

# ***Status of Consumer protection in the ECJ's case***

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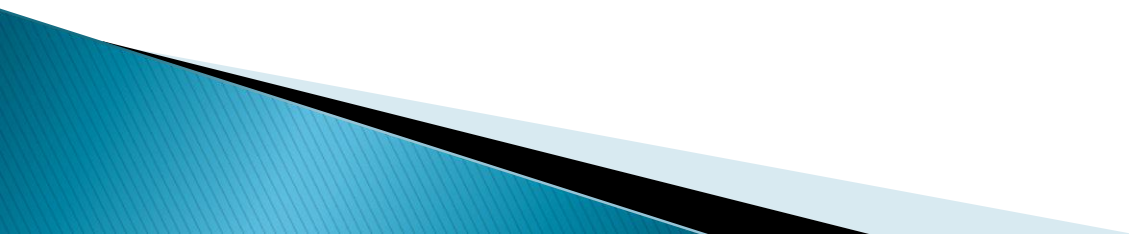
**2. Methodology**

**Multilevel constitutionalism as theoretical perspective and EU law prevalence**

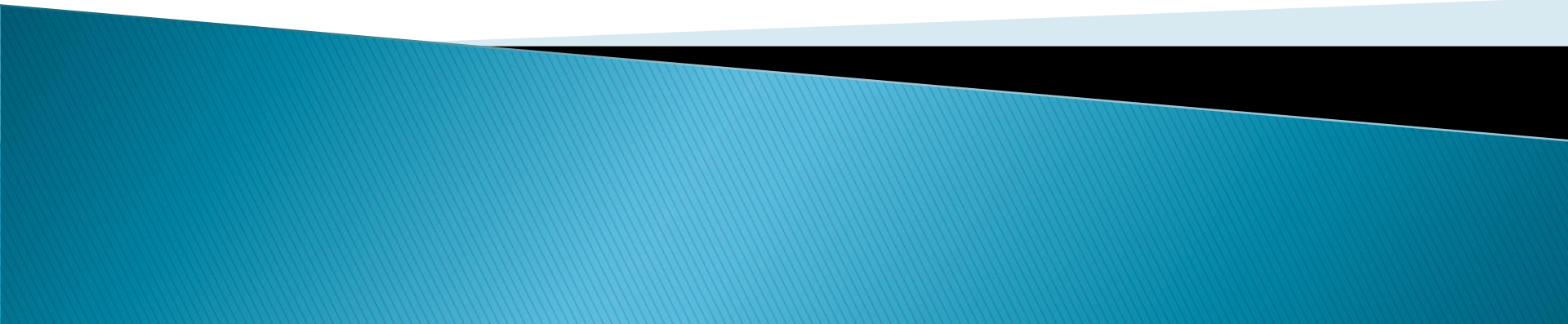
**3. Prevalence of EU law and autonomy of National Law**

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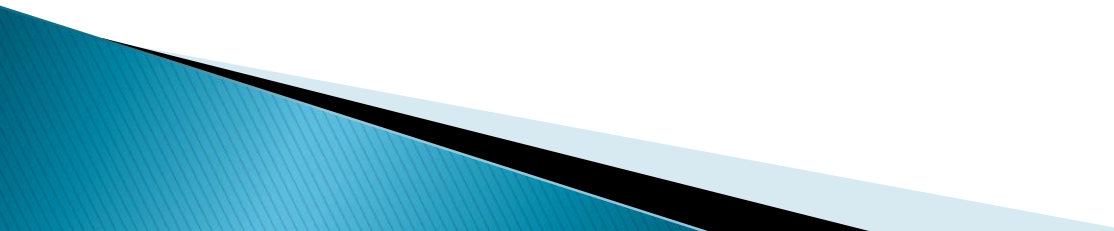
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# 1. Motivation

