*ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter*

# *MODULE 4 – CONSUMER PROTECTION*

**IN THE FRAMEWORK OF THE PROJECT "*ACTIVE CHARTER TRAINING THROUGH INTERACTION OF NATIONAL EXPERIENCES*" (ACTIONES)**

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**EUI TEAM :**
Prof. Fabrizio Cafaggi
Dr. Federica Casarosa
Dr. Nicole Lazzerini
Dr. Madalina Moraru
Prof. Paola Iamiceli
Dr. Francesco Paolo Patti
Dr. Mateusz Grochowski

## NATIONAL EXPERTS AND COLLABORATORS

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Judge Nicoletta Aloj
Judge Giuseppe Buffone
Judge Giuseppe Caruso
Judge Jasna Gažić Ferenčina
Lawyer Anelis Istratescu
Judge Hanspeter Lehofer
Judge Zsofia Lele
Prof. Chantal Mak
Judge Krasimira Milachkova
Judge Michal Novotný
Lawyer Isabela Delia Popa
Judge Sophia Retsa
Judge Karolina Rokita-Kornasiewicz
Judge Andreja Simsič
Prof. Joan Solanes Mullor
Lawyer Ioana Toadere
Prof. Aida Torres Perez
Judge Diana Ungureanu
Lawyer Răzvan Vasile Viorescu

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# MODULE 4 – CONSUMER PROTECTION

## Part 1 – Analysis of the legal area

### 1. Definition and historical evolution of consumer protection at European level

Consumer protection as an autonomous field of law can be defined as a 'young area' that has been subject to significant changes in the last decades. A first express definition of its objectives can be found in the famous President John F. Kennedy's speech in 1962, which proposed the establishment of four basic consumer rights.[1] Since then, the evolution of market and the growth of transnational trade has triggered several developments, resulting in the enactment of legislation and regulations for the purposes of protecting consumers from market abuse.[2]

At EU level, consumer protection was initially conceived as a means of integrating the economies of the Member States, and was aimed almost exclusively at enhancing transnational market performance. In other words, consumers were the final beneficiaries of an integrated and efficient common market. However, the acknowledgement that the consumers may also suffer from the drawbacks of the widened European market triggered the introduction of consumer-centred measures.

The starting point of consumer policy within the EU legal system dates then to the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy,[3] there a first elaboration of the rights which should be safeguarded was included, namely:

- the right to protection of health and safety,
- the right to protection of economic interests,
- the right of redress,
- the right to information and education,
- the right of representation (right to be heard).

Although the resolution did not provide for a legal basis, the resolution can be interpreted as the moment for a change of perspective: from a competition based approach, where the main points of reference were the producers, and their reciprocal behaviours; to a more holistic perspective where also the balance between producers and consumers is taken into account, so as to enhance the confidence of the latter into the market.

This perspective is reflected into the legislative measures proposed by the Commission, following the rights defined in the Council resolution addressing:

- product liability; [4]

[1] March 15, 1962. The speech was later called the Consumer Bill of Rights.

[2] See annex with relevant EU directives and regulations on this topic.

[3] OJ 1975 C 92/1.

[4] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

- sales made away from business premises;[5]
- misleading and unfair advertising; [6]
- consumer credit; [7]
- package travel; [8]
- unfair contract terms. [9]

The same perspective was shared also by the CJEU jurisprudence, as shown by the landmark decision in the *Cassis de Dijon* case.[10] Here, the CJEU took into account the arguments of the French government as regards the balancing between consumer protection (in particular vis-à-vis the risk of alcoholism) and free circulation of goods; however, affirmed that the national measures in the specific case were not proportionate to the intended aim. The principle of equivalence and mutual recognition allow any product lawfully produced in a Member Stater to enter into any other EU market.

It is important to note that the economic dimension was perceivable also from the legal basis used by the Commission to justify the legislative intervention. The directives were based on art. 100 of the EEC Treaty, then on art 95 EC requiring that the EU measures should be aimed at enhancing the functioning of the internal market. As clarified in the Tobacco Advertising decision,[11] the measures should *actually* contribute to the internal market and not only claiming it in the directive's recitals, otherwise the measure could be deemed as overcoming the boundaries of the EU competences.

Then, the Treaty of Maastricht of 1992 integrated the protection of the consumer into its objectives in Articles 3(s) and 129(a). In 1997, the Treaty of Amsterdam strengthened consumer protection, by stipulating in Article 169 TFEU that the Community should promote a number of consumer rights, such as the rights to information and education.

More recently, consumer protection has begun to develop a strong connection with fundamental rights, as a result of the perception that consumers are vulnerable vis-à-vis the consequences of wider market failures emerging in particular in areas such as finance, the environment, telecommunication and transport.[12]

At an EU level this desire for protection has received an initial reply with the inclusion of a specific article dedicated to consumer protection within the Charter of Fundamental Rights, namely art. 38 CFREU. Consumer protection is included in Chapter IV of the Charter on

[5] Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises

[6] Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising

[7] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit

[8] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours

[9] Directive 93/13/EEC on unfair terms in consumer contracts

[10] Judgment of the Court of 20 February 1979, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, Case 120/78, ECLI:EU:C:1979:42

[11] Judgment of the Court of 5 October 2000, Federal Republic of Germany v European Parliament and Council of the European Union, Case C-376/98, ECLI:EU:C:2000:544.

[12] See I. Behor, *EU Consumer law and Human rights*, OUP, 2013.

'Solidarity', thus recognising it as a fundamental policy objective. While this norm aims at improving public confidence both in the market and in the institutions of the EU it also indicates that consumer protection is now regarded as a fundamental social goal in the Union.
This is not the only Charter provision which may help to further consumer protection as art. 1 on human dignity, art. 3 on the right to the integrity of the person, as well as art. 8 on data protection, art. 11 on freedom of expression and information, art. 12 on freedom of assembly and of association CFREU may be relevant to promote consumer interests. However, to date few cases have addressed these dimensions under the consumer protection perspective.
From the case law of the Court of Justice of the EU, however, one of the first elements that emerge, and which will guide the following analysis, is the fact that in cases involving consumer protection one of the most relevant articles that triggered an intense dialogue with courts at national level is the use of art. 47 CFREU on effective remedies.[13] This article was taken into account and analysed by the CJEU in several cases, in order to justify the modification of national legislation and jurisprudence as regards the existence of effective substantial and procedural guarantees on the exercise of EU based rights, in this cases consumer rights.
The limits of art. 38 CFREU use as well as the relationship between the former and art. 47 CFREU will be presented in the next introductory section.

## 2. The use of the Charter of Fundamental rights in consumer protection

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[13] Please see Module 3.
[14] Please see Module 3.

national legislation and jurisprudence as regards the existence of effective substantial and procedural guarantees on the exercise of EU based rights, in this cases consumer rights.

As mentioned above Art 38 CFREU includes consumer protection within the fundamental policy objectives of EU. The formulation of the article, however, shows that consumer protection is intended as a legal principle, and not as a subjective right. This means that, pursuant art. 51(1) CFREU, principles shall be 'observed' (whereas rights shall be 'respected'), leading to their limited justiciability.[15] A clearer indication is then given by Article 52(5) CFREU, which states that principles may be implemented by EU legislative and executive acts, and by acts of Member States when they are implementing EU law. Moreover, "*[t]hey shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality*". This implies that for the courts they are important only when these acts are analyzed or their validity is reviewed; however, they do not provide the basis for direct claims for positive measures.[16] This does not exclude the possibility that legal principles may evolve into a subjective right through the development of the case law, but to date the CJEU case law has not yet made any steps towards an evolution in this direction.
Instead, several cases addressed the problem of allegedly insufficient consumer protection at national level from a different perspective, namely involving the right of consumers (as citizens) to effective remedies, as enshrined in art. 47 CFREU. In contrast to art. 38 CFREU, this is a substantive right of citizens: it binds the Member States when acting within the scope of EU law, allowing full justiciability.[17]
As a matter of fact, the sets of cases that will be presented below show that the both national court and CJEU combined the use of art. 38 CFREU and art. 47 CFREU to enhance the protection of the consumer and assess the national provisions implementing EU directives either in terms of substantive and procedural law.

| **Preliminary references mentioning art 38 CFREU** | **Preliminary references mentioning art 47 CFREU** | **CJEU Decisions mentioning art 38 CFREU** | **CJEU Decisions mentioning art 47 CFREU** |
|---|---|---|---|
| 9 | 7 | 6 | 13[18] |

As it will be presented in the analysis of each cycle of cases, art. 47 CFREU is not always raised by national courts, rather it is only recently that national courts have begun to emphasise this Charter article in their preliminary rulings.

[15] For a general description, please see Module 1.
[16] See *Pohotovost* below (casesheet n. 4.9) and also the decision of Czech Constitutional Court, III. ÚS 3725/13, on 10 April 2014, available at http://fra.europa.eu/en/caselaw-reference/czech-republic-constitutional-court-iii-s-372513.
[17] Please see Module 1.
[18] Note that amongst these, 3 were outside scope of EU law and 1 was deemed inadmissible.

Instead, the CJEU included art. 47 CFREU in the analysis of compliance of national provisions, making in some cases strong negative assessments of national (procedural) systems is relation to the substantive right to effective judicial protection. It is important to note that, as consumer protection directives do not provide for specific remedies, the analysis of art. 47 CFREU is tackled by the CJEU within the analysis of the principles of equality and effectiveness that limits the choices of national legislators when regulating the remedies available in case of violation of EU based rights.[19]

On the one hand, then the CJEU addresses the effectiveness[20] of the whole procedural system analysing in particular the ignorance of consumer's legal rights, the costs incurred by the consumer for legal proceedings, the level of complexity as well as the rapidity of enforcement proceedings, the possible ambiguities existing in the national legislation, and the type of good or service provided by the contract. In those cases where the Charter was not mentioned, the test adopted by the CJEU placed a greater emphasis on the objective to ensure effective protection of consumers vis-à-vis other national procedural law, such as efficiency of the court system or national margin of appreciation.

Whereas, aside from a very relevant exception, the cases where the CJEU also introduced the Charter dimension in the analysis, the balancing exercise resulted in a different outcome. In particular, art. 47 CFREU was used by the CJEU:

- to balance the ex officio power of judges to raise the unfairness of contract clauses, providing under the principle of *audi alteram partem* the possibility of both parties to react to the evaluations of the judge;[21]
- to justify a negative assessment of the national procedural rules, which did not provide for a right of appeal to consumers;[22]
- to positively assess the national procedural rules granting interim relief;[23]
- to assess if individual and collective right to effective remedies were infringed in cases of procedural rules prohibiting the intervention of consumer protection associations into an existing proceeding;[24]
- to balance the right to bring an action before court vis-à-vis general interest objectives such as the swift and less expensive resolution of claims and the reduction of the court system burdens.[25]

Given the limited number of consumer protection cases where art 47 CFREU was mentioned, it is not possible to state that this is a constant interpretative approach of the CJEU; here, the role and intervention of national courts will clearly be relevant to clarify the position of the CJEU as well as the criteria that may guide national courts in case of conflicts between national and European provisions.

[19] See Module 3 on procedural autonomy.

[20] In the consumer protection case law the CJEU addresses the principle of equality more precisely only in a couple of cases, namely the *Asturcom* and *Oceano Grupo* cases.

[21] See *Banif plus Bank* case (Casesheet n. 4.1)

[22] See *Sanchez Morcillo* cases (Casesheet n. 4.4).

[23] See *Kusionova* case (Casesheet n. 4.5).

[24] See *Pohotovost* case (Casesheet n. 4.9).

[25] See *Alassini* case (Casesheet n. 4.12).

## 3. The use of judicial dialogue techniques in consumer protection

The strategic use of judicial interaction techniques has emerged in several cases in the consumer protection area. The jurisprudence that has been developed by the CJEU on consumer related issues, demonstrates that national courts have used preliminary references to resolve the conflict of norms they face between national and European provisions.

National judges are usually faced with cases where the options available are disapplication and consistent interpretation. While deep divergences in terms of interpretation of norms may emerge, disapplication of national rules is deemed to be a very strong intervention by national judges. Moreover, in several cases such a decision runs the risk of being quashed in subsequent appeals within the national legal system. National courts (and in particular lower courts) therefore seek the guidance of the CJEU regarding the possibility of avoiding such an outcome.[26]

In some cases, the dialogue between national courts and CJEU has an impact on subsequent jurisprudence. In most cases the effect is internal to the Member State from which the preliminary ruling originated.[27] However, depending on the style of the CJEU decision the latter may have spillover effects in other countries.[28] This outcome may show different levels of collaboration between national courts and CJEU, as the national courts may adhere to the CJEU reasoning with little subsequent doubts regarding consistency between EU and national provisions, or the national courts may further interpret the CJEU decision leading to further conflicts of interpretation.[29]

In other cases, the dialogue between national courts and CJEU also has an impact on the decisions of the legislator.[30] Here, it is the latter that feels compelled to react to the CJEU judgment in order to avoid the disapplication of national provisions, which are deemed to be non-compliant with EU law. This outcome is not immediate, as it depends on several factors: first, on the nature of the CJEU decision, such an outcome is more probable in cases where the Court provides for a clear final decision, establishing not only the conflict but also the solution that the national judge may adopt; secondly, on the impact that the solution indicated by the CJEU may have on the national system; and finally, on the level of responsiveness of the legislator to EU decisions.

In all the cases, the outcome of the judicial interaction may lead to a deeper understanding of the connections between the EU law and the national implementing provisions, as well as the possibility for judges to question and improve existing judicial doctrines through new preliminary rulings on practical problems that are shared by national judges across Member States.[31]

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[26] See preliminary ruling in *Banif plus bank* (Casesheet n. 4.1).

[27] See *Asbeek Brusse* case (Casesheet n. 4.3).

[28] See the importance of *Invitel* decision in the reasoning of the Polish Supreme court as described below, (Casesheet n. 4.10).

[29] See *Alassini* case (Casesheet n. 4.12).

[30] See *Sanchez morcillo* and *Aziz* cases (Casesheets n. 4.4 and 4.6).

[31] See the section on preliminary rulings, in each of the cases selected.

## Part II – Selection of cases

### 1. Introductory remarks

The case sheets that follow are based on the cases that have been provided by the national experts that participated to the ACTIONES working group on consumers.

The selection has been made in line with the following criteria:

1. **Problem-based**: the national jurisprudence reflects in so far as possible the problems, questions, and ambiguities that national judiciary face in relation in the use of the Charter in the field of consumer protection.
2. **EU relevance**: the national jurisprudence identifies in so far as possible issues of EU-wide relevance, that touch upon the application (or omission of application) of the Charter in connection with the application of EU primary and secondary sources in the field of consumer protection.
3. **EU Charter of Fundamental Rights**: Priority is given to cases that cite the Charter of EU Fundamental rights. Additionally, cases that may have cited the Charter but omitted to do so (i.e. where the Charter was applicable) as well as the possible motives for doing or not doing so may be highlighted.
4. **EU Charter of Fundamental Rights level of protection:** particular attention is paid to national jurisprudence where the EU Charter was used to ensure higher protection of consumers compared to the protection ensured by the EU secondary legislation.
5. **Judicial Dialogue**: a special emphasis is placed on national jurisprudence that used one or more of the following judicial interaction techniques: preliminary reference procedure under Art. 267 TFEU, direct reference to the case law of CJEU or ECtHR, references to the jurisprudence of foreign national courts, disapplication of national legislation implementing EU secondary legislation.
6. **Divergent positions of national judiciary**: national jurisprudence highlighting divergent positions of national courts is considered: lower level courts vs. high courts/constitutional courts/other specialised national courts.
7. **CJEU case law connection**: national jurisprudence highlighting the difference or common approach to legal issues also faced by the CJEU.

