviated from in negotiated contracts or in general terms and conditions (e.g. Art. 100, 101, 199, 210 para. 4 CO).

[110] Meier-Hayoz (fn. 19), JZ 1981, p. 423.

[111] See ATAMER (fn. 23), ZSR 2024 II, p. 348 et seq.

[112] See DIKE UWG-HEISS (fn. 102), Art. 8 N 193 et seq.; HUGUENIN, Obligationenrecht, Allgemei- ner und Besonderer Teil, 3rd ed., Zurich/Basel/Geneva 2019, N 635 et seq.; KRAMER (fn. 101), recht 2023, p. 186; KRAMER/PROBST/PERRIG (fn. 44), N 759; BSK UWG-THOUVENIN (fn. 30), Art. 8 N 126 et seq.; FERRARI HOFER/VASELLA, in: Amstutz/Atamer (eds.), Handkommentar zum Schweizer Privat- recht, Vol. 8, 4th ed., Zurich 2023, Art. 8 UWG N 6; ATAMER (fn. 23), ZSR 2024 II, p. 348 et seq.

[113] DIKE UWG-HEISS (fn. 102), Art. 8 N 205; BSK UWG-THOUVENIN (fn. 30), Art. 8 N 128; PROBST, in: Jung/Spitz (eds.), Stämpflis Handkommentar, Bundesgesetz gegen den unlauteren Wettbe-

In a second and more important step, it must then be examined whether the clause in the specific case deviates so significantly from the established reference standard that it must be regarded as unfair within the meaning of Art. 8 UCA. The expectation in the second
The expectation in the second concretisation step is that courts will draw up the missing list of prohibition standards[114].
"The model of systematic-deductive reasoning in the sense of legal syllogism largely fails here; it is replaced by a problem-oriented (not system-oriented) 'discursivité non déductive', an inductive-heuristic weighing of solution aspects ('topoi', singular: 'topos') of legal or extra-legal provenance, namely the assessment of the consequences of a judicial precedent, whereby the interests of all parties involved must be taken into account."[115] A rule is formulated that anticipates a weighing of interests for all comparable types of contracts or GTC provisions and thus determines when there is a significant and unjustified imbalance between the contractual rights and obligations to the detriment of consumers in good faith, so that the limit of unfairness is reached.[116] As long as the Swiss legislator does not make up for this list of prohibitions, it is the task of the courts to make this concretisation in accordance with the delegation mandate. To ensure that this balancing process does not remain decisional, but can fulfil a rule-making function[117] - which is particularly necessary in GTC law - it is particularly important to disclose and justify the underlying assessments and preferences.[118]

c) Guidelines for concretisation

If Art. 8 UCA is to be concretised in such a way that actual prohibition norms of unfair terms are developed, this procedure must take place within formal and substantive guidelines.[119] In formal terms, the court must establish such a rule that it would establish as a legislator (Uni-

werb (UWG), 3rd ed., Bern 2023, Art. 8 N 436; FUCHS, in: Ulmer/Brandner/Hensen (eds.), AGB- Recht, Kommentar, 13th ed., Cologne 2022, § 307 BGB para. 238; see also ATAMER (fn. 23), ZSR 2024 II, p. 359 f., fn. 78 with further references.

[114] Concerning such lists see. N 23.

115 KRAMER/ARNET (fn. 6), p. 323 f.; see also RÖTHEL (fn. 87), p. 141 et seq.

[116] See ATAMER (fn. 23), ZSR 2024 II, p. 353 et seq. on the balancing of interests in the context of GTC control.

[117] See RÖTHEL (fn. 87), p. 148 et seq.

[118] This follows from the right to be heard, see BGE 136 I 229, E. 5.2; BSK BV-WALDMANN (fn. 18), Art. 29 N 57; see also KRAMER/ARNET (fn. 6), p. 43; also RÖTHEL (fn. 87), p. 139 f., who considers justifiability to be the most important guideline for concretisation.

[119] KRAMER/ARNET (fn. 6): formal principles of the rule of law (p. 281 ff.) and substantive points of orientation (p. 287 ff.); see also BK-Meier-Hayoz (fn. 1), Art. 1 ZGB N 316 ff. *("Method")* and N 353 *("Aids");* similarly also BK-EMMENEGGER/TSCHENTSCHER (fn. 5), Art. 1 ZGB N 451 ff. *("Contents and criteria");* CHK-MIDDENDORF (fn. 60), Art. 1 ZGB N 12 *("Methodological requirements").*

principle of realisability).[120] In terms of content, the court is provided with various instruments - similar to the interpretation[121] - by means of which a concretisation is to be carried out.[122] In particular, precedents, relevant doctrine,[123] general legal principles[124] and comparative legal findings[125] are of particular importance in the concretisation, just as they are in the creation of judge-made law that overrides the law.[126]

27 The extent to which non-legal arguments can be taken into account, on the other hand, is not uniformly answered.[127] EUGEN HUBER already stated that the realia - i.e. the "reality" - "belong *to both the shaping and the application of the law, in that they set certain conditions for both, which neither the legislature nor the judge may overlook".*[128] As a result, in older[129] as well as more recent[130] contributions to methodology (almost undisputed)[131] and also in federal court jurisprudence[132] the realist element is found either as an independent instrument of legal interpretation or as one of the classical elements of interpretation.