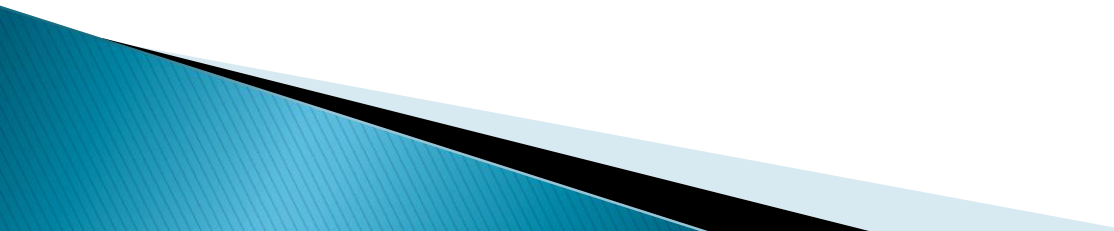


- The role of the European Court of Justice (ECJ) as a interpreter of private law has been questioned with two arguments: 1)An interpretative gap in the ECJ interpretation in the preliminary reference procedure, while the implementation takes place at national level with rules created outside the scope of the ECJ; 2)the lack of a an adequate methodology in private law matters (Schmid, 2006)
- However, taking into account the ECJ case law, we can say that the ECJ is developing a genuine European consumer procedural law (Mickilitz, 2014), and the European consumer law may benefit from a proactive approach of the Court (Mak, 2008)

- The aim of this conference is to make an approach to the development of a **Consumer Protection status in the ECJ case law.**
  - Certainly when there is not a regulation in EU law, Member States possess a procedural autonomy in order to make their own regulation. We can think than out of the Consumer Protection directive, EU Member States are free. However, this called procedural autonomy must respect and guarantee the exercise of EU fundamental rights, including (as we will see) consumer protection.
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# 2. Methodology

*Multilevel constitutionalism as theoretical perspective and EU law prevalence*

- Certainly we live immersed in a European legal space based on a context of legal systems with different levels which are increasingly intervened (Gómez Sánchez, 2011: 20).
  - Therefore we need a theoretical key to approach and try to explain these relationships, in order to make a good study of any element included in these relationships (as for example the Consumer protection status)
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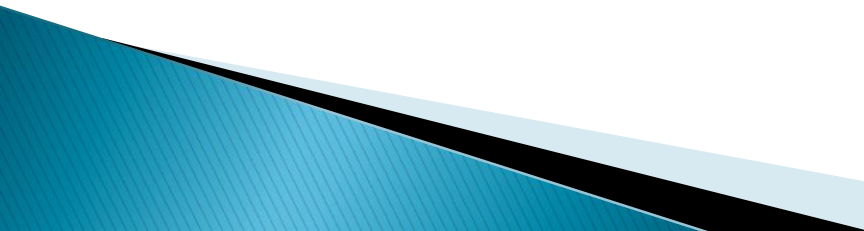
- A good theoretical approach is the multi-level constitutionalism, particularly when we need to make an approach to fundamental rights protection (Bilancia, De Marco, 2008).
- ✓ Specially after the entry into force of Lisbon Treaty in 2009 when we can speak about a new constitutional horizon (*horizonte constitucional*) in the relations between EU law and national law (Sarrión Esteve, 2011), or rather a type of *new constitutional paradigm*.





# **3. Prevalence of EU law and autonomy of National Law**



- From the EU law perspective, the ECJ conceives Union law as an autonomous system which is governed by a set of principles among which the direct effect and primacy over national law of the Member States (Van Gend en Loos, C-26/62, Costa v. Enel, C-6/64).
  - However, formal authority, which may take the law of the European Union in national legal systems will not depend solely on the jurisprudence of the Court. It is conditioned largely by the characteristics of each national system, and jurisprudence of national constitutional or supreme courts.
    - ✓ Therefore, we can say that this formal authority will depend on the way in which primacy is assumed by Member States (Chalmers, 2010: 189).
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- ▶ But, in any case, the prevalence of EU law needs two requirements:
  - ✓ we need to be within the scope of European Union law,
  - ✓ and furthermore the ECJ need the jurisdiction to guarantee the uniformity of the interpretation of EU law, and primacy and direct effect principles (the jurisdiction of ECJ is clear when we are in the scope of EU law, with limits in Judicial Cooperation in Criminal matters and External relations and foreign affairs)

▶ Leaving aside the second question, and regarding the first one, it should be noted that the scope of Union law is not confined exclusively to the characteristics of European Union competence matters...

✓ Since as it was stated by the ECJ a State Member exclusive competence matter does not excluded it automatically (*ratione materia*) of EU law scope of application.

✓ Therefore, EU Member States in the exercise of its exclusive powers should also respect EU law except in the case of a domestic situation without connection therewith.