### 2. Selected sets of cases

On the basis of the decisions provided by national experts, the case sheets that will follow address the most interesting cases where the use of the EU Charter, of judicial dialogue techniques, and of specific remedies may provide interesting insights for further developments of the jurisprudence at national level.

The selected cases include both cases where the EU Charter is expressly mentioned in the courts reasoning, highlighting if and how its inclusion may be interpreted as an added value; and also cases where the courts did not mention directly the EU Charter, but the issues addressed are similar, providing the basis for comparison.

Each case sheet will present a decision cycle, including not only the CJEU decision but the preliminary ruling and the follow up decision of the same court, as well as the decision directly

connected with the case that sow the dynamics of the judicial dialogue at national and supranational level.
Additionally, each case sheet includes a section addressing the impact of the CJEU decision on national jurisprudence. The proxies that will be used to evaluate the impact are, on the one hand, the reference to the CJEU decision in cases of foreign countries (than the one that presented the preliminary ruling), and, on the other, the preliminary ruling presented by national courts after the CJEU decision on similar legal questions.

*i. Ex officio (or own motion) judicial power*

Case sheet n. 4.1 - Banif plus Bank
Case sheet n. 4.2 – Pannon
Case sheet n. 4.3 – Asbeek Brusse

*ii. Right to appeal*

Case sheet n. 4.4 – Sanchez Morcillo I and II

*iii. Right to an effective remedy*

Case sheet n. 4.5 – Kusionova
Case sheet n. 4.6 – Aziz
Case sheet n. 4.7 – Weber & Putz
Case sheet n. 4.8 – Duarte Hueros

iv. Right to defence (collective redress)

Case sheet n. 4.9 – Pohotovost
Case sheet n. 4.10 – Invitel
Case sheet n. 4.11 – Sales Sinues

v. Out-of-court settlement system

Case sheet n. 4.12 – Alassini

Casesheet n. 4.1 – **Banif Plus Bank**

**Reference case**
**CJEU:** Judgment of the Court (First Chamber), 21 February 2013. Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai. Case C-472/11

***Core issues***
When the judge finds a clause to be unfair, should he/she wait for the consumer to submit a statement requesting that the term be declared invalid?
Should he/she invite the litigants to express their views on this matter?
To what extent do these requirements limit the judicial ex officio power/duty to declare an unfair term invalid or non-binding?

At a glance

| Area | Country | Reference to EU law | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| • Consumer protection | • HUNGARY | •art 47<br>•directive 93/13 | •preliminary reference | • CJEU<br>• Appeal Court | • ex officio power of judge<br>• principle of audi alteram partem |

*1. Timeline representation*


*2. Case law description*
The credit agreement between Mr Csaba Csipai and Banif Plus Bank was concluded through a standard form contract. The latter included a clause that allowed the Banif Bank Plus to claim for the full amount of the loan as well as default interest and costs in case of breach of contract by the borrower. As Mr Csipai paid only part of the instalments defined by the contract, the bank terminated the agreement and presented a claim in front of the Pest Central District court in order to recover the debt. As Pest Central District Court evaluated ex officio the clause as unfair, it allowed the parties to comment, then decided the case on 6 July 2010 addressing the contract excluding the unfair clause.
Banif Plus Bank appealed against that decision before the Budapest Municipal Court, which decided to stay the proceedings and to refer the following questions:

> '*Are the procedures of a national court consistent with Article 7(1) of [the Directive] if, where a contract term is held to be unfair, and the parties did not submit a claim to that effect, the court informs them that it holds sentence 4 of clause 29 of the standard contract terms of the loan agreement between the parties to the proceedings to be invalid? That invalidity arises from breach of the legislation, namely Paragraphs 1(1)(c) and 2(j) of Government Decree No 18/1999 …*
> *In the circumstances of the first question, is it permissible for the court to direct the parties to the proceedings to make a statement in relation to the contract term in question, so that the legal implications of any unfairness may be established and so that the aims expressed in Article 6(1) of [the Directive] may be achieved?*
> *In the circumstances described above, is it permissible for the court, when examining an unfair contract term, to examine all the terms of the contract, or may it examine only the terms on which the party concluding the contract with the consumer bases his claim?*'

The CJEU decided the case on 21 February 2013. The Court addressed only the principle of effectiveness, disregarding the principle of equivalence, starting from the assertion that the judge has the duty to ascertain on its own motion the unfairness of contract clause, and should be able to establish all the consequences of such a qualification under national law.[32] However, the CJEU balances effectiveness with the principle of effective judicial protection (art 47 CFREU) and in particular with the principle of *audi alteram partem*, which is part of the rights of defence.

Under this principle, the CJEU acknowledged that the both parties should not only be aware of the documents and observations made by the court but also be able to discuss them. Moreover, the court affirmed that in order to guarantee the right to a fair hearing, the parties should be able to debate and be heard on the matters of fact and law that are determinative.[33]

The CJEU then affirmed on this point that:

> "*Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that the national court which has found of its own motion that a contractual term is unfair is not obliged, in order to be able to draw the consequences arising from that finding, to wait for the consumer, who has been informed of his rights, to submit a statement requesting that that term be declared invalid. However, the principle of audi alteram partem, as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the* ***opportunity*** *to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure.*"

*3. Analysis*

*a. Role of the Charter*

[32] Para 27.

[33] Para 30.

Although not included in as a reference within the preliminary reference, the CJEU evaluated the national provision taking into account art. 47 CFREU. The Charter article is found to contain the principle of *audi alteram partem* as well as the principle of a fair hearing.
Art. 47 CFREU is then used to balance the evaluation of compliance provided by the effectiveness test. The CJEU tempered the duty to exercise the ex officio power by the national court with the obligation to safeguard the possibility for the parties to present their observations regarding the evaluation of unfairness.

b. Judicial dialogue
The national court sought guidance from the CJEU as regards the way in which it could consistently interpret the general procedural rule regarding the principle of *petitum* (or *non ultra petita*) and the obligation to ex officio evaluate the contractual clause. The preliminary reference clearly sought guidance regarding the possibility to consistently apply the national provisions in order to comply with EU law.
The CJEU provided guidance assuming the consistent interpretation, adressing in more general way the issue presented by the national court through the principle of *audi alteram partem*, thus tempering the results of its own case law on ex officio power of the judge.[34]

*c. Remedies*
The CJEU added a specific consideration to the exercise of ex officio power of the judge: the court clarified that national courts have the duty to evaluate the unfairness on their own motion, but their evaluation should not overcome the preference of the consumer. First, the evaluation of the national court should be presented to the parties, leaving sufficient time for both to present their views; secondly, the court should take into account the possibility that the consumer would prefer to apply the unfair clause. However, the court is not obliged to wait for the consumer to make a statement requesting the term be declared invalid before making such a declaration.[35]

d. Impact of CJEU decision
i. external
**Spain**
*Supreme Court, First Chamber n. 241/2013, 9 May 2013* - Asociación de Usuarios de los Servicios Bancarios, Ausbanc Consumo v Banco Bilbao Vizcaya Argentaria, SA, Cajamar Caja Rural, Sociedad Cooperativa de Crédito and Caja de Ahorros de Galicia, Vigo, Orense y Pontevedra. The Supreme court addressed the claim presented by a consumer protection association against three banks, asking for the *floor clauses* (*clausulas suelo*) included in several loan mortgages granted by such entities to be declared null and void on the grounds of non-

[34] In particular, C-243/08, *Pannon GSM Zrt. V Erzsébet Sustikné Győrfi*, ECLI:EU:C:2009:350; C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, ECLI:EU:C:2010:659; and C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*, ECLI:EU:C:2012:349.
[35] See on this point, also the interpretation of the Italian Supreme Court following the decision in *Pannon* below.

completion by the banks of the information duties set out in the EU Directive 93/13. In the evaluation of the EU principles to be applied to the case, the Supreme Court mentioned several CJEU judgements supporting its reasoning, and in particular cited Banif Plus Bank paragraph 30 concerning the duty to raise ex officio the unfairness of clauses and the obligation to give sufficient time to parties to react to such evaluation.[36] The Supreme court declared null and void the floor clause on three grounds: (1) the banks did not provide information on the inclusion of the floor clauses; (2) the banks did not provide information on the potential consequences in the event of a sharp drop in interests rates (as eventually happened); (3) the level of floor clauses and cap clauses imposed within the same loans were highly imbalanced. However, the Supreme Court dismissed the claim of the plaintiffs seeking an order to pay back to their clients the amounts unduly collected by application of the floor clauses. The justification of such lack of retroactive effects was the necessity to preserve legal certainty and to avoid negative consequences to a country's economic stability and general interests.[37]

ii. Preliminary references connected to the case and pending before the ECJ

*Request for a preliminary ruling from the Fővárosi Törvényszék (Hungary) lodged on 23 January 2014 – ERSTE Bank Hungary Zrt. v Attila Sugár. Case C-32/14*

1. Does a procedure of a Member State comply with Article 7(1) of Directive 93/13/EEC if, under that procedure, in the event of a breach by the consumer of an obligation contained in a document in due form drawn up by a notary, the other party to the contract avoids inter partes proceedings before a court and asserts its claim to the amount it indicates by issuing what is known as an "enforcement clause", without any examination being possible of the unfairness of a term of the underlying contract?
2. In such a procedure may the consumer request the annulment of the enforcement clause already issued, on the basis that there was no examination of the unfairness of a term of the underlying contract, whereas, according to the judgment in Case C-472/11, in court proceedings the court must inform the consumer if it finds that a term is unfair?

[36] Para 125 of the decision.

[37] Interestingly, after the decision several national lower courts did not follow the Supreme Court, allowing the possibility for clients of banks to recover the sums paid under the application of floor clauses since the conclusion of the contracts. The Supreme Court then intervened again with decisions n. 138/2015, of 24 March 2015 and n. 139/2015 of 25 March 2015, clarifying that when there is a declaration of invalidity of a floor clause, the restitution of the interests that would have been paid only dates back to 9 May 2013, the date of the previous decision of the Supreme Court when the clause was declared invalid.

Casesheet n. 4.2 – **Pannon**

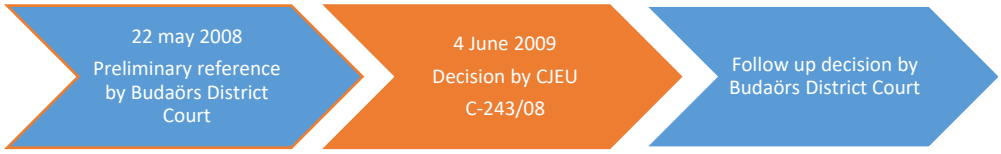
**Reference case**
**CJEU:** Judgment of the Court (Third Chamber) of 15 July 2010. Pannon Gép Centrum Kft v APEH Központi Hivatal Hatósági Főosztály Dél-dunántúli Kihelyezett Hatósági Osztály. Case C-368/09.

***Core issues***
Does a judge have the power/duty to assess the unfairness of a contractual term although the question has not been raised by the consumer during pleading?
Shall the judge provide so even when legal and factual elements necessary for this task are not available within the process?

At a glance

| Area | Country | Reference to EU law | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| •Consumer protection | • HUNGARY | •directive 93/13 | • preliminary reference | • CJEU<br>• Lower Court | • ex officio power of court |

*1. Timeline representation*




*2. Case law description*
The contract for mobile telephone service provision between Mrs Sustikné Győrfi and Pannon GSM Zrt. was a standard contract agreement, which included among the terms and conditions a jurisdiction clause setting the forum for any dispute arising from the contract in the place where the service provider has its seat.
After an alleged breach of contractual obligation, the service provider applied to the Budaörs District Court for an order of payment. The court was in fact located in the district where Pannon has its principal place of business. As a consumer opposed the order of payment,[38] the court acknowledged that under the applicable rules of procedure the territorial jurisdiction for the claim should be in the place of residence of the consumer. This issue of territorial jurisdiction, under the code of civil procedure, must be raised on its own motion by the court; however, under Hungarian law, the issue of jurisdiction cannot be raised anymore after the first filing by

[38] Note that the opposition was not addressing the problem of jurisdiction as regards consumer contracts.

the defendant of her defence to the substance of the dispute, as in the case at stake the consumer opposed to the order.

The Budaörsi District Court then decided to stay proceedings and referred the following questions:

> Can Article 6(1) of … Directive [93/13] – pursuant to which Member States are to provide that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer – be construed as meaning that the non-binding nature vis-à-vis the consumer of an unfair term introduced by the seller or supplier does not have effect ipso jure but only where the consumer successfully contests the unfair term by lodging the relevant application?
>
> Does the consumer protection provided by Directive [93/13] require the national court of its own motion – irrespective of the type of proceedings in question and of whether or not they are contentious – to determine that the contract before it contains unfair terms, even where no application has been lodged, thereby carrying out, of its own motion, a review of the terms introduced by the seller or supplier in the context of exercising control over its own jurisdiction?
>
> In the event that the second question is answered in the affirmative, what are the factors which the national court must take into account and evaluate in the context of exercising this control?'

The CJEU decided the case on 4 June 2008. The present analysis will be focused on the first two questions. The CJEU moved from the previous case law on the ex officio power of court and clearly affirmed that EU law confers on the national court both a power and a duty to examine the fairness of terms in consumer contracts.[39] The national procedural rules applicable to the case (such as the one regarding the territorial jurisdiction) do not limit any such duty to examine ex officio the fairness of a term.

However, the CJEU did not provide an open solution for the national court. Rather, it provided guidance for national courts as regards the test of fairness which should be carried out "*where [the court] has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction*";[40] the court is not required to disapply the term "*if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status*".[41]

Hence, the CJEU affirmed on this point that:

> "*Article 6(1) of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, must be interpreted as meaning that an unfair contract term is*

[39] Para 32: "*the role thus attributed to the national court by Community law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion*". See that the case law cited included Joined cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, ECLI:EU:C:2000:346; C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, ECLI:EU:C:2006:675; C-473/00, C-473/00 *Cofidis SA contro Jean-Louis Fredout*, ECLI:EU:C:2002:705.

[40] Para. 32.

[41] Para 33.

*not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand. The national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application. That duty is also incumbent on the national court when it is ascertaining its own territorial jurisdiction.*"

*3. Analysis*

*a. Role of the Charter*

No reference to the Charter.

*b. Judicial dialogue*

The national court sought to clarify the applicability of Directive 93/13/EEC to purely procedural provisions addressing the territorial jurisdiction of claims. The wording of the preliminary reference clearly sought guidance regarding the possibility of disapplying the national provisions in order to comply with EU law.

The CJEU directly resolves the case, affirming that the judge has the duty to evaluate the unfairness of the contractual clause, giving only as additional guidance the availability of legal and factual elements necessary for the evaluation.

*c. Remedies*

The CJEU allocated a relevant role for national courts as regards protection of consumers. The CJEU affirmed, on the one hand, that an unfair contract term is not binding on the consumer even if the consumer has not contested the validity of the term *in limine litis*. On the other hand, it went further to state that national courts are not only capable of determining on their own motion whether a term of a contract before it is unfair, but also have the obligation to examine the unfairness where legal and factual elements are available.

d. Impact of CJEU decision

i. External

**Italy**

*Corte di Cassazione, sezioni unite (joint chambers), 4.9.2012, n. 14828* - The Court decides on the question of whether, after a plaintiff has first filed a claim for contract termination due to a breach by the counterparty and subsequently a claim for restitution, the appellate court can validly reject the claims, given that it lacks the judicial power to investigate the validity of the contract when the plaintiff has originally filed a different type of action and being the modification of the claim precluded.