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[120] See in detail KRAMER/ARNET (fn. 6), p. 281 ff.; see also HASENBÖHLER (fn. 85), p. 108 f.; HÜRLI- MANN-KAUP/SCHMID, Einleitungsartikel des ZGB und Personenrecht, 4th ed., Zurich/Geneva 2024, p. 61; BK-Meier-Hayoz (fn. 1), Art. 1 ZGB N 316 et seq.

[121] S. LARENZ/CANARIS (fn. 6), according to which *"the same criteria that* [also] *play a role in the interpretation"* (loc. cit., p. 188) are *largely* relevant.

[122] ZK-DÜRR (fn. 87), Art. 4 ZGB N 108 ff.; KRAMER/ARNET (fn. 6), p. 287 ff.; see also RÖTHEL (fn. 87), p. 124 et seq.

[123] S.a. Art. 1 para. 3 ZGB: *"It follows established doctrine and tradition";* F. BYDLINSKI (fn. 95), Symposion Wieacker, p. 190 ff.

[124] See also BSK ZGB I-HONSELL (fn. 57), Art. 1 N 36; BK-Meier-Hayoz (fn. 1), Art. 1 ZGB N 405 et seq.

[125] See also BK-EMMENEGGER/TSCHENTSCHER (fn. 5), Art. 1 ZGB N 461; BSK ZGB I-HONSELL (fn. 57), Art. 1 N 36; BK-Meier-Hayoz (fn. 1), Art. 1 ZGB N 355 et seq.; see also BGE 126 III 129, E. 4: "*Moreover, in traditionally cross-border legal relations, an appropriate finding of law and thus also the filling of gaps cannot be realised without a comparative law basis* [...]*";* see also BGE 118 II 459, E. 3e.

[126] See KRAMER/ARNET (fn. 6), p. 287 et seq. for details.

[127] For example, GERMANN (fn. 92), p. 150 et seq.; HEINEMANN (fn. 14), FS Nobel, p. 41; BSK ZGB I-HONSELL (fn. 57), Art. 1 N 36; KRADOLFER (fn. 68), "Justice - Justiz - Giustizia" 2022/4, N 3; KRAMER/ ARNET (fn. 6), p. 284, 305 et seq.; SCHMIDT (fn. 73), FS Wassermann, p. 811.

[128] EUGEN HUBER, Recht und Rechtsverwirklichung, Probleme der Gesetzgebung und der Rechtsphilosophie, Basel 1921, p. 281. Before him (1912/13) already EGGER, Schweizerische Rechtsprechung und Rechtswissenschaft, Berlin/Heidelberg 1913, p. 42: *"If it* [jurisprudence] *is to fulfil its critical and creative task, then it requires knowledge of the real processes of life."*

129 See BK-Meier-Hayoz (fn. 1), Art. 1 ZGB N 210 ff. and N 323 ff.

[130] Instead of many ZK-DÜRR (fn. 87), Art. 1 ZGB N 89 f., 167-187; BK-EMMENEGGER/TSCHENTSCHER (fn. 5), Art. 1 ZGB N 325 ff., 462 ff.; KRAMER/ARNET (fn. 6), p. 197 ff.

[131] Rejecting the form set out here, for example SHK-HAUSHEER/JAUN (fn. 87), Art. 1 ZGB N 152.

[132] BGE 126 III 129, E. 4; BGer 6B_582/2017, E. 2.1.2; going even further, BGE 131 II 13, E. 7.1: "*The currently applicable law must be determined.*

to be determined is the law currently in force, which cannot be understood without reference to reality [...]."

[133] The realistic element is primarily applied where the law is interwoven with other areas of science, such as in the field of commercial law.[134] The creation of a reference to reality appears all the more appropriate where the court is (at least de facto)[135] required to formulate the law in a judicial manner when concretising general clauses.[136] For it is precisely the court which, pursuant to Art. 1 para. 2 CC, has to *"*slip *into the shoes of the legislator "*[137] and must therefore form its own independent view of the actual circumstances, the interests involved and the effects of the planned regulation. This legally and methodologically important task must not be shifted to the parties to the proceedings with reference to the principle of negotiation, and all the less may the court disregard relevant factual circumstances in this regard simply because the parties have not presented them.[138] As a *"mini-legislator "*[139] , the court must therefore also have (at least) the most important sources of knowledge for the legislator - i.e. not only legal and political, but also economic and psychological ones.[140] This is because *"legal norms are only meaningful if they relate to* [*reality*] *by taking into account the realities of the situation.*

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[133] On the possibilities of taking realities into account in connection with the teleological element of interpretation, see for example HOFFMANN-RIEM, Zwischenschritte zur Modernisierung der Rechtswissenschaft, JZ 2007, p. 645 ff., 647; PETERSEN/TOWFIGH (fn. 8), N 19; in relation to efficiency also EIDENMÜLLER, Effizienz als Rechtsprinzip, Möglichkeiten und Grenzen der ökonomi- schen Analyse des Rechts, diss. 4th ed., Tübingen 2015, p. 451 ff.