▶ This has allowed the ECJ to control:

✓ a) tax rules, as seen in *Schempp* in 2005 (Schempp, C-403/03), *Commission v. Belgium* in 2007 (Commission v. Belgium, C-522/04) and *Schwarz* in 2007 (Schwarz, C-76/05);

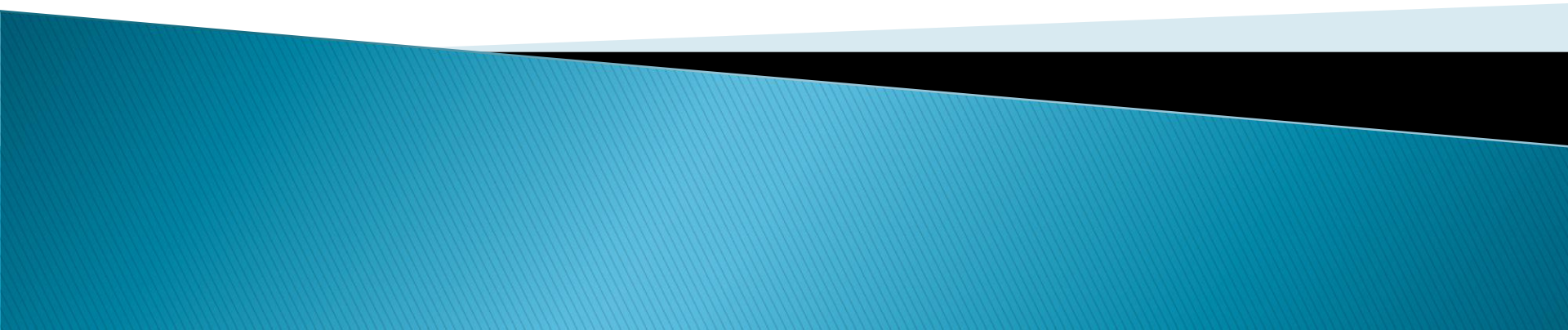
✓ b) the registration and change of name a in the national registry, in the cases *Kostantinidis* in 1993 (Kostantinidis, C-168/91), *Garcia Avello* in 2003 (García Avello, C-148/02), *Grunkin Paul* in 2008 (Grunkin Paul, C-353/08) and *Sayn Wittgenstein* in 2010 (Sayn Wittgenstein, C-208/09);

✓ c) the withdrawal of nationality from a Member State, in the case *Janco Rottman* in 2010 (Janco Rottman, C-135/08);

✓ d) a local law that forbids the entry to Maastricht coffee shops to persons not residents in the Netherlands, in the judgment *Marc Michel Josemans* in 2010 (*Marc Michel Josemans v. Burgemeester van Maastricht*, C-137/09)

✓ e) the national procedural rules despite the principle of autonomy in this matter, since the principle of freedom of configuration would be limited by the principle of equivalence and the principle of effectiveness, as we will explain below in *Banco Español de Crédito* in 2012 (*Banco Español de Crédito*, C-618/10), and finally *Aziz* in 2013 (*Aziz v. Catalunya Caixa*, C-415/11) and *Sánchez Morcillo* in 2014 (*Juan Carlos Sánchez Morcillo y María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria S.A.*, C-169/14).

# **4. Procedural Autonomy of National Law in relation to Consumer Protection Status.**



- ▶ As we know the EU Consumer legislation is based...
  - ✓ Article 169 of the Treaty on the Functioning of the European Union: “1. In order to promote the interests of consumers and to ensure a high level of consumer protection, **the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.**2. **The Union shall contribute to the attainment of the objectives** referred to in paragraph 1 through: (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States.3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).4. **Measures adopted** pursuant to paragraph 3 **shall not prevent any Member State from maintaining or introducing more stringent protective measures.** Such measures must be compatible with the Treaties. The Commission shall be notified of them.
  - ✓ Article 38 of the EU Charter of Fundamental Rights: “Union policies shall ensure a high level of consumer protection”



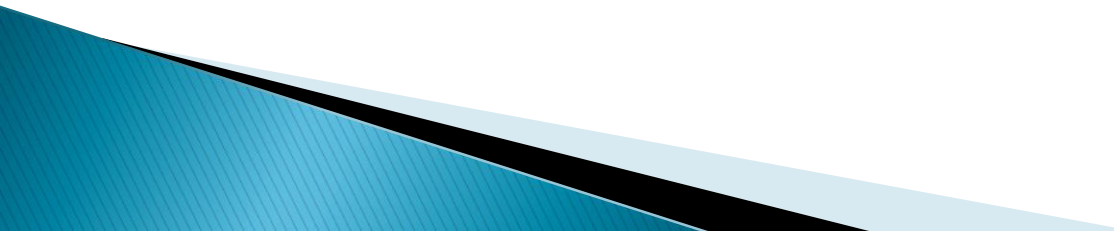
▶ As we know the EU Consumer legislation is based...