The Supreme Court therefore considers the extent of the ex officio power to ascertain the validity of a contract, where proceedings concerning contract termination were still on going. Based on recent legislative and judicial trends expanding the role for contract nullity as means

for protecting general interests and fundamental values well beyond the area of the individual interests, the Court acknowledges that the ex officio judicial power to ascertain contract validity contributes to the mandatory nature of legal rules establishing contract nullity.
On the one hand, it acknowledges that this power is limited whenever the law identifies one party as the sole interested party in the invalidity claim ("nullità di protezione" or relative nullity) and that this is the case for law based on EU directives, mainly for consumer contracts.
On the other hand, the Court refers to ECJ case law (namely *Pannon* and *Asturcom* cases) to interpret art. 1421 of Italian Civil Code which is a general contract law provision establishing an ex officio judicial power to declare a contract null and void. In the case of a consumer contract, the decision refers to the ECJ decision in *Pannon* in order to establish that the ex officio power/duty does not arise when the consumer objects to the declaration of nullity (in his/her own interest).
*Corte di Cassazione, sezioni unite (joint chambers), 12.12.2014, n.26242* - The Court decides on the question of whether, after a plaintiff has first filed a claim for contract termination due to breach of the counterparty and the claim has been rejected, the appellate court has a duty to ascertain the invalidity of the contract.
The Court acknowledges the role for nullity in recent trends of legislation and judicial thought, having special regard to the protection of general interests having constitutional relevance (such as fair functioning of the market and parties' equality). It underlines the role of the judge in advocating such an interest through the ex officio power to raise the issue concerning contract invalidity. It refers to the ECJ decision in the *Pannon* case to recall the judicial duty to examine the abusive nature of a clause in a consumer contract and not to enforce the abusive clause unless the consumer objects to the declaration of invalidity. This would be the only limitation on the ex officio judicial power (duty) to ascertain the invalidity of a contract.
The reference to the ECJ case law helps the Court to find the nullity provided for in consumer law as a "species" within the "genus" of contract invalidity with special regard to its role to protect general interests. The ex officio power is therefore a necessary means of guarantee for the effective protection of fundamental values in the social organization.

### ii. Preliminary references connected to the case

*Reference for a preliminary ruling from the Regional Court in Prešov (Slovak Republic) lodged on 9 February 2010 - Pohotovosť s.r.o. v Iveta Korčkovská. Case C-76/10*

1. (a) Is information about the total cost to the consumer in terms of percentage (the annual percentage rate - APR) of such importance that failure to mention it in the contract could render the cost of consumer credit non-transparent and insufficiently clear and comprehensible?
(b) Is it possible, under the consumer protection framework provided by Council Directive 93/13/EEC 1 of 5 April 1993 on unfair terms in consumer contracts, to regard the price as an unfair condition in a credit contract on the grounds of insufficient transparency and clarity if the contract fails to set out information on the total cost of consumer credit in percentage terms

and the price is expressed solely as a financial sum consisting of various fees specified both in the contract and in the General Terms and Conditions?
2. (a) Must Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that a national court, hearing an application for enforcement of a final arbitral award issued without the participation of the consumer, is required of its own motion, where the necessary information on the legal and factual state of affairs is available to it for this purpose, to consider the fairness of a penalty contained in the credit agreement concluded by a creditor with a consumer if, according to national procedural rules, such an assessment may be conducted in similar proceedings under national law?
(b) If the penalty for a violation of the consumer's obligations is disproportionate, is it for this court to draw the necessary conclusions arising therefrom under national law to ensure that the consumer will not be bound by that penalty?
(c) Can a penalty of 0.25% per day on outstanding credit, i.e. 91.25% p.a., be regarded as an unfair condition on the grounds that it is disproportionate?
3. In the application of EU legislation (Council Directive 93/13/EEC of 5 April 1993, Directive 2008/48/EC of the European Parliament and of the Council 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC), is the consumer protection framework of such a nature in relation to consumer credit agreements that, if a contract circumvents regulations designed to protect consumers in the field of consumer credit and if, under such a contract, an application is submitted for the enforcement of a ruling under an arbitral award, the court may discontinue enforcement proceedings or permit enforcement proceedings at the creditor's expense only up to the outstanding amount of the credit granted, if, under national rules, such an assessment of an arbitral award is admissible and the court has the necessary information about the factual or legal state of affairs at its disposal?

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*Reference for a preliminary ruling from the Krajský súd v Prešove (Slovakia) lodged on 23 May 2011 - Erika Šujetová v Rapid life životná poisťovňa, a.s.*
*Case C-252/11*

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Do Article 6(1) and Article 7(1) of Council Directive 93/13/EEC on unfair terms in consumer contracts 1 preclude the application of a provision of national law under which the court with territorial jurisdiction for the review of an arbitral award is always and only the court in whose area of jurisdiction, pursuant to an arbitration agreement or clause, the arbitration tribunal is established or the place of arbitration is situated, if the court finds that the arbitration agreement or clause is an unfair term within the meaning of Article 3(1) of the above directive?
If the answer to the first question is negative: do Article 6(1) and Article 7(1) of Council Directive 93/13/EEC on unfair terms in consumer contracts preclude the application of a provision of national law under which a court ... upon annulling an arbitral award, is to continue the main proceedings (i.e. concerning the claim originally heard before the arbitration tribunal) without re-examining its territorial jurisdiction over such continuing proceedings, even though, if the claim against the consumer had been filed from the outset with a court and not an

arbitration tribunal, the court with territorial jurisdiction for the proceedings would have been, from the outset, the court of the consumer's place of residence?

Casesheet n. 4.3 – **Asbeek Brusse**

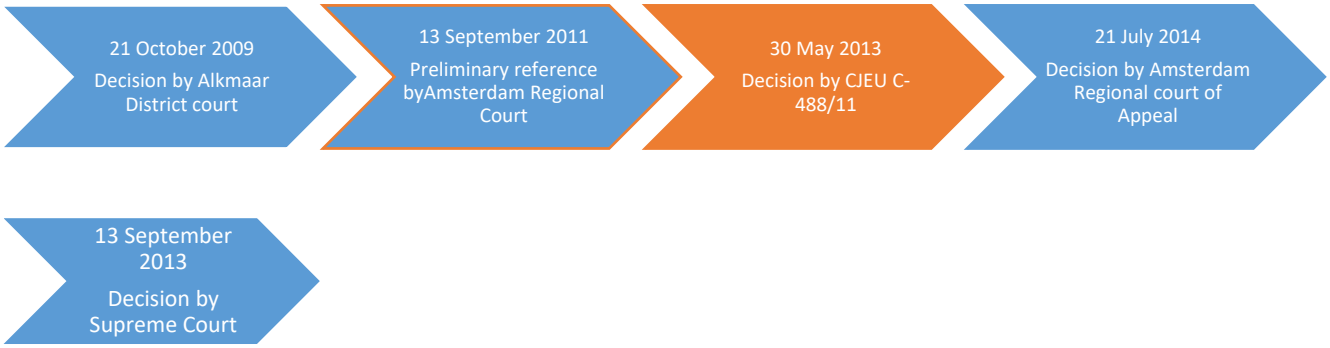
**Reference cases**
**CJEU:** Judgment of the Court (First Chamber), 30 May 2013. Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV. Case C-488/11
**The Netherlands:** Court of Appeal of Amsterdam, 13 September 2011, ECLI:NL:GHAMS:2013:CA1825
Court of Appeal of Amsterdam, 21 January 2014, ECLI:NL:GHAMS:2014:950

***Core issues***
Does a judge have the ex officio power/duty to assess the unfairness of a penalty clause and declare it non-binding even though, based on existing national law, the consumer has simply invoked the mitigation powers of the court and not the annulment of the unfair term?
Shall a judge interpret article 6, UCTD on non-bindingness of unfair contract terms as a rule of public policy?
Is, under EU law, a judge authorized to revise the content of an unfair term under the UCTD?

At a glance

| Area | Country | Reference to EU law | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| • Consumer protection | • NETHERLANDS | •directive 93/13 | • preliminary reference<br>• consistent interpretation | • CJEU<br>• Appeal Court | • ex officio power<br>• reduction of penalty |

*1. Timeline representation*




*2. Case law description*

The tenancy agreement between Jahani and Mr Asbeek Brusse and Ms de Man Garabito was concluded on the basis of a standard contract, which included a penalty clause requiring the tenant to pay an interest rate of 1% over the sum due per month of delay and a penalty calculated per day for the obligations arising from the contract.
As the tenants stopped paying the monthly rent, the landlord sought to recover the amount due and brought a claim before the Alkmaar District Court, including in the sum sought the penalty calculated upon the interest rate include in the contract. The court in a decision of 21 October 2009 upheld the request. The tenants then appealed before the Amsterdam Regional Court of Appeal, requesting a reduction of the sum to be paid as penalties.
On 13 September 2011, the Amsterdam Regional Court of Appeal decided to stay the proceedings and to refer the following questions:

> '*Should a person who lets residential premises on a commercial basis and who lets a residential property to an individual be deemed to be a seller or supplier within the meaning of the Directive [93/13/EEC of 5 April 1993 on unfair terms in consumer contracts]? Does a tenancy agreement between a person who lets residential premises on a commercial basis and a person who rents such premises on a non-commercial basis fall within the scope of the Directive?*
> *Does the fact that Article 6 of the Directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy mean that, in a dispute between individuals, the national transposition measures with regard to unfair contractual terms are a matter of public policy, so that the national court is competent and obliged, both in first-instance proceedings and in appeal proceedings, of its own motion (and thus also outside the ambit of the grounds of complaint), to assess a contractual term against the national transposition measures and to find that term to be void if it comes to the conclusion that the term is unfair?*
> *Is it compatible with the practical effect of [European Union] law that the national court does not refrain from applying a penalty clause which must be deemed to be an unfair contractual term within the meaning of the Directive, but, by the application of national legislation, merely mitigates the penalty, in a case where an individual has invoked the mitigation powers of the court, but not the voidability of the term concerned?*'

The CJEU decided the case on 30 May 2013. The CJEU held that Directive 93/13/EEC must be interpreted as applying to a tenant agreement such as the one at issue, if this agreement is subject to statutory or regulatory provisions set out by national law, which is a matter for the national court to ascertain. The CJEU, on the basis of its own recent jurisprudence in *Banif Plus Bank* (see case sheet n. 1), affirmed the duty of judges to examine the unfairness of contractual clauses of its own motion, where the legal and factual elements necessary for that task are available.
Then, under the equivalence test, the CJEU affirmed that art. 6(1) of Directive 93/13 "*must be regarded as a provision of equal standing to national rules which rank, within the domestic*

*legal system, as rules of public policy*".[42] Therefore, if at national level, the rules of public policy require the judge to examine of its own motion the validity of the legal measure, the same should apply as regards the unfairness of contractual clauses. Similarly, if at national level, the judge may annul a term that is contrary to public policy, the same should apply as regards unfair clauses.

However, the CJEU affirmed that in case of unfair clauses, the judge should exclude the application of the term, and under art 6(1) of Directive 93/13 is not authorised to revise its content, thus in the particular case to reduce the penalty.

In accordance with this judgment, the Amsterdam Regional Court of Appeal found that the contractual penalty clause fell within the scope of the Directive and should be considered unfair in light of art. 1(5) of the Annex to the Directive.[43] The Court of Appeal in a decision of 24 July 2014, considered that the contractual penalty is unfair, since it stipulates a fixed interest rate that is considerably higher than statutory interest and market interest in the Netherlands. Finally, the Court made an award for the rent still due plus statutory interest, and rejected all other claims.

The interaction between the courts did not trigger any changes in the legislative framework. However, the CJEU's *Asbeek Brusse* judgment had a considerable impact on Dutch case law. The national courts at all levels have used the CJEU judgement in their legal reasoning.[44]

Shortly after the CJEU decision, the Supreme Court of the Netherlands (Civil-law division) with a judgement of 13 September 2013 interpreted the national provision in a consistent manner so as to grant effective protection to consumers. The court faced a case of a building contract where applicable general terms and conditions included a clause concerning an interest of 2% on late payments. As the parties disagreed about the final settlement, the consumer alleged that the Court of Appeal should have examined of its own motion whether the contractual term of 2% interest per month on late payments was unfair.

From the case law of the CJEU (*Banco Español de Crédito* and *Pénzügyi Lízing*), the Supreme Court inferred that national courts are obliged to examine of their own motion whether a contractual term falls within the scope of Directive 93/13/EEC and, if so, whether the term is unfair. Referring to the CJEU's judgment in *Asbeek Brusse*, the Supreme Court concluded that this requires an examination of law equivalent to national rules of public order.

Thus, the Supreme Court holds that the Dutch Court of Appeal is obliged to perform such an ex officio examination, even if this would go beyond the (strictly delimited) scope of the dispute in appellate proceedings. Overriding the (strict) rules is only possible when an appeal has been

[42] Para 44.

[43] The article provides that terms may be unfair if 'have the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation'.

[44] See i.a. Supreme Court decisions : ECLI:NL:HR:2013:691; ECLI:NL:HR:2016:236; ECLI:NL:HR:2016:340; Court of Appeals decisions : ECLI:NL:GHSHE:2013:4346; ECLI:NL:GHARL:2013:6164; ECLI:NL:GHARL:2013:6635; ECLI:NL:GHARL:2013:9446; ECLI:NL:GHAMS:2014:1580; ECLI:NL:GHAMS:2015:165; ECLI:NL:GHAMS:2015:4630; ECLI:NL:GHARL:2015:2101; ECLI:NL:GHARL:2015:5535; ECLI:NL:GHAMS:2015:5241; ECLI:NL:GHARL:2016:100.

lodged against the judgment in first instance, otherwise the Court of Appeal is not competent to hear the case.
In addition, the Supreme Court considers that the court must take all the measures of inquiry that are necessary to obtain the necessary information able to ensure the full effectiveness of Directive 93/13, (i.e. to determine whether the directive is applicable, and whether the contractual terms are unfair). The court must observe the principle of hearing the arguments of both parties. The duty of ex officio examination also applies in the event of default on the part of the consumer, on the basis of Article 139 of the Dutch Code of Civil Procedure and the writ of summons.
According to the Supreme Court, the Court of Appeal should have found that the contractual term at issue in this case is unfair, partly because of the unusually high level of interest: 2% per month. In addition, the court is obliged to annul the unfair term.

3. *Analysis*

a. *Role of the Charter*

Although the CJEU did not expressly mention the Charter, it clearly linked its reasoning with the one adopted in *Banif Plus Bank*, where instead art. 47 CFREU was *motu proprio* brought into the decision. In particular, the CJEU confirmed the importance of the principle of *audi alteram partem*, which should be applicable in all the cases where the judges found on their own motion the unfairness of contractual clauses.

b. Judicial dialogue

The Court of Appeal sought to clarify the applicability of Directive 93/13/EEC to other types of contracts than sales contracts, i.e. interpreting national law consistently with EU law. Furthermore, the Court wished to clarify whether it was allowed to mitigate a contractual penalty (cf. Article 6:94 BW) or had to disapply the contract clause and thereby sought to resolve a conflict of norms.
The case law following the CJEU decision show that the lower courts and supreme court consistently applied the CJEU reasoning, to the extent that the Supreme court in a later case extended the power of judges in appeal proceedings to evaluate the unfairness of the clause.

c. *Remedies*

Referring to its case-law, the CJEU affirmed once again that the judges have a duty to evaluate on their own motion if the contractual terms may be deemed as unfair, insofar as they have sufficient factual and legal information. This duty does not however extend to a power to modify the content of the contract. As a matter of fact the CJEU affirmed that national courts are required to exclude the application of an unfair contractual term, without being authorised to revise the content of that term.

d. Impact of CJEU decision

i. External

No impact on foreign jurisprudence acknowledged.

ii. Preliminary references connected to the case

*Request for a preliminary ruling from the Audiencia Provincial Navarra (Spain) lodged on 25 April 2014 — Antonia Valdivia Reche v Banco de Valencia, S.A. Case C-208/14*

Does Article 6 of Directive 93/13 require the national court, when it has found a term setting a rate of 29% for default interest to be unfair, to declare that term ineffective, without any scope for reducing the rate of interest agreed, even though such a reduction has been expressly requested by one of the consumers against whom proceedings have been brought?