[134] BK-EMMENEGGER/TSCHENTSCHER (fn. 5), Art. 1 ZGB N 327; KUNZ, Sondermethodik zur wirtrecht 2017, p. 141 et seq., 149.

[135] See already N 19.

[136] MARTENS, Rechtliche und ausserrechtliche Argumente, Rechtstheorie 2011, p. 145 ff., 163 f.; in detail (also on the concrete benefits) STARK (fn. 2), p. 245-247; see also HERGENRÖDER, Zivilprozes- suale Grundlagen richterlicher Rechtsfortbildung, Habil, Tübingen 1995, p. 336 et seq.; **see also** BGE 114 II 239, E. 5b: "*The judicial development of the law that transcends the law has its limits from the outset where an answer cannot be found within the framework of the applicable legal system with specific legal considerations alone* [...]." However, this decision is to a certain extent at odds with the Federal Supreme Court decisions cited in footnote 132.

[137] HASENBÖHLER (fn. 85), p. 109; see also Meier-Hayoz (fn. 19), JZ 1981, p. 418.

[138] SCHMIDT (fn. 73), FS Wassermann, p. 812.

[139] HASENBÖHLER (fn. 85), p. 109.

[140] EUGEN HUBER, in: Amtliches stenographisches Bulletin der schweizerischen Bundes- versammlung, Nationalrat, 1906, p. 1036: *"With this last sentence* [...] *the judge is thus instructed* [...] *to place himself on the high level of the legislator and to form the applicable legal principle according to the motives given to the legislator, so that he has to pronounce his judgement for this case according to the considerations that must underlie correct legislation";* in this sense also DESCHENAUX, Der Einleitungstitel, in: Gutzwiller (ed.), Schweizerisches Privatrecht, zweiter Band, Einleitung und Personenrecht, Basel 1967, p. 1 ff, 108; HASENBÖH- LER (fn. 85), p. 109; on German law, RÖTHEL (fn. 87), p. 86 ff.; SCHMIDT (fn. 73), FS Wassermann, p. 809 f., who speaks of the inclusion of *"social data"* (p. 810).

The Federal Supreme Court also states that, in connection with the realistic element, "[e]*mpirical-scientific data* [...] are *used to give content to undefined legal concepts* [...]".[142]

28 Within the framework of the realistic element, it is therefore the task of the courts to infer the meaning of a norm by taking into account the actual circumstances.[143] The actual circumstances naturally also include supra-individual realities (so-called legal facts),[144] which, although they do not specifically affect the concrete facts of the case, nevertheless show relevant references to the (applicable) law.[145] *"In the form of statistical, legal-sociological, medical, etc. data, [such legal facts] form the basis for defining a judicial standard.* Such legal facts] [...] *form the basis for the definition of a judicial standard* [...]. "[146]

29 There is no doubt that opening up the spectrum of judicial argumentation to the findings of other sciences harbours risks and difficulties. For example, from a practical legal perspective, it is pointed out that judicial expertise is primarily geared towards legal argumentation and not towards the utilisation of empirical findings and that the courts may have to be provided with considerable factual and personal resources in order to cope with the task of judging with non-legal findings.[147] Furthermore, the procedural rules of civil proceedings - apart from the establishment of the facts of the individual case[148] - are not at all geared towards the courts activating non-legal expertise.[149]

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[141] STARCK, Empirie in der Rechtsdogmatik, JZ 1972, p. 609 ff., 612; see also MATHIS, Interdisziplinarität und Rechtswissenschaft, ius.full 2021, p. 196 ff., 199.

[142] BGer 6B_582/2017, E. 2.1.2 (on this decision already in detail N 16 f.).

[143] BK-EMMENEGGER/TSCHENTSCHER (fn. 5), Art. 1 ZGB N 325. This includes not only the factual circumstances at the time of the enactment of a legal norm (as argued by SHK-Hausheer/ JAUN [fn. 87], Art. 1 ZGB N 152), but also the current circumstances (see BK- EMMENEGGER/TSCHENTSCHER [fn. 5], Art. 1 ZGB N 326); see also LARENZ/CANARIS (fn. 6), p. 12:
"The jurist must take into account the social circumstances to which a norm refers when interpreting it."

[144] See already N 16 f. on these in detail.

[145] S. BGer 6B_582/2017, E. 2.1.2; ZK-DÜRR (fn. 87), Art. 1 ZGB N 179; on German law SANDER (fn. 73), p. 86 ff., esp. pp. 95-97; SCHMIDT (fn. 73), FS Wassermann, p. 809 f.

[146] BGer 6B_582/2017, E. 2.1.2; see also FORSTMOSER/VOGT (fn. 91), p. 589; BK-Meier-Hayoz (fn. 1), Art. 1 ZGB N 211.

