

Status of Consumer protection in the ECJ's case

Part II

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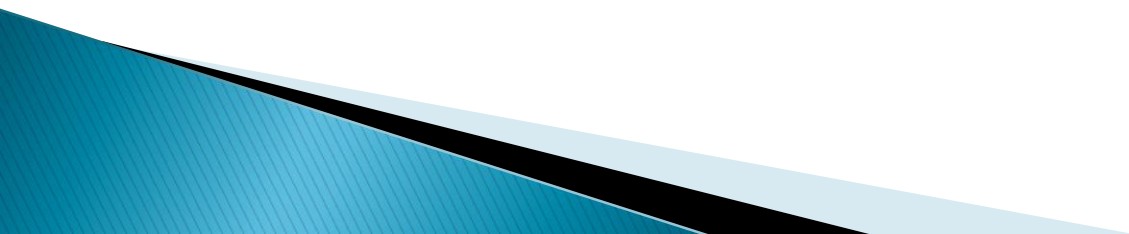


SUMMARY

1. Reminder

2. The Spanish Supreme Court assumed the ECJ doctrine on Consumer Protection

3. Most recent ECJ cases on EU consumer protection



1. Reminder

- ▶ 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 according to each domestic legal system (for instance national procedural law)
- ▶ 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.**

- ▶ But, in any case, the prevalence of EU law needs two requirements:
 - ✓ we need to be within the scope of European Union law (**we need a connecting factor**)
 - ✓ 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)

▶ **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 materiae*) of EU law scope of application.

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

➤ **We need a connecting factor.** For instance a interesting recent case: ECJ 8 May 2014, *Pelckmans Turnhout NV*, C- 483/12. ECJ has not competence in order to control a national regulation which prohibits traders from opening their establishments seven days a week by imposing a requirement of one day of rest per week.

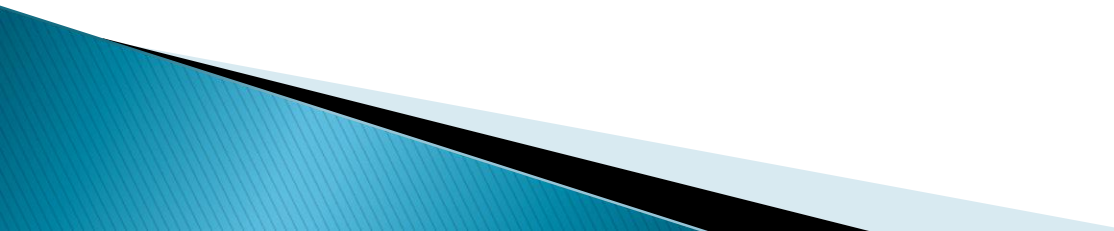
▶ The ECJ has pointed out that the national legislation must be effective in order to guarantee EU rights, in a way that we can consider ECJ developing a very interesting **package of procedural rights in the Consumer Protection Status**, or maybe an **EU Consumer Procedural Status**:

- ✓ Configuration of an ***ex officio* action of national courts** (outside their own legislation) must interpret "as far as possible" national law (*Unibet, Pannon*), and they "could" use the action **against the national legislation** (*Pénzügyi*)
- ✓ The development of the **principle of equality of arms** which must govern the procedure (*Sánchez Morcillo*)

▶ 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.**

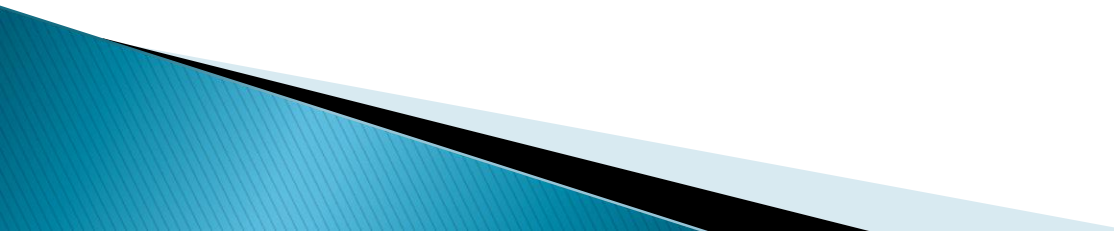


✓ In the case *Sánchez Morcillo* (Juan Carlos Sánchez Morcillo y María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria S.A., C-169/14), the ECJ once again failed against the Spanish legislation regarding the mortgage enforcement in order to guarantee consumer protection, observing that actually 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 conclude that the ECJ has pointed out that the national legislation must be effective in order to guarantee EU 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) must interpret "as far as possible" national law (*Unibet, Pannon*), and they "could" use the action **against the national legislation** (*Pénzügyi*)
- ✓ The development of the **principle of equality of arms** which must govern the procedure (*Sánchez Morcillo*)

2. The Spanish Supreme Court assumed the ECJ doctrine on Consumer Protection

- The Spanish Supreme Court is assuming the ECJ case law we pointed out before regarding the effectiveness of EU consumer protection, and developing an important jurisprudence in order to guarantee EU consumer rights in Spain.
 - The best example to see how the ECJ case law has influenced the Spanish Supreme Court is the cases related to the so called “**floor clauses**” as abusive clauses in the mortgage contracts:
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- ✓ **Sentencia del Tribunal Supremo de 9 de mayo de 2013** (nº 485/2012). In application of the ECJ doctrine, declaration of the invalidity of “floor clauses” and the validity of the loan or mortgage contracts. Criteria for the evaluation of the validity of clauses in consumer contracts. **No retroactive effects. ?**
- ✓ Sentencias del Tribunal Supremo de 24 de marzo de 2015 (138/2015) and 25 de marzo de 2015 (nº 139/2015): Clarification that when there is a declaration of invalidity of a floor clause, proceed restitution to borrowers of interest that would have been paid since May 9, 2013, date of the Sentence of the Supreme Court.

3. Most recent ECJ cases on EU consumer protection.

- ECJ 15 January 2015, *Birutė Šiba*, C-537/13, the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as applying to **standard form contracts for legal services**, such as those at issue in the main proceedings, **concluded by a lawyer with a natural person acting for purposes which are outside his trade, business or profession (Lithuania)**
- ECJ 23 October 2014, *Alexandra Schulz and Josef Egbringhoff*, joined cases C-359/11 and C-400/11, precluding a national legislation (Germany) which determines the content of consumer contracts for the supply of electricity and gas covered by a universal supply obligation and allows the price of that supply to be adjusted, but which does not ensure that customers are to be given adequate notice, before that adjustment comes into effect, of the reasons and preconditions for the adjustment, and its scope, in order to **exercise the rights to terminate the contract or to challenge the adjustment of the supply price.**

▶ ECJ 18 September 2014, *Vueling Airlines v. Instituto Galego de Consumo*, C-487/12. Article 22(1) of Regulation No 1008/2008 on common rules for the operation of air services in the Community must be interpreted as **precluding a national law that requires air carriers to carry, in all circumstances, not only the passenger, but also baggage checked in by him, provided that the baggage complies with certain requirements as regards, in particular, its weight, for the price of the plane ticket and without it being possible to charge any price supplement to carry such baggage.**

✓ EU law does not preclude, without prejudice to the application, in particular, of rules enacted in the field of consumer protection. Member States can regulate aspects of the contract of carriage by air, in order, in particular, to protect consumers against unfair practices. Nevertheless, such a national law cannot be contrary to the pricing provisions of Regulation No 1008/2008.

**THANK YOU FOR YOUR
ATTENTION**