*Request for a preliminary ruling from the Juzgado de Primera Instancia e Instrucción No 3 de Ávila (Spain) lodged on 11 February 2014 — Banco de Caja España de Inversiones, Salamanca y Soria, S.A. v Francisco Javier Rodríguez Barbero and María Ángeles Barbero Gutiérrez. Case C-75/14*

Under Council Directive 93/13/EEC 1 of 5 April 1993 on unfair terms in consumer contracts, and in particular Article 6(1) thereof, and in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, must a national court, when it finds there to be an unfair default-interest clause in mortgage loans, declare the clause void and not binding or, on the contrary, must it moderate the interest clause, referring the matter back to the party seeking enforcement or lender for recalculation of the interest?
Is the Second Transitional Provision of Law 1/2013 of 14 May 2013 nothing more than a clear limitation on the protection of consumer interests, by implicitly imposing upon the court the obligation to moderate a default-interest clause which is tainted by unfairness, recalculating the stipulated interest and maintaining in force a stipulation which was unfair, instead of declaring the clause to be void and not binding upon the consumer?
Does the Second Transitional Provision of Law 1/2013 … contravene … Directive 93/13/EEC …, and in particular Article 6(1) thereof, by preventing application of the principles of equivalence and effectiveness in relation to consumer protection and avoiding application of the penalty of nullity and lack of binding force in respect of default-interest clauses tainted by unfairness and stipulated in mortgage loans entered into prior to the entry into force of Law 1/2013 …?

*Request for a preliminary ruling from the Juzgado de Primera Instancia e Instrucción nº 2 de Marchena (Spain) lodged on 10 September 2013 – Caixabank SA v Antonio Galán Rodríguez. Case C-486/13*

Under Council Directive 93/13/EEC 1 of 5 April 1993 on unfair terms in consumer contracts, and in particular Article 6(1) thereof, and in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, must a national court, when it finds there to be an unfair default-interest clause in mortgage loans, declare the clause

void and not binding or, on the contrary, must it moderate the interest clause, referring the matter back to the party seeking enforcement or lender for recalculation of the interest?
Is the Second Transitional Provision of Law 1/2013 of 14 May 2013 nothing more than a clear limitation on the protection of consumer interests, by implicitly imposing upon the court the obligation to moderate a default-interest clause which is tainted by unfairness, recalculating the stipulated interest and maintaining in force a stipulation which was unfair, instead of declaring the clause to be void and not binding upon the consumer?
Does the Second Transitional Provision of Law 1/2013 of 14 May 2013 contravene Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, and in particular Article 6(1) thereof, by preventing application of the principles of equivalence and effectiveness in relation to consumer protection and avoiding application of the penalty of nullity and lack of binding force in respect of default-interest clauses tainted by unfairness and stipulated in mortgage loans entered into prior to the entry into force of Law 1/2013 of 14 May 2013?

Casesheet n. 4.4 – **Sanchez Morcillo I and II**

**Reference cases**

**CJEU:** Judgment of the Court (First Chamber), 17 July 2014. Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA. Case C-169/14
Order of the Court (First Chamber) of 16 July 2015- Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA. Case C-539/14
**Spain:** Juzgado de Primera Instancia e Instrucción n.º 7 de Avilés, Auto 6957/2013; 6958/2013; 6959/2013; 6960/2013 and 6961/2013, of 14 November 2013.
Constitutional Court, decisions AATC 70/2014 and 71/2014, of 10th March 2014 and AATC 111/2014, 112/2014, and 113/2014, of 8th April 2014.

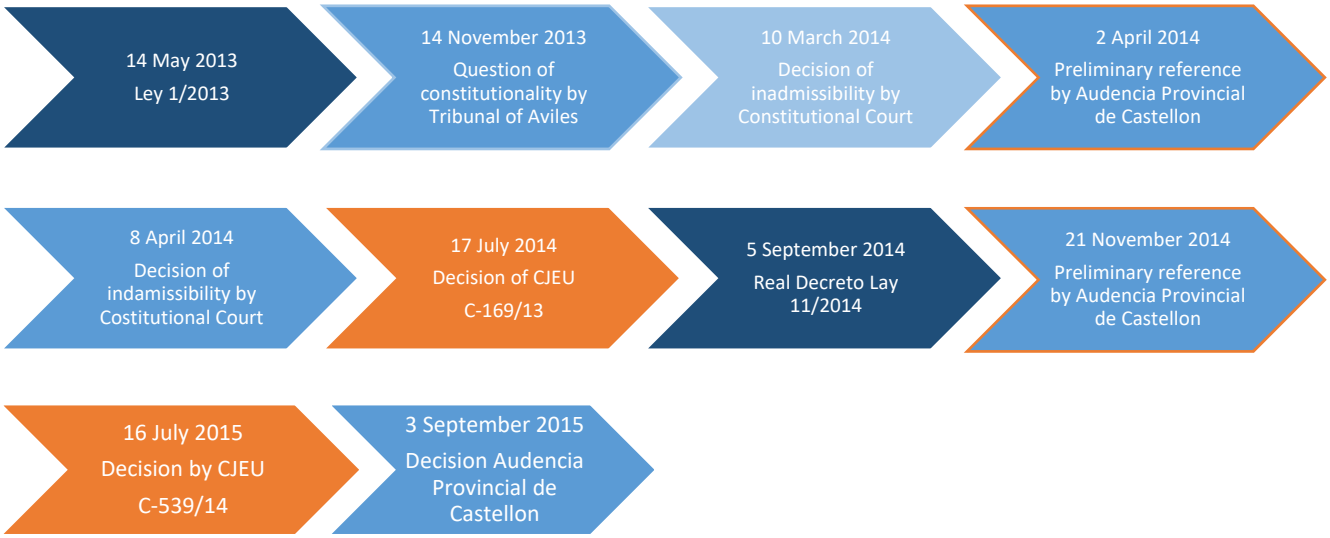
***Core issues***

Should the consideration for the fundamental right to effective judicial protection (art. 47 CFREU) lead a judge hearing a mortgage execution to stay the procedure and allow for interim measure if he finds that the procedure is grounded on a title based on unfair terms?
Should the consideration for the fundamental right to effective judicial protection (art. 47 CFREU) lead a court of appeal to assess the unfairness of the title on which the mortgage procedure is grounded although the grounds for appeal pursuant to existing national law?
How should the judge choose between disapplication, conform interpretation or a preliminary reference in respect of any national rule that could violate art. 47 CFREU under these respects?
To what extent is art. 47 a sufficient ground for disapplication (or conform interpretation) of national law and to what extent is consideration for other rights or principles necessary (e.g. the right to housing)?
How can these latter considerations influence the choice of remedies, namely between a timely termination of the executory procedure v. compensatory measures once the family home is seized and sold as security?
Can the judge extend these consumer protective measures based on art. 47 CFREU to cases in which the consumer's claim is based on grounds other than those covered by E.U. law?

**At a glance**

| Area | Country | Charter provision | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| • Consumer protection | • SPAIN | • art 47<br>• art 34<br>•directive 93/13 | • preliminary reference<br>• disapplication | • CJEU<br>• Appeal court<br>• Constitutional Court<br>• Lower courts<br>• Legislator | • Right to appeal<br>• ex officio power |

## 1. *Timeline representation*




## 2. *Case law description*

On May 14th 2013 the reform of several provisions of the Spanish Code of Civil procedure and related Laws was enacted by Ley 1/2013,[45] which aimed at reinforcing the protection of mortgage debtors, with particular attention being paid to vulnerable categories. The Law was enacted as an implementation of the CJEU decision in Case C-415/11 *Mohammed Aziz*.[46]

With the amendment, the Spanish legislator introduced a new ground of objection based on the unfairness of the contractual terms within the foreclosure proceeding. This ground of objection leads to an incidental and separate procedure within the executive one. The incidental procedure is an oral one: the parties may only submit the documents that they consider pertinent, as provided by art. 695.2 CCP.[47] If the judge deems the ground as well-founded, the enforcement is suspended and the execution is terminated. If the judge deems the ground unfounded, the enforcement will continue. As provided by art. 695.4 CCP, the order declaring the unfairness of the clause and the dismissal of the execution or non-application of the unfair term is subject to appeal. On the contrary, the order rejecting the objection is not subject to appeal.[48]

This different treatment as regards the possibility of appeal against the decision of the judge within the foreclosure proceeding, led to a set of questions of constitutionality presented by the Tribunal of Lower Instance of Aviles. These questions questioned if art. 695.4 CCP was compatible with the principle of equality, and its specific procedural application, namely the

[45] Ley 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social. BOE 116, 15 May 2013.

[46] See Case sheet n. 6.

[47] Note that this ground for opposition is only available for consumers, as defined in the Royal Legislative Decree 1/2007, approving the consolidated version of the General Law for the Protection of Consumers and Users and other supplementary laws (hereinafter TRLGDCU).

[48] However, the debtor the debtor may still exercise nullity of action for abuse of that clause in ordinary declaratory proceedings under Art. 698 LEC, but without affecting the executive process.

principle of equality of arms, which the Constitutional Court deemed included in the substance of Art. 24.1 SC.[49]

The Spanish Constitutional Court however left the question unresolved in light of procedural rules. The *amparo de constitutionalidade* required that in order to deem such a request admissible, the court should specify or justify to what extent the outcome of the decision depends on the validity of the provision in question (the so-called *juicio de relevancia*). The Spanish Constitutional Court found that the Tribunal of Aviles did not justify the connection between the specific provision and the solution of the proceedings.[50] Thus, the Constitutional Court deemed the questions inadmissible in decisions AATC 70/2014 and 71/2014, of 10th March 2014 and AATC 111/2014, 112/2014, and 113/2014, of 8th April 2014.

In the meantime, the Audencia Provencial de Castellon received an appeal against the decision of the Court of First Instance n. 3 of Castellon. The First Instance decision rejected the objection of a consumer regarding the enforcement of a notarial act which allowed the Bank (in the specific case Banca Bilbao) to demand payment of the entire loan together with ordinary and default interest and the enforced sale of the mortgaged property. Although neither the debtor alleged as ground of opposition the existence of unfair terms, nor the First Instance Court raised the possible existence of unfair terms, the Audencia Provencial deemed that the relevant provisions applicable to the case, namely the above mentioned art. 695.4 CCP (as allowing for appeal only in case of dismissal of the execution based on the unfairness of the title) could be incompatible with the objective of consumer protection pursued by Directive 93/13 and with the right to an effective remedy guaranteed by art. 47 CFREU.

Although not all the questions of constitutionality addressing the same provision were decided by the Constitutional Court, on April 2nd 2014 the Audencia Provencial de Castellon made a preliminary reference to the Court of Justice of the European Union, which addressed the same issue. In its reference it posed the following questions:

> "*Is it compatible with Article 7(1) of Directive 93/13 a procedural rule, such as that laid down in Article 695(4) CCP, which, as regards the right to an appeal against a decision determining the outcome of an objection to enforcement proceedings in relation to mortgaged or pledged assets, to permit an appeal to be brought only against an order discontinuing the proceedings or disapplying an unfair clause and to exclude an appeal in other case?*
>
> *Does the principle of the right to an effective remedy, to a fair trial and to equality of arms, guaranteed by Article 47 of the Charter, preclude a provision of national law, such as that laid down in Article 695(4) CCP?*"

[49] Juzgado de Primera Instancia e Instrucción n.º 7 de Avilés, Auto 6957/2013; 6958/2013; 6959/2013; 6960/2013 and 6961/2013, of 14 November 2013.

[50] See the analysis in Helena Díez García, *Igualdad de Armas y Tutela Judicial Efectiva en el Art. 695.4 LEC tras el Real Decreto-Ley 11/2014, de 5 de Septiembre: Crónica de una Reforma Legislativa Anunciada (de los AATC 70/2014, 71/2014, 111/2014, 112/2014 Y 113/2014 a la STJUE de 17 de Julio de 2014)*, Derecho Privado y Constitución, 28, 2014, 201-262.

The Court of Justice of the EU decided the case on a very short time and the decision was published on July 17th 2014. The Court addressed the case by taking the two questions together and focused its analysis on the principle of the effectiveness of EU law.
The Court examined whether national procedural law respected the fundamental right to effective judicial protection laid down in Article 47 CFREU. Here, the Court affirmed that EU law does not generally require a second level of jurisdiction[51] but in the specific case a right to appeal must be granted. This was due to the fact that the foreclosure proceeding had as its object the consumer's family home, and it is based on an enforceable notarial instrument that is not subject to an *ex ante* judicial scrutiny.
It is important to note that the Court analysed the Spanish procedural system as a whole: first it interpreted that the judge, pursuant art 552(1) CCP, has only a discretionary power to examine of its own motion the unfairness of contract clauses; secondly, it acknowledged that the consumer could claim the unfairness of the clause in a separate declaratory proceeding, but these proceedings may not affect the foreclosure proceedings in the absence of the possibility for the judge to make an order for interim relief with suspensive effect of the latter. The result of this system is that the consumer could only be granted a purely compensatory remedy. In the view of the Court, this resulted in a negative assessment of the Spanish system, as such a remedy could not be deemed to provided effective judicial protection for the consumer.[52]
Further in its analysis of the specific legal provision, the Court stressed that the limitation of the consumer's right of appeal "*accentuates the imbalance existing between the parties to the*

[51] See para 36: "*In that connection, it should be observed that, according to EU law, the principle of effective judicial protection does not afford a right of access to a second level of jurisdiction but only to a court or tribunal (see, to that effect, judgment in Samba Diouf, C 69/10, EU:C:2011:524, paragraph 69). Consequently, the fact that the only remedy available to the consumer, as a debtor against whom mortgage enforcement proceedings are brought, is to bring an action before a single jurisdictional level in order to protect the rights derived from Directive 93/13 is not, in itself, contrary to EU law.*"

[52] See par. 43: "*Having regard to those characteristics, if the consumer's objection to the enforcement of the mortgage against his property is dismissed, the Spanish procedural system, taken as a whole and in the manner applicable in the main proceedings, exposes consumers, and possibly, as is the case in the main proceedings, their family, to the risk of losing their dwelling in an enforced sale, while the enforcing court may have, at most, delivered a rapid assessment of the validity of the contractual clauses upon which the seller or supplier bases his application. The protection that the consumer, as a mortgage debtor against whom enforcement proceedings are brought, might obtain by way of a separate judicial scrutiny undertaken in the context of substantive proceedings brought in parallel with the enforcement proceedings, cannot offset that risk because, even if the scrutiny revealed the existence of an unfair clause, the consumer would not be granted a remedy reflecting the damage he had suffered by restoring him to the situation he was in before the enforcement proceedings against the mortgaged property, but, at best, an award of compensation. The purely compensatory nature of the remedy that might be awarded to the consumer would confer on him only incomplete and insufficient protection. It would not constitute either adequate or effective means, within the meaning of Article 7(1) of Directive 93/13, of preventing the continued use of the clause, found to be unfair, in the instrument that contains a pledge by way of mortgage against a property on the basis of which enforcement proceedings were brought against that property (see, to that effect, Aziz, EU:C:2013:164, point 60).*"

*agreement*"[53] and that remedying such an imbalance was the objective sought by the Unfair Contract Terms Directive, in particular through judicial scrutiny of unfair contract terms.
Thus the Court decided that:

> "*Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding a system of enforcement, such as that at issue in the main proceedings, which provides that mortgage enforcement proceedings may not be stayed by the court of first instance, which, in its final decision, may at most award compensation in respect of the damage suffered by the consumer, inasmuch as the latter, the debtor against whom mortgage enforcement proceedings are brought, may not appeal against a decision dismissing his objection to that enforcement, whereas the seller or supplier, the creditor seeking enforcement, may bring an appeal against a decision terminating the proceedings or ordering an unfair term to be disapplied.*".