[147] See, for example, CROON-GESTEFELD, Interdisziplinäres Arbeiten der Zivilgerichte, in: Christandl *et al.* (eds.), Intra- und Interdisziplinarität im Zivilrecht, Jahrbuch Junger Zivilrechtswissenschaftlicher 2017, Baden-Baden 2018, p. 51 et seq, 67 f.; EIDENMÜLLER (fn. 133), p. 394 (in relation to economics); LURGER (fn. 18), p. 130; PETERSEN, Braucht die Rechtswissenschaft eine empirische Wende?, Der Staat 2010, p. 435 ff., 447 ff., esp. p. 451; SCHMIDT (fn. 73), FS Wassermann, p. 813 f.; see also MEIER (fn. 2), p. 29 f.

[148] On the distinction between legal facts and facts of the individual case N 16 f.

[149] See for example BIAGGINI (fn. 92), p. 395; cf. also SCHMIDT (fn. 73), FS Wassermann, p. 814 f.

This criticism is certainly justified. However, it should not be overlooked that jurisprudence plays a central role in analysing such arguments. In particular, it is up to law to seek dialogue with neighbouring sciences.

[150] Such interdisciplinary interactions can create useful links,[151] which the courts can in turn draw on when making their decisions. How science can adopt non-legal arguments as its own is assessed differently.[152] However, it goes without saying that this can only be done in the form of a reflected adoption, in which each argument is critically examined at the legal level and integrated into the dogmatic analysis.[153]

5. Potential influence of behavioural economic findings on the decision of the District Court of Bülach

As already stated,[154] the qualification of a GTC clause as unfair requires a judgement. 31
requires an assessment. According to the above, the court must determine *modo legislatoris* on the basis of which criteria this assessment is to be made. The District Court of Bülach has Art. 8 UCA in so far as it held - in accordance with the doctrine and previous case law - that within the framework of Art. 8 UCA, a comprehensive

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[150] S. (in relation to the economic analysis of law) NOBEL, Zur Koexistenz von Recht und Öko- nomie: ökonomische Analyse des Rechts als Aufforderung zum Dialog, in: Dubs *et al.* (eds.), Der Kanton St. Gallen und seine Hochschule, Beiträge zur Eröffnung des Bibliothekbaus, St. Gallen 1989, p. 454 ff., 458; see also HEINEMANN (fn. 14), FS Nobel, p. 40 f.

[151] PETERSEN (fn. 147), Der Staat 2010, p. 455, speaks of "*scientist*[s] *who perform a certain bridging function* [...]*"*; see also AUGSBERG, Von einem neuerdings erhobenen empirischen Ton in der Rechtswissenschaft, Der Staat 2012, pp. 117 ff., 119.

152 ALTWICKER (fn. 2), ZSR 2019 I, p. 181, takes a very open position in this regard; P. BYDLINSKI, Grundzüge der juristischen Methodenlehre, 4th ed, Vienna 2023, p. 63; EIDENMÜLLER, Rechtswissenschaft als Realwissenschaft, JZ 1999, p. 53 ff.; HEINEMANN (fn. 14), FS Nobel, p. 27 f.; OTT/SCHÄFER, Die ökonomische Analyse des Rechts - Irrweg oder Chance wissenschaftlicher Rechtserkenntnis?, JZ 1988, p. 213 ff., 214; HOFFMANN-RIEM (fn. 133), p. 649; MATHIS (fn. 141), ius.full 2021, p. 196; PETERSEN/TOWFIGH (fn. 8), N 18; ZÄCH (fn. 19), ZSR 1977 I, p. 326; taking a more hesitant stance ERNST, Gelehrtes Recht, Die Jurisprudenz aus der Sicht des Zivilrechtslehrers, in: Engel/Schön (eds.), Das Proprium der Rechtswissenschaft, Tübingen 2007, p. 3 ff., 15 ff., esp. p. 19 f.: generally rejecting LOBINGER, Perspektiven der Privatrechtsdogmatik am Beispiel des allgemeinen Gleichbehandlungsrechts, AcP 2016, p. 28 ff., 39, 79, 105; RITTNER, Das Modell des homo oeconomicus und die Jurisprudenz, JZ 2005, p. 668 ff., 669 f.

[153] FLEISCHER, Gesellschafts- und Kapitalmarktrecht als wissenschaftliche Disziplin, in: Engel/Schön (eds.), Das Proprium der Rechtswissenschaft, Tübingen 2007, p. 50 ff., 76.

[154] S. N 22-25.