✓ **The Directive on Consumer Protection Rights (2011/83/EC)** replaces, as of 13 June 2014, the Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EEC to protect consumer in respect of contracts negotiated away from business premises.

✓ **Directive 1999/44/EC** on certain aspects of the sale of consumer goods and associated guarantees as well as **Directive 93/13/EEC** on unfair terms in consumer contracts, which remain in force.

▶ Nevertheless, there is no in the EU consumer legislation a regulation of the consumer procedural rights, or better say **there is no a EU Consumer Procedural law.**

✓ Therefore, there is **procedural autonomy of EU Member States** regarding the regulation of Consumer procedural law.

- ▶ In this sense, in the absence of EU legislation, EU Member States are free to regulate the procedure for the implementation of EU law (Procedural law is in this case), according to each domestic legal system.
  - ▶ Nevertheless, according to the principle of cooperation laid down in art. 4 of the Treaty on European Union (EUT), **Member States shall take the necessary measures to ensure fulfilment of the obligations under the Treaty, and in particular, national courts shall provide appropriate judicial protection of rights which EU law confers on individuals.**
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▶ We can say that the principle of procedural autonomy implies that the EU Member States are free to configure the appropriate procedural rules to guarantee EU law, and particularly rights recognized in EU legislation, in this case Consumer Protection law and Consumer Protection guarantees and rights, because national judges are the EU ordinary judges and courts.

✓ In 2007, ECJ pointed out in *Unibet* case (Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern, C-432/05) that in the Treaty there is no a regulation of a national procedural remedy for the preservation of EU law other than those laid down in national law. However, EU law requires the national configuration of procedural rules which allow procedures and mechanism to ensure the respect for the rights deriving from EU law.

▶ The ECJ has pointed out that the national legislation must be effective in order to guarantee those rights, in a way that we can consider ECJ developing a very interesting **package of procedural rights in the Consumer Protection Status**, or maybe an **EU Consumer Procedural Status**:

- ✓ Configuration of an ***ex officio* action of national courts** (outside their own legislation) and the development of the **principle of equality of arms** which must govern the procedure.

# **5. EU Consumer Procedural Status**

▶ The national regulation must not be less favourable than those governing similar domestic actions (**principle of equivalence**); and nor should render impossible in practice or excessively difficult the exercise of rights conferred by EU law (**principle of effectiveness**).

✓ Corresponding to the national courts to interpret "as far as possible" the procedural rules applicable so that the application of these rules contributes to the goal of ensuring effective judicial protection of EU law rights attributed to litigants (*Unibet*, paragraphs 38 to 44 and 54).

▶ Furthermore, the ECJ has interpreted the principle of effectiveness strictly, being very demanding with national regulations.

✓ In this sense, in the case *Pannon* in 2009 (Pannon GSM, C-243/08) states that the specific characteristics of judicial proceedings between professionals and consumers, in national law, cannot be an element that may affect the legal protection they enjoy under EU law. And **the national court is required to examine ex officio the unfairness of a contractual term available, as soon as he/she has the facts and law that need to do it.**

✓ This is a new case law doctrine or procedural remedy, called *ex officio doctrine* (Micklitz, 2013) and developed by the ECJ in several important cases.

✓ It is important to note that according to *Pénzügyi* case in 2010 (VP Pénzügyi Lízing Zrt. Ferenc Schneider, C-137/08) **a national court can examine ex officio and declare a contractual term as unfair although in the case that the parties have not requested it, and although under national procedural law the tests can only be performed at the request of a party in the civil process.**

➤ This is an application of the principle of effectiveness that involves not only an interpretation of national procedural law, but **it also allows court's ex officio action not provided under the national procedural law, and therefore against the national legislation: a new action for the Consumer Procedural Status.**