The Spanish legislator reacted quickly to the decision and enacted on 5 September 2014 the Real Decreto Ley 11/2014 (hereinafter RDL 11/2014),[54] which included a provision amending art. 695.4 CCP providing for an appeal by the debtor to the decision of the judge to dismiss a complaint based on the unfairness of the contractual clause. Thus, the article reads as follows:

> "*4. An appeal may lie against the order discontinuing enforcement or disapplying an unfair term or rejecting the complaint on the ground laid down in paragraph 1(4) of the present article.*
> *Save in those circumstances, no appeal shall lie against orders adjudicating upon the objection to enforcement referred to in the present article and the effects of those orders shall be confined exclusively to the enforcement proceedings in which they are made.*"

However, the legislator limited the extension of the appeal to the specific complaint based on EU law, without extending such a possibility to all grounds available to the debtor within a foreclosure proceeding.
The Audencia Provencial de Castellon did not deem the legislative reform as fully implementing the decision of the CJEU. Thus, on 10 October 2014 notified to the parties its intention to present a second preliminary reference within the same proceeding. The Audencia Provincial affirmed that the RDL 11/2014 still did not respect the rights recognized by Directive 93/13/EEC and thus a violation of various fundamental rights had occurred, including the right to effective judicial protection in terms of the right to equality of arms, the right to housing and the right to private and family life.
In order to justify the connection with EU law, the Audencia Provencial pointed to the fact that the new wording of art 695.4 CCP could be in conflict with art 1(q) of the Annex to Directive 93/13/EEC, which states that unfair terms are those that have the purpose or effect of excluding or hindering the exercise of legal action or resources by the consumer.

[53] Para. 46.
[54] Spanish BOE n.º 217, 6 September 2014, pag. 69767. Note that in the Exposition of motives of the Law, the legislator referred only to the need to implement the Sanchez Morcillo decision of the CJEU.

Thus the question to the CJEU was the following:

> "*Must Article 7(1) of [Directive 93/13], read in conjunction with Articles 47, 34(3) and 7 of the [Charter] be interpreted as precluding a procedural provision of the kind laid down in Article 695(4) of [the amended LEC], applicable to appeals against a decision determining the outcome of an objection to enforcement proceedings in relation to mortgaged or pledged goods, which allows an appeal to be brought only against an order terminating the proceedings, disapplying an unfair term or rejecting an objection based on an unfair term, the immediate consequence of which is that more legal remedies on appeal are available to the seller or supplier seeking enforcement than to the consumer against whom enforcement is sought?*"

The CJEU decided the case on 16 July 2015.[55] The Court acknowledged that the amended procedural regime established by art 695.4 CCP allows the judge of the foreclosure proceeding to evaluate, before the conclusion of the execution procedure, the unfairness of a contractual clause, with the possibility of declaring the nullity of the proceedings. Moreover, the Court recognised that the amended provision allows the consumer to lodge an appeal against the decision which rejected the complaint based on the unfairness of the contractual clause;[56] thus, it affirmed that art. 695.4 CCP guarantees consumers a complete and sufficient remedy, within the meaning of art. 7(1) of Directive 93/13/EEC.

With regard to the alleged violation of fundamental rights, the Court stressed that the system does not infringe the right to effective judicial protection. This was because the system provided not only that the judge hearing the execution can evaluate, before the conclusion of the foreclosure proceeding, the unfairness of the contractual term, but also that a court of appeal can verify, as part of a double instance system, if the judge hearing the execution in the first instance made a correct analysis of such a clause.

With regard to equality of arms, the Court stated that art. 695.4 CCP effectively gives consumers a reasonable opportunity to exercise judicial actions based on the rights recognized in Directive 93/13/EEC upon conditions not manifestly disadvantageous in relation to the creditor (i.e. the professional). However, the court did not assume the competence of the national court, as the fact that under the Spanish legislation consumers do not have the right to bring an appeal against a decision rejecting their complaint based on grounds other than the unfairness of the contractual term, does not fall into the scope of that directive. For this reason,

[55] Note that the CJEU resolves the case through the expedited procedure provided for in Article 23a of the Statute of the Court of Justice of the European Union and in Article 105(1) of the Rules of Procedure of the Court. The request was justified by the fact that the subject matter of the enforcement in the foreclosure proceeding was the permanent residence of the consumers, thus with a risk that the residence may be lost and of putting the debtors and their family in a particularly difficult position.

[56] See par 39: "*It is undisputed that the provision so amended does indeed give consumers the right to bring an appeal against the decision of the court responsible for enforcement rejecting their objection to the mortgage enforcement proceedings, if that objection is based on the unfairness of a term, within the meaning of Article 3 Directive 93/13, contained in the contract from which the debt arises and which is the basis for the enforcement order.*"

such legislation is not liable to jeopardise the effectiveness of consumer protection which by the directive seeks to provide.

Finally, as regards the alleged right to housing, the Court recalled that art. 34(3) CFREU does not guarantee the right to housing but the "*right to social assistance and housing assistance*" in the framework of social policies based on art. 153 TFEU with the result that that provision was not relevant in the present case.

Thus, the decision of the Court was the following:

> "*Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with Articles 47, 34(3) and 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a national provision of the kind at issue in the main proceedings, by which the consumer, as a mortgage debtor against whom enforcement proceedings are brought, may bring an appeal against the decision rejecting his objection to the enforcement only when the court of first instance has not upheld an objection based on the unfairness of the contractual term upon which the enforcement is based even though the sellers or suppliers may, by contrast, appeal against any decision terminating proceedings regardless of the ground of objection on which that decision is based.*"

The Audencia Provencial de Castellon then decided the case on 3 September 2015. As mentioned above, the appeal presented by the consumer-debtor was not grounded on the unfairness of the clause; thus it felt into the number of grounds of objection that do not entail a right of appeal for the debtor under Spanish legislation. The Audencia Provencial was therefore dismissed the appeal as inadmissible.

### *3. Analysis*

#### *a. Role of the Charter*

Although the AG in its Opinion contested the applicability of the Charter to the case, as outside the scope of EU law given that the latter does not govern national procedural rules, the CJEU upheld the request of the national court and examined the principle of effectiveness in relation to art. 47 CFREU. Thus the CJEU adopted a broad interpretation of Article 51(1) CFR as referred not only to the situations in which Member States enforce EU rules (implementation stricto jure), but also to those situations which fall within the scope of EU law.

The CJEU affirmed that the compensatory remedy available to the consumer, in case the executory proceeding ending with the sale of the house given as security, would be insufficient to provide effective judicial protection. Moreover, even though EU law does not in principle afford a right of access to a second level of jurisdiction, the limitation of the right to appeal on the basis of procedural law could not be justified where the enforcement proceedings relate to the consumer's family home.

#### *b. Judicial dialogue*

After the reform of the procedural law, the commercial courts of first instance and appeal faced several issues with a view to improve the level of protection for consumers in case of over-

indebtedness. After the inadmissibility of the request of constitutionality before the national constitutional court on the basis of conflict between procedural provisions and constitutionally protected rights, the Appeal court sought guidance from the CJEU. It is important to note that the same question was presented to the constitutional court and CJEU by the national courts, demonstrating the interdependence between the protection of the right of appeal at national and European level.
The decision of the CJEU triggered the modification of national legislation. As a result the legislator limited its reform to the EU law realm, without extending the same guarantees to debtors in general.
The repetitive use of the preliminary reference was used by the appeal court to ask the CJEU to evaluate if the national legislator correctly interpreted the guidance given in the previous decision.

*c. Remedies*

The case-law examined addresses the relationship between the declaratory proceedings and the executory ones in case of mortgage loans. In particular, the analysis of the CJEU addressed whether the consumer in the specific legal system is placed in a vulnerable position, and thus whether the procedural guarantees enable him to exercise his rights.
The CJEU analysed the procedural system and acknowledged the existence of a limitation of the consumer's right of appeal. Although the court affirmed that EU law does not require a right to appeal, in the legal context this limitation was deemed as an element that could worsen the existing imbalance between consumer and professional.

*d. Impact of CJEU decision*

i. External

No impact on foreign jurisprudence acknowledged.

ii. Preliminary references connected to the case

> *Request for a preliminary ruling from the Audiencia Provincial de Illes Balears (Spain) lodged on 16 July 2015 — Francisca Garzón Ramos and José Javier Ramos Martín v Banco de Caja España de Inversiones, Salamanca y Soria, S.A., Intercotrans, S.L. (Case C-380/15)*

In providing that a court seized of ordinary proceedings for the annulment of an enforceable instrument cannot under any circumstances grant interim relief staying mortgage enforcement proceedings relating to the instrument claimed to be null and void, is Article 698(1) of the Ley de Enjuiciamiento Civil compatible with the principle of effective judicial protection affirmed in Article 47 of the Charter of Fundamental Rights of the European Union?
In the event that the answer to the previous question is that the provision of Spanish law is not compatible with the article of the Charter in question, is the case-law of the Court of Justice, and in particular its judgment in Case C-169/14 Sánchez Morcillo and Abril García, therefore applicable to this case?

Casesheet n. 4.5 – **Kusionova**

**Reference case**
**CJEU:** Judgment of the Court (Third Chamber), 10 September 2014. Monika Kušionová v SMART Capital, a.s. Case C-34/13

***Core issues***
Should a judge assessing the validity of a contract, enabling a creditor to enforce a charge by extra-judicial means and without any review by a court, take into account E.U. law, namely the principles of high consumer protection, effective judicial protection and the right to housing, even where the wording of such a contract term is based on a national provision?
How should the judge assess the effectiveness of judicial protection where the right to one's home is involved? How can this assessment influence the choice of remedies, namely the application of interim relief and the possibility of considering the enforcement sale null and void?
What role does the principle of proportionality play in this respect?

At a glance

| Area | Country | Reference to EU law | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| • Consumer protection | • SLOVAKIA | • art 38<br>• art 47<br>• art 7<br>•directive 93/13 | • preliminary reference<br>• proportionality<br>• consistent interpretation | • CJEU<br>• Appeal Court<br>• legislator (indirectly) | • effective remedy (interim relief)<br>• ex officio power |

*1. Timeline representation*

*2. Case law description*

The consumer credit agreement between Monika Kušionová and SMART Capital was secured by a charge on the family house of the former. Mrs Kušionová claimed in front of the District court of Humenné that the credit contract as well as the charge agreement were invalid (and therefore to be declared void) as the credit agreement contained an unfair clause.

The District court of Humenné, declared that the credit agreement was partially void, whereas the charge agreement was totally annulled. Both parties lodged an appeal before the Regional court of Prešov. The appeals concerned the terms of the charge agreement that allowed the extrajudicial enforcement of the charge on the immovable property provided by the consumer as security. SMART Capital affirmed that the clause was based on a statutory provision (art 151j of the Slovak Civil Code), so as to allow the creditor to enforce the charge without any review of the underlying agreement to be reviewed by a court.

The Regional Court of Prešov deemed the national provision to be potentially in conflict with Directive 93/13, as it may allow the inclusion of an unfair clause within a consumer contract. Thus, on 20 December 2012, the Slovak court decided to stay the proceedings and posed the following questions to the CJEU by way of preliminary reference:

> "Are [Directive 93/13] and [Directive 2005/29], in the light of Article 38 of [the Charter], to be interpreted as precluding legislation of a Member State, such as Paragraph 151j(1) of the Civil Code, in conjunction with other provisions of the legislation applicable in the present case, which enables a creditor to recover sums on the basis of unfair contract terms by enforcing a charge against a consumer's immovable property without any assessment of the contract terms by a court and despite there being a dispute as to whether the contract term at issue is unfair?
>
> Does the European Union legislation referred to [in question 1] preclude the application of a national rule, such as Paragraph 151j(1) of the Civil Code, in conjunction with other provisions of the legislation applicable in the present case, which enables a creditor to recover sums on the basis of unfair contract terms by enforcing a charge against a consumer's immovable property without any assessment of the contract terms by a court and despite there being a dispute as to whether the contract term at issue is unfair?
>
> Must the judgment of the Court of Justice [in Simmenthal, EU:C:1978:49] be interpreted as precluding, in the interests of meeting the objectives of the directives [referred to in question 1] and in the light of Article 38 of the [Charter], the national court from applying domestic provisions, such as Paragraph 151j(1) of the Civil Code, in conjunction with other provisions of the legislation applicable in the present case, which enable a creditor to recover sums on the basis of unfair contract terms by enforcing a charge against a consumer's immovable property without any assessment of the contract terms by a court and also, despite there being a dispute, to circumvent review by a court of its own motion of the contract terms?
>
> Is Article 4 of [Directive 93/13] to be interpreted as meaning that a term in a contract concluded by a consumer without representation by a lawyer which enables a creditor to enforce a charge by extra-judicial means and without any review by a

> court, is a circumvention of the important principle of EU law that contract terms are to be reviewed by courts of their own motion and, for that reason, is unfair, even where the wording of such a contract term is based on a national provision?"

Before the CJEU decided the case, the Slovak legislator adopted a reform on April 2014 (Law n 106/2014 Z.z.), which modified the procedural rules applicable to the enforcement of charges, so that para. 21.2 of the Law on Voluntary Sale by Auction provided that

> "*Where the validity of the charge agreement is challenged or the provisions of the present law are infringed, any person who claims that his rights have been adversely affected as a result of that infringement may request the court to declare the sale void*".

On 10 September 2014, the CJEU decided the case. The analysis of this case sheet will only focus on the first three questions.

A first interpretative step was to extend the evaluation of national legislation on the basis not only of art. 38 CFREU, as requested in the preliminary ruling, but also to art. 47 CFREU. The Court – after having affirmed the lack of provisions regarding the enforcement proceedings within the Directive 93/13, thus leaving the regulation of such elements to the procedural autonomy of Member states– addressed the compliance of national mechanisms vis-à-vis the principles of equivalence and effectiveness.

As the equivalence test was deemed to be met, the Court analysed the whole procedural system in order to verify if it also met the requirements of the effectiveness test. The Court acknowledged that the Slovak procedural system (as amended in 2014) provides for the possibility for the consumer to contest the enforcement proceedings within three months from the day the auction took place.[57] This time limit, as well as the fact that the consumer should not be completely passive in the procedure, was deemed by the court as compliant with its previous jurisprudence. Moreover, the fact that amended legislation provided that the sale may be declared void by national courts, does not affect the situation of the consumer as it allows him/her to return to a situation almost identical to the original one.[58]

The Court went on to evaluate the proportionality of the remedy (using the terminology of *penalty* in the decision). It noted that the fact that the security given by consumers may frequently be his/her family home is a peculiar, as also stated in ECHR jurisprudence, thus such a case required that any balancing exercise take into account also art. 7 CFREU providing for the right to accommodation. The possibility for interim relief granted by the national court to avoid the eviction of the consumer from the family home then was considered as sufficient to prevent the continued use of an unfair term.

The final decision of the CJEU on this point was then the following:

> "*Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows the recovery of a debt that is based on potentially unfair contractual terms by the extrajudicial enforcement of a charge on immovable property provided as security by the consumer, in so far as that*

[57] Para 55.