The court further specified that this balancing of interests would be to the detriment of the user of the GTC (i.e. abusive) if the user of the GTC abused its drafting power in order to pursue its own interests with the GTC in a significant and unjustified manner.[156] The court came to the conclusion that these conditions were not met, as the GTC user had legitimate reasons for introducing the GTC provision and these were (also) in the customer's favour.[157]

32 As explained above, the court would have had to determine the standard of comparison used to determine whether a disproportion exists as a first step. Dispositive contract law, to which recourse is to be made in the first instance, provides for the vast majority of cases that the termination of a contract by rescission or cancellation is not subject to any formal or receipt requirements.[158] In other words, the contracting parties can generally also terminate the contract verbally or by letter post. Furthermore, the dispositive law assumes that the termination constitutes a unilateral declaration of intent.[159] By making the customers in the example of the Bülach District Court de facto dependent on the cooperation of employees of the GTC provider for a successful termination,[160] the termination mutates into a consensual transaction, which runs counter to the character of a unilateral declaration of intent. According to the above, the special requirements of the call or live chat deviate from dispositive law, which is why there is a disproportion.

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[155] BezGer Bülach FV210068 of 22 December 2022, E. V: *"Accordingly, when evaluating GTCs according to the standard of good faith, a comprehensive weighing of all interests worthy of protection of the GTC user and the consumer must be carried out* [...]*";* from previous case law, for example HGer ZH HG210223, E. 7.3.4.3 *("proportionality test");* cf. in detail ATAMER (fn. 23), ZSR 2024 II, p. 345 ff.; see also ATAMER/FURGER, Klassiker der Banken- AGB: Vertragsänderungsvorbehalt- und Retrozessionsverzichtsklauseln, SZW 2024, p. 140 et seq., 146 with further references; see also Botschaft UWG (fn. 102), p. 6179.

[156] Similarly BGH VII ZR 249/12 of 4 July 2013, para. 23 *("if the user abusively seeks to assert his own interests at the expense of his contractual partner by unilaterally drafting the contract without sufficiently taking into account his interests from the outset and granting him appropriate compensation");* see also ATAMER (fn. 23), ZSR 2024 II, p. 355.

[157] See the decision in detail N 7 et seq.

[158] An important exception is tenancy law (see Art. 266l para. 1 CO); see also Art. 298 para. 1 CO on leases; Art. 406e para. 3 CO on marriage or partnership brokerage.

[159] BGE 113 II 259, E. 2a; KOLLER, Ordentliche, fristlose und missbräuchliche Kündigung des Arbeitsvertrages, AJP 1995, p. 1251 ff., 1251.

[160] As can be seen from the customer complaints in footnote 50, the employees of the GTC user can refuse to co-operate and thus make the termination impossible; see also RUSCH (footnote 23), recht 2024, p. 226.

In a second step, the court would have had to determine whether or under what circumstances this deviation is so significant that it can be assumed to be abusive. In our opinion, it would have been appropriate, within the framework of the realistic element, to develop a case group of unfair GTC clauses. 33

This is because, taking into account the actual circumstances - proven by empirical scientific studies - such hurdles introduced by the GTC provision in the termination process have a considerable influence on customers' willingness to terminate and lead to just such *"successes* for companies *in the sense of preventing terminations that are objectively in their interests"*.[161]

A look across borders also shows that this problem is widespread.[162] Thus various legislators have included a corresponding group of cases in their exemplary lists of unfair terms.[163] Austrian law, for example, provides in Section 879 ABGB in conjunction with Section 6 (1) no. § 6 para. 1 no. 4 KSchG, for example, provides that *"*[f]or *the consumer* [...] *particularly such* 34

contractual provisions within the meaning of Section 879 ABGB are *in any case not binding, according to which* [Clause 4] *a notification or declaration to be made by the consumer to the entrepreneur or a third party must fulfil a stricter form than the written form or special access requirements".* Furthermore, German law also provides for a similar, even more restrictive group of cases of absolutely invalid general terms and conditions clauses in Section 309 (13) (b) and (c) BGB: *"Even insofar as a deviation from the statutory provisions is permissible, a provision in general terms and conditions is invalid* [para. 13] *a provision by which notices or declarations to be given to the user or to a third party are bound* [lit. b] *to a stricter form than the text form in contracts other than those referred to in letter* [a164] *or* [lit. c] *to special conditions.*

[161] Consumer Commission Baden-Württemberg (fn. 40) (the opinion is based on the expert opinion cited in fn. 40), p. 4; see also N 11 et seq.

[162] Consumer Commission Baden-Württemberg (fn. 40), p. 4: "*It is noticeable from numerous consumer complaints and the resulting proceedings of the consumer centres that cancellations are made dependent on callbacks or confirmations from the provider, for example, or that consumers can allegedly only cancel in certain ways* [...]*";* SOLMECKE, Das Gesetz für faire Ver- braucherverträge - Das Ende der Endlosverträge bei Handys und Streaming, K&R 2021, p. 613 et seq, 614: "*Customers are often referred to letters, a fax or even a telephone hotline instead* [instead of an online cancellation option]*, where they are then supposed to be persuaded to waive the cancellation."*

[163] See already N 23 on these lists.