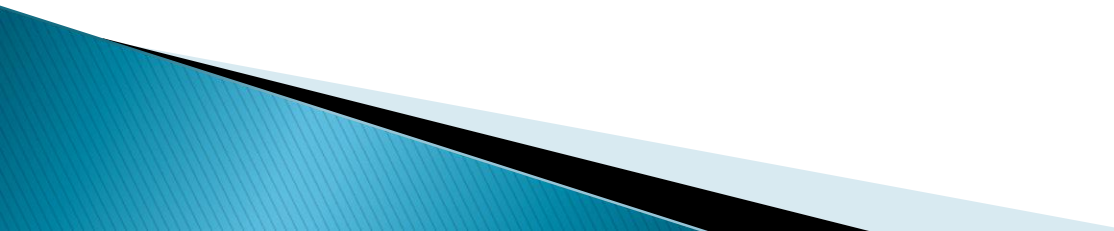
✓ It is true that in the *Dominguez* case in 2012 (Dominguez, C-282/10, paragraph 27) ECJ considers that the national court must determine the applicable procedural rules, and it must, taking into consideration all elements of the national legislation and applying the interpretative methods recognized in this, do everything within their powers to ensure the full effectiveness of EU law.

❖ However, if the interpretation of national procedural law does not allow this? The solution, from our point of view is clear: **Pénzügyi doctrine.**

▶ In the most recent cases, the ECJ has had occasion to review the Spanish procedural law regarding the procedural autonomy principle and the protection of rights recognized in EU law.

✓ In the *Banco Español de Crédito* case in 2012 (Banco Español de Crédito v. Joaquín Calderon Camino, C-618/10) ECJ stated that **the Spanish procedural rules about the payment procedure were contrary to the principle of effectiveness in preventing consumer protection.** The reason is that the Spanish legislation did not allow the national court when it had the fact and law elements to examine *ex officio* the unfairness of a contractual default interest clause contained in a contract held between a professional and a consumer, when the consumer did not raised opposition to it.

✓ In the case Aziz in 2013 (Mohamed Aziz v. Caja de Ahorros de Catalunya, Tarragona i Manresa (Catalunyacaixa), C-415/11), ECJ stated that **it was incompatible with EU law a Spanish legislation that in regulating the mortgage enforcement (and eviction) proceeding , did not provide the possibility of formulating grounds of opposition based on the unfairness of a contractual term (which is the basis of ejection title). And at the same time, the law did not allow the judge of the declarative process (which the power to assess the unfairness of the clause) to take precautionary measures, including, in particular, the suspension of the mortgage enforcement (and eviction) proceeding when it is necessary to ensure the full effectiveness of the court final decision.**

- ▶ The problem of the Spanish legislation was that it did not cover and guarantee the rights of a consumer in relations to banks because they could discuss the unfairness of a clause only in the declarative process, not in the mortgage enforcement proceeding. At the same time, in the mortgage enforcement proceeding the consumer could not argue the unfairness of a clause.
  - ▶ In this sense, according to that legislation, the consumer usually lost the mortgage enforcement proceeding, and after that if he/she wins the declarative process, in that moment it will be impossible the recuperation of the house, with the impact of this situation in the protection of rights of the Spanish consumer.
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- ▶ After the Aziz case, Spain changed the legislation to adapt it to the ECJ jurisprudence.
- ▶ Nevertheless, on 14 July 2014, in the case *Sánchez Morcillo* (Juan Carlos Sánchez Morcillo y María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria S.A., C-169/14), the ECJ once again failed against the Spanish legislation regarding the mortgage enforcement in order to guarantee consumer protection.
  - ✓ ECJ mentioned *Banesto* and *Aziz* cases, and observed that actually Spanish legislation in relation to mortgage enforcement "gives the seller or supplier, as a creditor seeking enforcement, the rights to bring an appeal against a decision ordering a stay of enforcement or declaring an unfair clause inapplicable, but does not permit, by contrast, the consumer to exercise a right of appeal against a decision dismissing and objection to enforcement" (*Sánchez Morcillo*, C-169/14, paragraph 44).

➤ We can see in this case *Sánchez Morcillo*, a confirmation of the **principle of equality of arms** (*Sánchez Morcillo*, C-169/14, paragraph 49) which must govern the procedural legislation in this case.

Therefore, we can say that:

✓ The so called **procedural autonomy principle is actually greatly reduced**, and that EU Member States when implementing and regulating their legal system must always guarantee the exercise of rights covered in EU law, and particularly in the EU Consumer law.

✓ Moreover, the ECJ developed a very interesting **package of procedural rights in the Consumer Protection Status**, or maybe an **EU Consumer Procedural Status** including a new *ex officio* action of national courts (outside their own legislation) and the principle of equality of arms which must govern the proceedings.

**THANK YOU FOR YOUR  
ATTENTION**



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