[58] Compared to the case in Sanchez Morcillo, where only a compensatory remedy was allowed.

*legislation does not make it excessively difficult or impossible in practice to protect the rights conferred on consumers by that directive, which is a matter for the national court to determine.*"

The Regional court of Presov then quashed the first-instance judgment and remanded the case for further consideration.

3. *Analysis*

a. *Role of the Charter*

The national court correctly linked the Charter to the secondary law provisions included in the Directive 93/13/EC. The national court used as reference also the principle stated in art. 38 CFREU, although the main issue addressed by the Directive provisions mentioned in the preliminary ruling deals with the issue of remedies.

This fact was acknowledged by the CJEU, which affirmed that, although the preliminary ruling included an explicit reference only to art. 38 CFREU, its assessment will also take into account art. 47 CFREU.[59] However, the CJEU in its later analysis does mentions neither art. 38 nor art. 47 CFREU. As a matter of fact, the CJEU examined whether the possibility of an order for interim relief could ensure the protection of art. 7 CFREU, on the fundamental right to accommodation. Although the reference to such a fundamental right expressly acknowledged a relationship between the former and consumer protection, it did not clarify whether this relationship should include also the right to housing assistance (Art. 34(3) CFREU).

An important additional element is the fact that the proportionality of the measures should also be included in the art. 7 CFREU analysis.

b. *Judicial dialogue*

The Slovak regional court in effect reproduced the question presented (and withdrawn) by the District court of Presov in Case C482/12, Peter Macinský and Eva Macinská v Getfin s.r.o. Financreal- s.r.o.[60]

As in the previous case, the national court sought to overcome the problems in the mortgage sector created by the financial crisis. The national court then faced the choice between a direct disapplication of the national provision upon the basis of the conflict with EU law and the possibility of making a preliminary reference to the CJEU. Given the existence of several judgements of the CJEU in which the latter acknowledged a high level of protection for the consumer, the national court made a preliminary reference in order to receive guidance from the CJEU.

The CJEU in its decision took into account those legislative developments that had occurred after the making of th preliminary reference and interpreted the national legislation consistently

[59] See para. 45.

[60] See the preliminary ruling presented: "*Is Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts to be interpreted as precluding legislation of a Member State, such as Paragraph 151j(1) of the Občianský zákonník (Civil Code) in conjunction with the other provisions of legislation at issue in the present case, which enables a creditor to enforce the fulfilment of unfair contract terms by enforcing a lien by the sale of immovable property despite the objections of the consumer and a dispute regarding the matter and without an assessment of the contract terms by a court or other independent tribunal ?*".

with EU law and fundamental rights. Additionally, it highlighted the consistency between the EU and ECHR standard of protection, making reference to the ECtHR jurisprudence on the same issue.

*c. Remedies*

The CJEU based its analysis on the principle of sincere cooperation (art 4(3) TEU) and on its previous case law relating to the assessment of effectiveness, proportionality and dissuasiveness of remedies.[61] The requirements of effectiveness and dissuasiveness are analysed together, and focus on the one hand, on the availability of an interim relief to prevent the enforcement proceedings, and on the other, on the reform of the Slovak procedural law that allows the judges to declare the auction sale void. The analysis of the requirement of proportionality then also brings the protection of the right to accommodation as provided by art 7 CFREU into the balancing exercise. The availability for national courts to adopt interim measures to avoid the immediate risk of the consumer (and his/her family) being evicted from their home is seen as an adequate and effective remedy. One could question whether the protection of the consumer as an individual may conflict with the need to protect other rights (i.e. creditor and bona fide purchaser). Could this consideration change the balance brought about by the application of the proportionality test?

*d. Impact of CJEU decision*

i. External

No impact on foreign jurisprudence acknowledged.

ii. Preliminary references connected to the case

No preliminary ruling connected.

[61] In particular, LCL Le Crédit Lyonnais, C 565/12, EU:C:2014:190, paragraph 44 and case-law cited.

Case sheet n. 4.6 – **Aziz**

**Reference cases**

**CJEU:** Judgment of the Court (First Chamber), 14 March 2013. Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa). Case C-415/11

**Spain:** Constitutional Court, decision AATC n. 41/1981, 18 December 1981

Juzgado de Primera Instancia n. 2 of Sabadell, 7 October 2010

Constitutional Court, decision ATC 113/2011, 19 July 2011

Juzgado de Primera Instancia n. 13 of Madrid, Auto n. 215/2013, 15 March 2013

***Core issues***

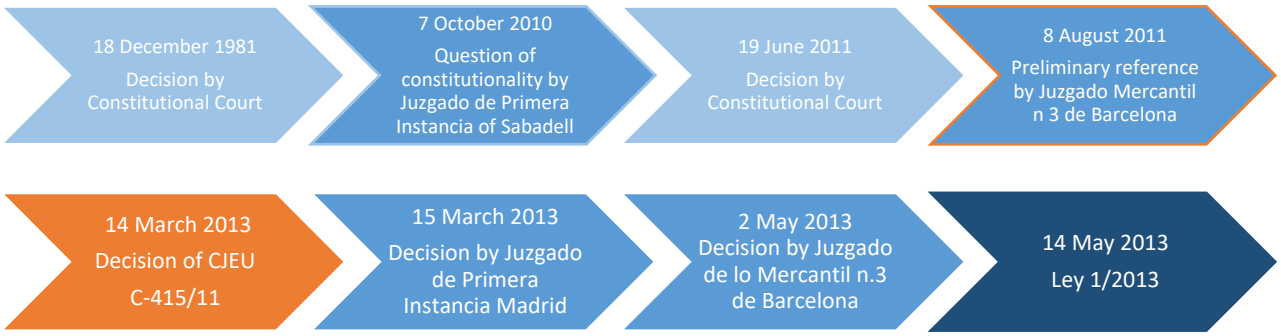
Should a consumer be able to object to foreclosure proceedings based on the unfairness of the contractual terms in the proceedings?

Should a mortgage foreclosure be suspended when a declaratory claim is presented before a judge based on the unfairness of a contractual term constituting the ground for enforcement?

**At a glance**

| Area | Country | Reference to EU law | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| • Consumer protection | • SPAIN | •directive 93/13 | • preliminary reference<br>• disapplication | • CJEU<br>• lower courts<br>• Constitutional Court<br>• Legislator | •Right to effective remedy (interim relief)<br>• ex officio power |

1. *Timeline representation*




2. *Case law description*

The Code of Civil Procedure (Ley de Enjuiciamiento Civil 1/200, hereinafter CCP) regulates enforcement proceeding in Book III (arts. 517 – 520). The law provides for a comprehensive and unified regulation based on an executive title, with special norms that regulate mortgage foreclosures (arts. 681-698). In this case, the Spanish CCP provides for some limitations as

regards the grounds of objection available to debtors; any other ground of objection to the executory enforcement can only be sought through declaratory proceedings, which however cannot have a suspensive effect over the foreclosure proceedings. These limitations are justified by the privileged protection granted the mortgage creditor in order to obtain a quick sale of the mortgaged goods in order to repay the loan. Such a result would not be achieved with the inclusion of wide set of grounds of objection and the related possibility of suspending the mortgage foreclosure. The effectiveness of the procedure could therefore be hampered by such an inclusion.

These provisions raised doubts in Spanish courts regarding the compliance with the Constitution, namely art. 24 on right of defence. The Constitutional Court evaluated such a question of constitutionality with its seminal decision AATC n. 41/1981, 18 December 1981, affirming, as regards arts. 579, 695 and 698 CCP, that while the mortgage foreclosure is a proceeding where there are strong limits to the adversarial process, this does not mean that it hampers the right of defence of the debtor. This structure is justified by the specificities of the executive title and it is not deemed to be contrary to any constitutional rights, in particular art. 24 of the Spanish Constitution.[62]

In the middle of the financial crisis a lower court again seized the Constitutional Court regarding the constitutionality of the procedure. In particular, the Juzgado de Primera Instancia n. 2 of Sabadell raised on 7 October 2010 a question of constitutionality. The first instance court asked if the summary enforcement proceedings adopted in mortgage foreclosure violated the Constitution, and in particular Art. 9.3 on the prohibition of arbitrary action by public authorities, Art. 24.1 on the right to effective judicial protection and Art. 47, on the right to enjoy decent and adequate housing.

The Constitutional Court deemed the question as inadmissible, with decision ATC 113/2011, of 19 July 2011.[63] The Court affirmed that the order of referral was on the one hand too generic and abstract to evaluate whether the challenged provisions were really relevant to the main proceedings, and on the other hand the order was requesting an indirect reform of the regime, which goes beyond the remit of the Constitutional Court. As a matter of fact, the Constitutional

[62] "En procedimiento de ejecución hipotecaria se limita extraordinariamente la contradicción procesal, pero ello no significa que se produzca indefensión. Hay que reconocer, con la doctrina, que en el procedimiento debatido falta la controversia entre las partes. En puridad, es un proceso de ejecución. Más en concreto, es un procedimiento de realización del valor de la finca hipotecada, que carece de una fase de cognición. Tal estructura resulta lógica, a partir de la naturaleza del título (…). El hecho de que el procedimiento de ejecución sumario se caracterice, consecuentemente con la naturaleza del título, por la ausencia de contradicción procesal, no significa que produzca indefensión y que, en consecuencia, resulte anticonstitucional por ser contrario al artículo 24 de la Constitución. Existen poderosos argumentos que apoyan la conclusión opuesta. El primero es de índole sistemática. La situación del deudor o del titular del dominio de la finca hipotecada no se puede enjuiciar sólo a partir de la regulación de la ejecución, sino que viene decidida por el conjunto de las relaciones procesales posibles. Lo expeditivo de la ejecución no elimina la posibilidad de contradicción que sigue abierta en el juicio ordinario. En rigor, la radical limitación de las excepciones no se refiere a la contradicción considerada en sí misma, sino a su efecto suspensivo sobre la realización del valor; hay una limitación de las excepciones que pueden producir el efecto suspensivo y nada más (…) Desde esta perspectiva, es claro que no puede haber violación del artículo 24 de la Constitución, porque el deudor y el titular del dominio de la finca no quedan indefensos, ni privados de tutela"

[63] Auto 113/2011, 19 July 2011, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2011-13956.

Court pointed out that "*It is only for the legislative power to decide on the Code of Civil Procedure and thus the issue was treated as a 'political question'.*"

In the meantime the Juzgado de lo Mercantil n. 3 of Barcelona received the claim of Mr Aziz for the declaration seeking the annulment of the enforcement proceeding based on the annulment of clause 15 of the mortgage loan agreement, on the ground that it was unfair. Mr Aziz, Spanish resident of Moroccan nationality, was in fact evicted in January 2011 from his house after failing to make payments on his 138,000 euro loan with Catalunya Caixa. On this basis, on 8 August 2011 the Juzgado de lo Mercantil No 3 de Barcelona referred a number of preliminary references to the CJEU. The Spanish court asked the following questions:

> "*Whether the system of levying execution, in reliance on judicial documents, on mortgaged or pledged property provided for in Article 695 LEC, with its limitations regarding the grounds of objection, may be nothing more than a clear limitation of consumer protection.*
>
> *How is the concept of disproportion to be understood with regard to:*
>
> *a) the use of acceleration clauses[64] in contracts planned to last for a considerable time – in this case 33 years – for events of default occurring within a very limited specific period;*
>
> *b) the setting of default interest rates which are not consistent with the criteria for determining default interest in other consumer contracts (consumer credit);*
>
> *c) the unilateral establishment by the lender of mechanisms for the calculation and determination of variable interest – both ordinary and default interest – which are linked to the possibility of mortgage enforcement and do not allow a debtor who is subject to enforcement to object to the quantification of the debt in the enforcement proceedings themselves but require him or her to resort to declaratory proceedings in which a final decision will not be given before enforcement has been completed or, at least, the debtor will have lost the property mortgaged or charged by way of guarantee – a matter of great importance when the loan is sought for the purchase of a dwelling and enforcement gives rise to eviction from the property?*"

The ruling of the CJEU was then decided on 14 March 2013. *Although the CJEU addressed both questions, this case sheet will focus on the first one.* After having invoked the principle of procedural autonomy of the Member States, the CJEU went further in addressing the equality and effectiveness test, without mentioning expressly the Charter of Fundamental Rights. In particular, when looking at the effectiveness test, the Court found that the Spanish procedural law impairs the protection of consumers as the court hearing the declaratory proceedings could not grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of its final decision.[65] Nor can the compensation that the consumer may receive – in case of dismissal of the

[64] Accelleration clauses are contract terms that fully matures the performance due from a party upon a breach of the contract. Such clauses are most prevalent in mortgages and similar contracts to purchase real estate in installments.

[65] Para. 59.

enforcement proceedings after the declaration of unfairness of the contractual term on which the mortgage is based - be deemed complete and sufficient, and thus constitute an adequate or effective means of preventing the continued use of that term.[66]

Before any intervention of the Spanish legislator to amend the procedural system, the Juzgado de lo Mercantil n. 3 of Barcelona decided the case on 2 May 2013. Following the CJEU judgment, the court held that national judges (in executive proceedings) not only have the power, but they are required to assess of their own motion whether a contractual term falling within the scope of the Directive is unfair. Hence, the court declared three clauses of the mortgage contract to be null and void on the ground that they were unfair, though only one of those clauses had been challenged by the applicant. At the same time, the Commercial Court acknowledged that, according to the right to a fair trial enshrined in Art. 47 CFREU, the parties must be given the opportunity to discuss the elements examined of its own motion by the judge. Therefore the parties were given the chance to discuss all the clauses that could be considered unfair.

Immediately after the decision of the CJEU, Spanish lower courts started to implement directly its reasoning in their decisions. In particular, the Juzgado de Primera Instancia n. 13 of Madrid, on 15 March 2013,[67] granted the suspensive effect of executory proceeding in case the consumer started a declaratory proceeding, implicitly disapplying the provision of art 698 CCP.[68]

The Spanish legislator then directly intervened, amending the procedural law with Ley 1/2013 of 14 May 2013.[69] As mentioned above, when the CJEU decided the *Aziz* case it opened up two possible solutions for the Spanish legislator in order to make the procedural system compliant with the Directive 93/13/EEC: (1) including a new ground of objection based on the unfairness of the contractual terms in the foreclosure proceedings; or (2) giving the judge in the declaratory proceeding the possibility to adopt as a precautionary measure, the suspension of the foreclosure proceedings. The Ley 1/2013 adopted the first solution, including a new ground of objection based on the unfairness of contractual terms within those contained in art. 695.1 CCP, which then read as follows:

> *"(1) In proceedings under this chapter, an objection to enforcement by the party against whom enforcement is sought may be admitted only if it is based on the following grounds:*
> *1. Extinction of the security or the secured obligation, […]*
> *2. An error in determining the amount due, […]*

[66] Para. 60.

[67] Auto n. 215/2013, 15 March 2013, available at http://www.pgprocuradores.com/blog/wp-content/uploads/2013/05/auto-paralizacion-ejecucion-hipotecaria.pdf

[68] The same conclusion was reached by Audiencia Provincial de Burgos, with the decision 10 April 2013. Note that some judges also addressed the issue of how to implement the CJEU decision vis-à-vis the legislation in force, such as in the case of the Agreement of Junta Sectorial de Jueces de Primera Instancia, Mercantil y Registro Civil del Partido Judicial de Alicante of 23 April 2013, mentioned in Esteban de la Rosa, EPRL 2015.

[69] Measures to Protect Mortgagees, Debt Restructuring and Social Rents (B.O.E. 2013, 116).