164 "Letter a" covers contracts for which the law provides for notarisation.

access requirements. "[165] It is emphasised that a GTC clause that only permits a declaration by telephone is also invalid pursuant to Section 309 No. 13 lit. b BGB.[166] However, GTC clauses that only provide for termination by telephone or online chat fall under Section 309 No. 13 lit. c BGB.[167] This is because both the call and the online chat requirement generally - but especially in the example of the District Court of Bülach[168] mentioned above - require that employees of the GTC user accept and confirm the cancellation. Such a requirement of actual acknowledgement constitutes an unauthorised special receipt requirement pursuant to Section 309 No. 13 lit. c BGB.[169]

35 These problems have become particularly acute in recent years due to the conclusion of long-term contracts - such as streaming, telephone or internet contracts - via digital channels. Here too, termination options are made more difficult by the fact that customers are expected to comply with complicated or unusual processes.[170] To counteract these developments, the German legislator enacted a so-called law for fair consumer contracts in 2021, probably based on an opinion[171] influenced by behavioural economics and the expert opinion on which it was based.[172] According to

165 On this provision, for example, COESTER-WALTJEN, in: Staudinger BGB, Buch 2: Recht der Schuldverhältnisse, 15th ed., Berlin 2022, Section 309 No. 13 marginal nos. 6-7b.

166 DAMMANN, in: Wolf/Lindacher/Pfeiffer (eds.), AGB-Recht, Kommentar, 7th ed., Munich 2020, § Section 309 No. 13 para. 28: *"For this reason, a formal requirement is generally only milder than a text or written form requirement if it also leaves the customer the freedom to choose the text or written form"* (emphasis removed); agreeing WEILER, in: Gsell *et al.* (eds.), beck-online. GROSSKOMMENTAR, as of 1 December 2024, Section 309 BGB No. 13 marginal no. 42; as does WURMNEST, in: Säcker *et al.* (eds.), Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB, Band 2: Schuld- recht - Allgemeiner Teil I: §§ 241-310, Munich 2019, Section 309 No. 13 marginal no. 8, which states that the requirements for the text form may not be changed to the detriment of the contractual partner.

167 See on the requirement of access via a hotline expressly BECKER, in: Hau/Poseck (ed.), BeckOK BGB, status: 1 May 2024, Section 309 No. 13 para. 9.

168 See in this regard the customer complaints in footnote 50.

169 BECKOGK/WEILER (fn. 166), Section 309 BGB No. 13 para. 54: *"This is the case if the actual knowledge* [...] *is taken as a basis."*

170 See, for example, BRÖNNEKE/SCHMIDT (fn. 40), p. 16 et seq. (p. 16: *"The publicly accessible areas of the websites [external areas] of 37 companies were analysed with regard to the number of necessary 'clicks' by a [randomly selected] test.*
The publicly accessible areas of the websites [external areas] of 37 companies were analysed with regard to the number of 'clicks' required from a [randomly selected] product page to the first mention of cancellation information [deadline, form, form; GTC mentioned separately]"; loc. cit. p. 32: "*If one considers the economic background, such a* [complicated] *design of the webpages is in the interests of the providers, it is a 'customer loyalty programme' of its own kind, which, however, is not justified by anything from the overriding public interest perspective."*).

171 Consumer Commission Baden-Württemberg (fn. 40).

172 BRÖNNEKE/SCHMIDT (fn. 40).

173 See also STIEGLER (fn. 51), p. 443.

This obliges companies in relation to certain contracts *to "ensure that the consumer can make a declaration on the website for the ordinary* [...] *cancellation of a contract that can be concluded on the website* [...] *via a cancellation button. The cancellation button must be legibly labelled with nothing other than the words 'Cancel contracts here' or with a corresponding unambiguous formulation."* (Section 312k (2) BGB).[174] The "Cancel" button must lead directly to a form page on which the consumer can identify himself and effectively submit the cancellation request by clicking on the "Cancel now" button. The French legislator followed the German[175] and added Art. L-215-1-1 to the *Code de la consommation* with the aim of making cancellation possible in just a few steps and allowing the consumer to benefit from better offers on the market.[176] The English legislator has also included an explicit provision for the easy and quick termination of *subscription contracts* in *Sec.* 260(1) of the *Digital Markets, Competition and Consumers Act 2024*.[177]

Against this background, the District Court of Bülach can be agreed with insofar as *"cancellation modalities* must be *adapted to the digital and complex needs "*[178] . However, such an adaptation does not take place by forcing the customer to make a telephone call or communicate via a live chat, but rather, for example, by giving them the (simple) option of cancelling their contract with just a few clicks on the website.
to cancel their contract with just a few clicks on the website without having to involve the GTC user.

Finally, it is necessary to answer what kind of case group of abusive clauses pursuant to Art. 8 UCA could have been developed in the example of the District Court of Zurich. Taking into account the behavioural economics and comparative law findings, it seems appropriate in any case that the customer should be given a right of cancellation.

[174] See STIEGLER (fn. 51), p. 443 et seq. on the legislative process and the provision in detail.

[175] See DOUVILLE, La résiliation par voie électronique, Recueil Dalloz 2022, p. 1602 et seq.

[176] S. Art. 15 LOI nº 2022-1158 du 16 août 2022 portant mesures d'urgence pour la protection du pou- voir d'achat; see BERNHEIM-DESVAUX, Les incidences en droit de la consommation de l'adoption de la loi dite pouvoir d'achat, Contrats Concurrence Consommation, Éditions techniques - Édi- tions du Juris-classeur - LexisNexis 2022, nº 162; s.a. <https://www.francenum.gouv.fr/guides-et-conseils/developpement-commercial/gestion-de-la-relation-client/resiliation-en-3-clics>.

[177] See in detail BUSCH/TWIGG-FLESNER, A Roadmap for Regulating Subscriptions in the Digital Fairness Act, EuCML 2024, p. 234 ff., 240.

[178] BezGer Bülach FV210068 of 22 December 2022, E. VI, 2.2.3.2.

the possibility of cancellation, which he can exercise without the involvement of the GTC user. Accordingly, the result of such a concretisation could have been something like this:

A GTC clause is unfair, in particular, if it
conditions for cancellation by the consumer that do not at least allow cancellation in text form.

38 According to this case group of Art. 8 UCA, the cancellation would have to be permitted *at least* in a form that allows proof by text.[179] The text form as a formal requirement is already known in Swiss law.[180] For example, it is provided for in court and arbitration agreements (Art. 17 para. 2 and Art. 358 para. 1 ZPO) and for the fulfilment of the duty of orientation in doorstep selling (Art. 40d para. 1 OR). The "at least" is intended to express the fact that the GTC user can continue to enable, but not enforce, cancellation via other channels, such as by telephone or an online cancellation button. Parallel to such (alternative) channels, cancellation in text form must also be possible in any case.[181]

39 In view of the fact that it is increasingly possible to conclude contracts via the internet, it would be timely and desirable if (simple) cancellation via the internet were also made possible for such providers - along the lines of Section 312k BGB. The approach of *"*[p]*arallel initiation and cancellation methods* "[182] is also a trend that is establishing itself globally; for example, a number of

[179] RUSCH (fn. 23), recht 2024, p. 225 f., according to which termination must always be possible in writing, is less far-reaching.

[180] See for example HUGUENIN (fn. 112), N 347; MÜLLER, Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Obligationenrecht, Allgemeine Bestimmungen, Art. 1-18 OR mit allgemeiner Einleitung in das schweizerische Obligationenrecht, Art. 11 N 95 ff.

[181] This also applies to German law with regard to the relationship between Section 312k (cancellation button) and Section 309 No. 13 (control of general terms and conditions) BGB: Resolution recommendation and report of the Committee on Legal Affairs and Consumer Protection of 18 June 2021, 19/30840, p. 16; GÜSTER/BOOKE, Kündigungsbutton-Pflicht bei Dauerschuldverhältnissen, MMR 2022, p. 450 ff., 450; see also footnote 166 on Section 309 No. 13 BGB.

[182] Cox/Caruso (fn. 44), p. 1650.

Various states in the USA,[183] the Netherlands[184] and Denmark[185] have corresponding regulations.[186] However, such a provision cannot be created through the concretisation of Art. 8 UCA. This is because the open GTC content control is aimed at prohibiting *unfair* terms and is not suitable for creating conditions *that are necessary* from a behavioural economics,[187] comparative law,[188] but also market economy[189] perspective. The creation of such a regulation would have to be addressed by the legislator.

6. Appraisal

The law in general, but also the judicial decision-making process in 40
in particular should not *per se* be closed to findings of a non-legal or interdisciplinary nature. Rather, it seems necessary that legal doctrine

[183] For example, California (§ 17602[d][1] Business and Professions Code [BPC]: *"*[A] *business that allows a consumer to accept an automatic renewal or continuous service offer online shall allow a consumer to terminate the automatic renewal or continuous service exclusively online, at will, and without enga- ging any further steps that obstruct or delay the consumer's ability to terminate the automatic renewal or continuous service immediately*"), Delaware (§ 2732[4] Delaware Code, Title 6, Commerce and Trade: *"*[...]. *A consumer who enters into a contract online shall be permitted to cancel the contract online"*), Florida (§ 501.165[2][d] Florida Statutes: *"A seller that enters into or renews any service con- tract with a consumer which includes an automatic renewal provision must allow the consumer to can- cel the service contract in the same manner, and by the same means, as the consumer manifested his or her acceptance of the service contract"*), Illinois (Illinois Compiled Statutes 815 ILCS 601/10[b-5]:
"[...]. *A consumer who accepts an automatic renewal or continuous service offer online must be allowed to terminate the automatic renewal or continuous service exclusively online, which may include a termination email formatted and provided by the business that a consumer can send to the business with additional information, or a link to a website or other online service consumers can use to cancel"*).

[184] Art. 236 f. Burgerlijk Wetboek Boek 6 and Netherland Enterprise Agency, RVO, Automa- tic renewal subscription (<https://business.gov.nl/regulation/automatic-renewal-subscription/>):
"Consumers must be able to cancel their agreement in exactly the same way as they signed up for it"; Autoriteit Consument & Market, Annuleren en opzeggen (<https://www.acm.nl/nl/verkoop-aan-consumenten/klantenservice/annuleren-en-opzeggen#bronnen>).