> *3. In the case of enforcement against movable property mortgaged or property subject to a non-possessory pledge, the existence of another pledge, […]*
> *4. The unfairness of a contractual term constituting the grounds for enforcement or that has determined the amount due."*

*3. Analysis*

*a. Role of the Charter*

No direct mention of the Charter.

*b. Judicial dialogue*

The national commercial courts of first instance and appeal sought to overcome the problems generated by the financial crisis on the mortgage sector through a dialogue with the national constitutional court. As the constitutional court refrained from stepping into the role of the legislator (though it did trigger legislative action through its decision) the national court faced the choice between a direct disapplication of the national provision upon the basis of the conflict with EU law, and the possibility of requesting a preliminary reference. Given the existence of several judgements of the CJEU, where the latter acknowledged a high level of protection for consumer, the national court presented the preliminary reference in order to receive guidance from CJEU on how consistently apply national law.

The immediate consequence, after the decision of the CJEU was the possibility of legitimately disapplying the national provision.

Furthermore, the decision of the CJEU eventually triggered the reaction of the legislator on the specific issue, allowing a reform of the procedural provisions.

*c. Remedies dimension*

Although the starting point of the case was the absence of the possibility for consumers to raise an objection on the ground of unfairness of the contractual clause, the CJEU addressed the Spanish procedural system as a whole, analysing the relationship between the declaratory and mortgage foreclosure proceedings. The result is the introduction of a new remedy, capable of establishing a stronger connection between enforcement and declaratory proceedings. In particular, the CJEU finds that judges shall have the power to order an interim stay of the enforcement proceedings in order to grant effective protection to consumers.

*d. Impact of CJEU decision*

i. External

**Poland**

*Judgment of the Supreme Court of 15 January 2016, I CSK 125/15* - General reference to the premises of abusiveness set forth in the *Aziz* case is mentioned in this case.[70] As a consequence,

[70] "*A significant contractual imbalance to the detriment of a consumer is contrary to proper conduct (good faith, compare art. 3 section 1 of the 93/13 directive), when it can be reasonably assumed that the contractor of a*

the Court came to the conclusion that a clause limiting the consumer's protection in the case of impossibility of performance, due to unexpected circumstances (also those being within the seller's control) is abusive. Beyond paraphrasing the reasoning in Aziz, no more direct links to this decision have been established by the Supreme Court.

*Judgment of the Court of Appeals in Warsaw of 10 April 2013, VI Aca 1191/12* - Reference to the *Aziz* case (in the same manner as Supreme Court in I CSK 125/15 case) as a basis for a criterion of assessment as to whether a particular term has an abusive character. The Court of Appeals implies in its reasoning that the clauses under examination would not be accepted by the reasonably acting consumer. The case dealt with two clauses: (1) shifting the entire burden of changes of VAT rate after conclusions of the contract to the consumer and (2) excluding the consumer's right to cancel the contract in the cases when the actual area of the flat the object of the contract deviates from the area agreed initially agreed to by up to 5%. The Court did not draw any more links to the *Aziz* case in this judgment.

*Judgment of the Regional Court for the Capital City Warsaw of 27 June 2014, XVI GC 2056/12* - The Court made the same use of the *Aziz* decision – referring to the general means of identifying abusive clauses described by CJEU. The Court examined a clause specifying the basis of the liability of an insurance company for damage caused to the shipped item, eventually not finding it abusive.

**Bulgaria**

*Supreme Court of Cassation, n. 1112/2015, 10 August 2015.* The Supreme court addressed the appeal of the Commission for Consumer protection against the decision of the Sofia Appeal court regarding the unfairness of a clause included in the General terms and conditions of contracts for the use the electricity distribution grids of a business company. Although not citing it expressly, the Supreme court adopted the test defined in CJEU case *Aziz*.[71]

ii. Preliminary references connected to the case

> *Request for a preliminary ruling from Request for a preliminary ruling from the Audiencia Provincial de Castellón (Spain) lodged on 7 April 2014 — Juan Carlos Sánchez Morcillo, María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, S.A. (Case C-169/14)*

Is it compatible with Article 7(1) of Directive 93/13/EEC, which imposes on Member States the obligation to ensure that, in the interests of consumers, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers

*consumer, treating him/her in the fair and just way and taking into account his/her legally justified claims, could not sensibly expect that the consumer would accept, within the negotiations, a clause giving rise to this imbalance (compare judgment of the Court of Justice of the European Union of 14 March 2012, C-415/11 in the case Mohammed Aziz vs. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*". Translation by Author

71 Note that instead the Sofia Appeal Court addressed the test provided in Aziz and deemed the clause at issue not unfair.

or suppliers, for a procedural rule of the kind laid down in Article 695(4) of the Spanish Law on Civil Procedure, applicable to appeals against a decision determining the outcome of an objection to enforcement proceedings in relation to mortgaged or pledged goods, to allow an appeal to be brought only against an order staying the proceedings or disapplying an unfair term and to exclude appeals in other cases, the immediate consequence of which is that whilst the party seeking enforcement may appeal when an objection to enforcement is upheld and the proceedings are brought to an end or an unfair term is disapplied[,] the consumer against whom enforcement is sought may not appeal if his objection is dismissed?

Within the ambit of the EU legislation on the protection of consumers contained in Directive 93/13/EEC, is it compatible with the principle of the right to an effective remedy and a fair trial in accordance with the principle of equality of arms, affirmed in Article 47 of the Charter of Fundamental Rights of the European Union, for a provision of national law of the kind laid down in Article 695(4) of the Spanish Law on Civil Procedure, applicable to appeals against a decision determining the outcome of an objection to enforcement proceedings in relation to mortgaged or pledged goods, to allow an appeal to be brought only against an order staying the proceedings or disapplying an unfair term and to exclude appeals in other cases, the immediate consequence of which is that whilst the party seeking enforcement may appeal when an objection to enforcement is upheld and the proceedings are brought to an end or an unfair term is disapplied, the party against whom enforcement is sought may not appeal if his objection is dismissed?

Case sheet n. 4.7 – **Weber & Putz**

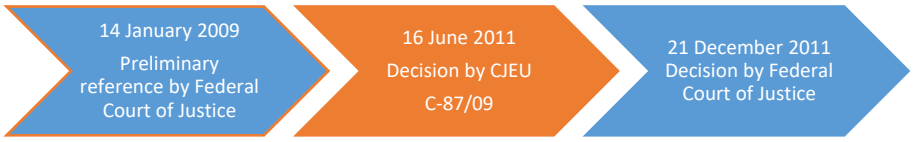
**Reference cases**
**CJEU:** Judgment of the Court (First Chamber) of 16 June 2011. Gebr. Weber GmbH v Jürgen Wittmer (C-65/09) and Ingrid Putz v Medianess Electronics GmbH (C-87/09). Joined cases C-65/09 and C-87/09.
**Germany:** Federal Court of Justice, Decision VIII ZR 70/08, 21 December 2011

***Core issues***
When the law provides for an array of consumer remedies, can the seller refuse any of them in case of proportionality?
Should the court revise the allocation of costs on the basis of proportionality?

At a glance

| Area | Country | Reference to EU law | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| • Consumer protection | • GERMANY | •Directive 1999/44 | • preliminary reference<br>• consistent intepretation | • CJEU<br>• Lower Court | •right to effective remedy |

*1. Timeline representation*




*2. Case law description*
Mr Wittmer and Weber concluded a contract of sale in respect of polished tiles. After having had about two thirds of the tiles laid in his house, Mr Wittmer noticed that there was shading on the tiles, which was clearly visible. The only possible remedy was complete replacement of the tiles, which was on charge of the seller. Added to the replacement, Mr Wittmer asked the seller to remove the defective goods and replace them on the floor. Since the seller refused, Mr Wittmer had it done by another professional and then sought to recover the cost of removal from the seller.
The Regional Court of Kassel ordered Weber to pay Mr Wittmer only a reduction of the sales price, and dismissed the action as to the remainder. On appeal against the decision by Mr Wittmer, the Higher Regional Court of Frankfurt ordered Weber to deliver a new set of tiles free from defects and to pay Mr Wittmer half of the cost for removing and disposing of the defective tiles, and dismissed the action as to the remainder.

Weber appealed to the Federal Court of Justice, which states that its judgment will on the interpretation of Article 3(2) and the third subparagraph of Article 3(3) of the Directive, in accordance with which Paragraph 439 of the BGB.[72]

Thus, on 14 January 2009, the Federal Court of Justice decided to stay the proceedings and to refer the following questions:

> "*Are the provisions of the first and second subparagraphs of Article 3(3) of [the Directive] to be interpreted as precluding a national statutory provision under which, in the event of a lack of conformity of the consumer goods delivered, the seller may refuse the type of remedy required by the consumer when the remedy would result in the seller incurring costs which, compared with the value the consumer goods would have if there were no lack of conformity, and with the significance of the lack of conformity, would be unreasonable (absolutely disproportionate)?*
>
> *If the answer to the first question is in the affirmative: are the provisions of Article 3(2) and the third subparagraph of Article 3(3) of [the Directive] to be interpreted as meaning that, where the goods are brought into conformity by replacement, the seller must bear the cost of removing the consumer goods not in conformity from a thing into which, in a manner consistent with their nature and purpose, the consumer has incorporated them?*"

On, 16 June 2011 the CJEU decided the case. The CJEU started its reasoning from art 3(3) of the Consumer Sales Directive affirming that "bringing into conformity of the goods" means that the consumer is entitled to require the seller to repair the goods or to replace them unless that is impossible or disproportionate.[73] The fact that the obligation to bring the goods into conformity should be 'free of charge' was intended to protect consumers from the risk of financial burdens which might dissuade them from asserting their rights in the absence of such protection.[74]

The CJEU then affirmed that in a situation where neither party to the contract is at fault, it is justified to make the seller bear the cost of removing the goods not in conformity and installing the replacement goods, since those additional costs, first, would have been avoided if the seller had at the outset correctly performed his contractual obligations and, second, are now necessary to bring the goods into conformity.

However, the possibility to refuse repair of replacement may be invoked by the seller if these are impossible or relatively disproportionate. If only one of the two remedies is possible, the seller may therefore not refuse the only remedy, which allows the goods to be brought into

[72] Note that Paragraph 439(3) of the BGB provides that the seller may refuse the type of subsequent performance chosen by the buyer not only where that type of performance would result in disproportionate cost in comparison to the alternative type of performance ('relative lack of proportionality'), but also where the cost of the method chosen by the buyer, even if it is the only method possible, is inherently disproportionate ('absolute lack of proportionality').

[73] para 45.

[74] para 46.

conformity with the contract.[75] This is justified as it allows effective protection of the legitimate financial interests of the seller, which is additional to the protection provided for in Articles 4 and 5 of the Directive.[76]

Then the decision of the CJEU was the following:

> "*Article 3(2) and (3) of Directive 1999/44/EC must be interpreted as meaning that, where consumer goods not in conformity with the contract which were installed in good faith by the consumer in a manner consistent with their nature and purpose, before the defect became apparent, are restored to conformity by way of replacement, the seller is obliged either to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and installation of the replacement goods. That obligation on the seller exists regardless of whether he was obliged under the contract of sale to install the consumer goods originally purchased.*
>
> *Article 3(3) of Directive 1999/44 must be interpreted as precluding national legislation from granting the seller the right to refuse to replace goods not in conformity, as the only remedy possible, on the ground that, because of the obligation to remove the goods from where they were installed and to install the replacement goods there, replacement imposes costs on him which are disproportionate with regard to the value that the goods would have if there were no lack of conformity and the significance of the lack of conformity. That provision does not, however, preclude the consumer's right to reimbursement of the cost of removing the defective goods and of installing the replacement goods from being limited, in such a case, to the payment by the seller of a proportionate amount.*"

The Federal Court of Justice then decided the case on 21 December 2011.[77] The Federal court followed the reasoning of the CJEU and accommodated the new prerequisites within the statutory framework in relation to the obligation to remove the defective goods: § 439(1) BGB that allows consumers to claim free delivery of a conforming good was broadly interpreted to encompass also de-installation and removal of the non-conforming goods.[78] However, as regards the specific content of § 439(3) BGB, the Federal Court asked the legislator to intervene and change the content of the provision. In the decision, the Federal court provided for a case specific solution, based on the consumer protection objective, prohibiting the seller to refuse to provide a first tier remedy on the grounds of disproportionality if the other first tier remedy is impossible. Then the Federal Court divided the replacement costs between the parties, as a result of the seller having to provide replacement at a high cost to himself, which then allows him to claim that the consumer's right of reimbursement should be limited.

[75] para 71.

[76] para 73

[77] Decision VIII ZR 70/08.

[78] Note that the following jurisprudence of the Federal Court showed to consistently interpret national rules with the CJEU decision, using a broad interpretation of the definition of delivery of goods so as that consumer may claim the replacement of non-conforming goods that could cover also the replacement's associated costs. See Federal Court of Justice, 17 October 2012, VIII ZR 226/11.

*3. Analysis*

*a. Role of the Charter*

No reference to the Charter.

*b. Judicial dialogue*

The national court intended to solve a conflict of norms between the national regulation on sales law and the mandatory provisions of Directive 99/44. The Federal Court sought to receive guidance but in the following decision it involved also the legislator in the dialogue. On the one hand, the Federal Court adopted a consistent interpretation of national and European law following the criteria provide by the CJEU; where the Federal Court deemed consistent interpretation insufficient to provide a clear set of criteria to national courts, it asked for a reform of national law.

*c. Remedies*

The CJEU introduced a set of criteria regarding the remedies available for consumers iin case of defective goods. First, the reimbursement of the cost replacement is limited, as the seller may refuse it if it is significantly disproportionate. Second, the national courts may reduce the consumer's right to reimbursement. Third, the seller cannot refuse the repair or the substitution of the defective goods on the basis that this would involve absolutely disproportionate cost. Finally, in case of reduction of reimbursement cost (on the basis of judge's decision) the buyer should be able to choose either price reduction or rescission, instead of replacement.

*d. Impact of CJEU decision*

i. External

**Netherlands**

*Rechtbank Overijssel, 22 January 2014, ECLI:NL:RBOVE:2014:500*. The decision assessed whether non-conformity of goods could be recognized and the consequences in terms of allocation of replacement cost regarding defective swimming pools. The District Court affirmed that the swimming pools were non-conforming as per the contract, taking into account the timely notifications of the consumers about the non-conformity in order to rectify the defect by enabling many attempts to repair the swimming pools. The District court, then in the assessment of the costs, mentioned the CJEU's decision in Weber and Putz and decided what should be determined as 'proportional' limitation of the reimbursement. Although the reasoning seemed to allocate a very strong responsibility on the seller, the District court decided in the end that the consumer had to contribute 75% of the replacement costs, allocating on the consumer a very high contribution.

**Bulgaria**

*Supreme Administrative court, 14 December 2012, n. 11172/2012.* The case addressed the appeal of a commercial company trading cell phones against the decision of the lower administrative court issuing the obligation to replace a cell phone by a new one or to refund the amount paid by the consumer. The decision, though not mentioning explicitly the CJEU

decision in Weber and Putz, consistenly apply the reasoning of the court as regards the interpretation of directive 99/44. The Supreme administrative court affirmed that the request of the consumer to replace the commodity with a new one, after several failed repairs, is not disproportionate in the light os art 112, par. 1 of Bulgarian Consumer Protection Act.

ii. Preliminary references connected to the case

No similar preliminary ruling so far.