[185] According to the Consumer Ombudsman, clauses according to which a cancellation must be made in a different and more onerous way for the consumer than the way in which the contract was concluded are unfair under Sections 36 and 38C of the Danish Contracts Act (see Forbrugerom- buds. Forbrugerom-budsmanden, En aftale skal kunne opsiges ved benyttelse af samme medie/kanal, som aftalen er indgået på, 29 September 2014 [<https://forbrugerombudsmanden.dk/find-sager/sager/markeds-foeringsloven/sager-efter-markedsfoeringsloven/kontraktvilkaar/opsigelse-af-aftale-paa-samme- medie-som-indgaaelse>]).

[186] See also Cox/Caruso (fn. 44), p. 1650 f.

[187] In detail N 11 et seq.

[188] See also N 35.

[189] See on situational market failure N 4; on the negative market effects of automatically renewing contracts in general Cox/Caruso (fn. 44), p. 1626 et seq.

and legal practice must take into account empirically proven findings, e.g. from behavioural economics. For, even if the application of the law is a process determined by the law itself and therefore predominantly characterised by law, legislation, jurisprudence and case law cannot close their minds to the findings of empirical research if they intend to offer contemporary and realistic solutions. Judicial practice must therefore, as we believe is rightly demanded in various instances for Swiss law, (also) take into account the real-world foundations in the decision-making process. However, this demand does not represent a paradigm shift. The traditional methodological instruments will continue to be the primary means of finding and applying the law. However, realistic considerations should be used in particular when the traditional instruments do not lead to a clear result, because only very open elements of the offence can be taken from the law and therefore require a high degree of concretisation (keyword: general clause). Empirical findings should therefore be used as an aid to complete the law, supplementing the traditional instruments and thus supporting legal doctrine.

41 This applies in particular to the example discussed in this article on the concretisation of Art. 8 UCA. For more than 12 years now, Swiss law has had a provision that provides court practice with a basis for reviewing GTC provisions that can in principle be applied to a large number of cases.[190] However, no notable use[191] of this open content review can be noted to date, although the topic is much discussed abroad and is regularly the decisive factor for new legislative initiatives.[192] For this reason, it must be emphatically demanded that - if the Swiss legislator does not endeavour to ensure a fair and up-to-date control of abusive GTC provisions,[193] by providing the courts with exemplary lists of abusive unfair terms.

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[190] Prior to the UCA revision in 2012, Art. 8 UCA was rarely applied due to the element of "misleading" (see only Dike UWG-HEISS [fn. 102], Art. 8 N 33; KRAMER/PROBST/PERRIG [fn. 44], N 351).

[191] Only a handful of decisions deal with the topic in detail, see for example OGer ZH PP230005 of 19 July 2023, E. 3.1; HGer ZH HG210223-O of 21 June 2023, E. 7.3.4; OGer SO ZKBES. 2021.105 of 2 November 2021; KGer SZ ZK1_2016_28 of 2 May 2017, E. 3c.

[192] LOOS/LUZAK, Update the Unfair Contract Terms Directive for Digital Services, European Parliament, 2021, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies PE 676.006 - February 2021; WENDEHORST, Rechtsdurchsetzung im Verbrau- cherrecht - materiellrechtliche Aspekte, in: Verhandlungen des 21. Österreichischen Juristentags, Vol. II/1, Vienna 2022, p. 1 et seq, 50 f.; LEHMANN/BUSCH, Make It Stringent: A Plea for an Unfair Terms Regulation, ERPL 2023, p. 1175 ff.; see also KRAMER (fn. 101), Recht 2023, p. 188.

[193] See, for example, the rejection of the parliamentary initiative in footnote 44 ("Tacit extension of service contracts. More information and protection for consumers").

The courts are committed to an appropriate concretisation of Art. 8 UCA. For if the courts continue to hide for a long time behind the clearly inadequately specified facts of Art. 8 UCA by qualifying situations (recognised as abusive in various European legal systems) as not subsumable under the provision and ignoring the findings of behavioural economics, the judiciary is in danger of drifting away from social reality.[194] In the words of HOPT (already expressed in 1975), however, the situation can also be described much more optimistically, namely that *"jurisdiction* [...] [here] has *the opportunity* [...] *to contribute to the existential task of political and social equalisation in modern industrial society through groundbreaking decisions".*[195]

[194] GRUNDMANN (fn. 3), RabelsZ 2022, p. 408: *"It would not even be an exaggeration to state that without such an exchange, the legal sciences would distance themselves from their primary object of observation, society, and in the long term would atrophy into a formal discipline";* HOPT, Was ist von den Sozialwissenschaften für die Rechtsanwendung zu erwarten?, JZ 1975, p. 341 ff., 347:
"If he [the practitioner of law] *does not succeed in providing at least a rough remedy, then the gap between the population and the judiciary widens or political and social developments simply threaten to overrun the administration of justice."*

[195] HOPT (fn. 194), JZ 1975, p. 347.