Case sheet n. 4.8 – **Duarte Hueros**

**Reference case**
**CJEU:** Judgment of the Court (First Chamber), 3 October 2013. Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA. Case C-32/12

***Core issues***
When the law provides for an array of consumer remedies, establishing different requirements for each of them and setting a hierarchy, so that some remedy may not be sought before others have been considered or applied, does the judge have the power/duty to choose on its own motion the effective remedy replacing that chosen by the consumer?
Should the court allow the consumer to change his/her initial claim even though the procedural rules do not allow so?
Or, should the consumer be entitled to file a new claim in a separate cause of action after his/her former claim was rejected for lack of prerequisites, even though the procedural rules do not allow so?
How could a judge choose between consistent interpretation, disapplication and preliminary reference?

At a glance

| Area | Country | Reference to EU law | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| •Consumer protection | • SPAIN | •Directive 1999/44 | • preliminary reference<br>• consistent intepretation | • CJEU<br>• Lower Court | •right to effective remedy |

1. *Timeline representation*


2. *Case law description*

After having bought a car with a sliding roof from Autociba, Ms Soledad Duarte Hueros had to return the car several times to be repaired as water leaked into the car when it rained. The attempts to repair the car were however unsuccessful. As the request by Ms Duarte for replacement of the car was refused by Autociba, the former claimed rescission of the contract and asked Autociba and the manufacturer of the car to repay the purchase price.
The Court of First Instance of Badajoz held that rescission of the contract could not be granted under Article 3(5) of the national law implementing the Consumer Sales directive since the lack

of conformity was considered as "minor", thus only a reduction of price could be sought. As Ms Duarte has not claimed price reduction, the judge indicated that he could not apply it.
The court, however, deemed that national procedural rules could conflict with EU law, as on the one hand, art. 218 LEC provided that "*judicial decisions must be commensurate with the requests made by the parties*"; however on the other hand, as the buyer did not claim a price reduction by way of an alternative claim, any subsequent application would be inadmissible because of the res judicata principle.
Thus, the Court of First Instance of Bajadoz on 13 January 2012 decided to stay the proceedings and to refer the following question:

> "*If a consumer, after failing to have the product brought into conformity – because, despite repeated requests, repair has not been carried out – seeks in legal proceedings only rescission of the contract, and such rescission is not available because the lack of conformity is minor, may the court of its own motion grant the consumer an appropriate price reduction?*"

The CJEU decided the case on 3 October 2013. The CJEU, after having pointed out that the Consumer Sales Directive does not provide for specific remedies, analysed the national procedural rules under the principles of equivalence and effectiveness. Apart from the brief mention of equivalence, the CJEU focused its reasoning on effectiveness. The CJEU observed that Spanish procedural rules do not allow courts to grant a price reduction of their own motion in the framework of system where the consumer may not modify its original submission nor bring a fresh action. This then hampers the effective protection of the consumer. However, the CJEU did not deduce from this that the national court is obliged to grant a price reduction of its own motion. It is sufficient that national procedural law can be interpreted to enable the consumer to exercise his rights under the Consumer Sales Directive.[79]
Thus, the CJEU affirmed that:

> "*Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the national court hearing the dispute to grant of its own motion an appropriate reduction in the price of goods which are the subject of a contract of sale in the case where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity in those goods is minor, even though that consumer is not entitled to refine his initial application or to bring a fresh action to that end*."
>
> The national court was instructed to decide the case accordingly. The case was however eventually concluded through a plea agreement.

*3. Analysis*

*a. Role of the Charter*

No reference to the Charter.

[79] Para 42.

*b. Judicial dialogue*

The CJEU adopted an interpretation of the Consumer Sales Directive consistent with the national legislation, giving criteria of guidance to the national court to enable it to verify if national procedural rules enabled the consumer to exercise his rights.

*c. Remedies*

The CJEU addressed the procedural aspects of the Consumer Sales directive, under the specific issue of an ex officio duty of national courts to apply European law. The CJEU affirmed that the Consumer sales directive precludes national rules, which do not allow a national court hearing the dispute to grant of its own motion an appropriate price reduction, under the given circumstances.

Although the CJEU did not clearly distinguish between the reasoning behind the Unfair Terms Directive and the Consumer sales directive, they both aim for strong and effective consumer protection. Consequently, in line with the unfair terms case law, a national court should be required to grant of its own motion the alternative remedy of price reduction, when a consumer has incorrectly invoked rescission (because the non-conformity is only minor) and is only entitled to price reduction and the national system makes it impossible or excessively difficult to invoke this alternative remedy (e.g. a national system does not allow refining the initial application and does not allow making a fresh action to that end), provided that all the necessary legal and factual elements are available.

*d. Impact of CJEU decision*

i. External

**Netherlands**

Supreme Court, 12 February 2016, n. 15/1503359, ECLI:NL:PHR:2015:2658. The Supreme Court decided on a case regarding a consumer contract which includes both a subscription to the mobile service as well as the sale of a phone. The Supreme Court affirmed that national courts have the duty to examine (ex officio) the content of the contract and apply the national legislation implementing Directive 87/102 on consumer credit. In particular, the Supreme Court affirmed that the national court, has to ensure adequate effective consumer protection, this allowed the Supreme Court to introduce a new remedy, not specified in the Dutch Civil Code.[80] The wide and detailed reference to CJEU case law supported the reasoning of the Supreme Court, which ends in a higher level of consumer protection.

ii. Preliminary references connected to the case

No similar preliminary ruling so far.

80 See A. van Duin, Dutch Supreme Court on effective remedies for consumers, 21 April 2016, available at http://recent-ecl.blogspot.it/2016/04/a-recent-development-in-area-of.html.

Casesheet n. 4.9 – **Pohotovost**

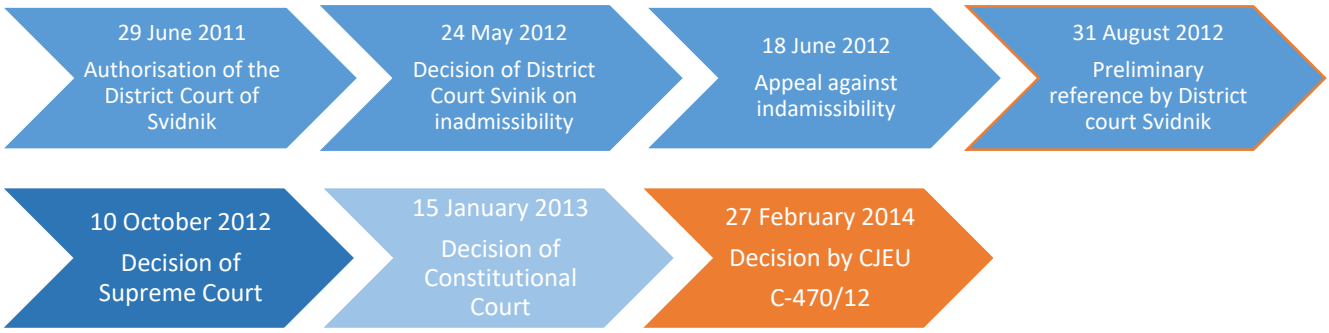
**Reference case**
**CJEU:** Judgment of the Court (Third Chamber), 27 February 2014, Pohotovosť s. r. o. v Miroslav Vašuta. Case C-470/12.

***Core issues***
In order to enable the effective protection of a consumer, should a consumer association be allowed to intervene in enforcement proceedings to enforce an arbitral award against a consumer?
Should the judge suspend the proceedings in order to allow such participation?

At a glance

| Area | Country | Reference to EU law | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| • Consumer protection | • SLOVAKIA | • art 38<br>• art 47<br>•Directive 93/13 | • preliminary reference<br>• deferential approach (light) | • CJEU<br>• Appeal court<br>• Supreme court<br>• Constitutional Court | • collective remedies |

1. *Timeline representation*




2. *Case law description*

The consumer credit agreement between Pohotovosť s.r.o. and Miroslav Vašuta included an arbitration clause which was enforced through the decision on 9 December 2010 of the Slovak Permanent Court of Arbitration to order the payment of a defined sum by Mr Vasuta to Pohotovost. The arbitral award was then presented to the District Court of Svidník for enforcement. The District Court upheld the application for a limited sum (excluding interest for late payment and cost of recovery) on 29 June 2011.

On 9 September 2011, the Slovak consumer protection association HOOS applied to intervene in the enforcement proceedings on the basis of Paragraph 93(2) of the Code of Civil Procedure. By order of 24 May 2012, the District Court of Svidník declared the request inadmissible and dismissed the application claiming that the court should suspend the proceedings.[81]

On 18 June 2012, the Slovak Consumer protection association HOOS brought an appeal against that order. The Association raised the fact that the arbitration clause should have been deemed unfair ex officio by the court, and that the legal inferences regarding the failure to include the annual percentage rates within the consumer credit contract were not taken into account.[82]

The District Court of Svidník deemed that the request required the interpretation of the CJEU, and therefore, on 31 August 2012, made a preliminary reference posing the following questions:

> "*Are Articles 6(1), 7(1) and 8 of Directive 93/13 ..., in conjunction with Articles 38 and 47 of the Charter ..., to be interpreted as precluding national legislation such as Paragraph 37(1) and (3) of the Enforcement Code, which does not allow a consumer protection association to intervene in enforcement proceedings?*
> *If the answer to the first question is that that legislation does not conflict with [European Union] law, is Paragraph 37(1) and (3) of the Enforcement Code to be interpreted as not precluding a national court from granting a consumer protection association leave to intervene in enforcement proceedings in accordance with Articles 6(1), 7(1) and 8 [of that directive]?*"

Before the CJEU decided the case, on 10 October 2012, the Slovak Supreme Court addressed a similar question, affirming that the intervention of a consumer protection association was not admissible in enforcement proceedings, since they were not contentious proceedings but rather proceedings for the enforcement of a decision on the merits which is final and binding on the debtor. A similar conclusion was then made by the Slovak Constitutional Court on 15 January 2013.

On 27 February 2014, the CJEU decided the case. Initially, the CJEU acknowledged that the jurisprudence of the Supreme and Constitutional courts at national level agree on the inadmissibility of applications for the intervention of consumer protection associations in enforcement proceedings.[83] After having confirmed the role of the national courts in evaluating the unfairness of contact clauses, the CJEU affirms that directive 93/13/EC does not contain any provision regarding the role to be accorded consumer protection associations nor does it contain any provision on their entitlement to intervene in individual disputes. It is therefore for the national system to establish such rules, in compliance with the principles of equality and

[81] This was justified on the basis of factual elements brought by the Hoos association itself in its request. See Case C-470/12 Photovosť sro v Miroslav Vašuta, paragraph 13: "*the appointed bailiff was not impartial, on the ground inter alia that the bailiff in question had in the past been employed by Pohotovost'. In accordance with the case-law of the l'Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic), the fact that the bailiff had been employed by Pohotovosť was incompatible with the bailiff's duty of impartiality. In addition, the Združenie HOOS claimed that the enforcement proceedings should be suspended in their entirety.*"

[82] Citing Case C-40/08 Asturcom and Others [2009] ECR I 9579 and the order in Case C-76/10 Pohotovosť [2010] ECR I 11557.

[83] Para 38.

effectiveness.[84] Deeming the principle of equality satisfied, the CJEU addressed compliance with the principle of effectiveness, including in its analysis arts. 38 and 47 CFREU. The Court found that neither art 38 nor art 47 CFREU impose an interpretation of Directive 93/13/EC which would include a right for consumer protection associations to intervene. In particular, the Court distinguished between the right to effective remedies of individual consumers and that of consumer protection associations which are not, as such, infringed by the national rule regarding intervention. Moreover it noted that legal aid and the intervention of consumer protection associations are two different concepts.

Thus, the CJEU reached the following decision:

> *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in particular Articles 6(1), 7(1) and 8 of that directive, read in conjunction with Articles 38 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding national legislation which does not allow a consumer protection association to intervene in support of a consumer in proceedings for enforcement, against the latter, of a final arbitration award.*

As on 27 December 2012 Pohotovosť made a request to suspend the enforcement proceedings of the arbitration award, the District Court of Svidník decided the case and dismissed the appeal of the HOOS consumer protection association.

3. *Analysis*

a. *Role of the Charter*

The national court linked the Charter to the secondary law provisions included in the Directive 93/13/EC. The national court also used as a reference the principle stated in art 38 CFREU, although the main issue addressed by the Directive provisions mentioned in the preliminary ruling address the problem of remedies.

Within the analysis of the principle of effectiveness, the CJEU addressed the role of Charter provisions. The CJEU stated firmly that art. 38 CFREU does not entail the possibility of granting a right to intervene to consumer protection associations (or indeed any other right, given the nature of the provision as a principle). As regards art. 47 CFREU, the CJEU does address both the possibility of an infringement of consumer's rights as well as the right of the consumer association. On the one hand, the consumer's right to an effective remedy does not extend to the possibility of receiving legal support by third parties, which were not parties to the dispute. On the other hand, the right to an effective remedy enjoyed by the consumer association is not infringed as the latter still have the possibility of accessing the court pursuant to art 7(2) of Directive 93/13.

b. Judicial dialogue

The first instance and appeal courts at national level acknowledge the difficulty of limiting the enforcement proceedings based on arbitration awards. This problem was already a matter of dialogue between Slovak courts and CJEU as the latter evaluated as unfair the arbitration

[84] Para 46.

clauses included in the consumer contracts by the decision C-76/10 (Pohotovosť s.r.o. v Iveta Korčkovská). Thus, the national court seems to rely on the use of preliminary reference in order to trigger the intervention of the CJEU in favour of consumers. The preliminary reference is then structured as a request to clarify if disapplication of the national rules may be justifiable. The CJEU in its reasoning acknowledged the position of the national supreme and constitutional courts, demonstrating a deferential approach.

c. Remedies dimension

One could ask whether, considering it is an underlying dimension of the case, the CJEU could address the issue of the ex officio power of the judge to evaluate the unfairness of contract clauses. The CJEU cited its own jurisprudence on the role and powers of the judges. Could it go further regarding the issue of whether the Slovakian courts could intervene, raising on their own motion the unfairness of the arbitration clause included in the consumer contract within the enforcement proceeding? The case may be compared with the approach in *Aziz* case in this respect.

d. Impact of CJEU decision

i. External

No impact on foreign jurisprudence acknowledged.

ii. Preliminary references connected to the case

No similar preliminary ruling so far.

Case sheet n. 4.10 – **Invitel**

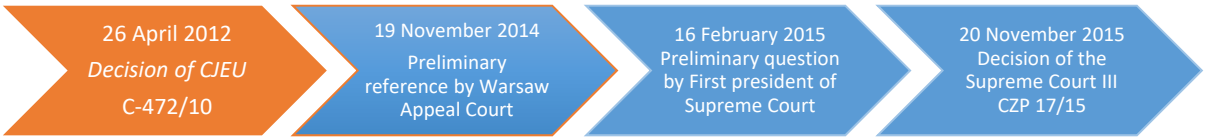
**Reference cases**
**CJEU:** Judgment of the Court (First Chamber), 26 April 2012. Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt. Case C-472/10
**Poland:** First President of the Supreme Court motion, BSA I-4110-1/15, 16 February 2015
Supreme Court, 20 November 2015, No. III CZP 17/18

***Core issues***
When national legislation provides for mechanisms of a declaration of the unfairness of terms in *abstracto*, should the effects of the judgment extend to contracts where the same term is used by the same enterprise or other enterprises?
How should the right to effective judicial protection be balanced with the right to a fair trial, if ever?

At a glance

| Area | Country | Reference to EU law | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| • Consumer protection | • POLAND | •art 47<br>•Directive 93/13 | •consistent interpretation | • Supreme court<br>• Appeal Court | • right to fair trial |

1. *Timeline presentation*




2. *Case law description*

On 26 April 2012, the CJEU decided the Invitel case. The decision was the following

> "*It is for the national court, ruling on an action for an injunction, brought in the public interest and on behalf of consumers by a body appointed by national law, to assess, with regard to Article 3(1) and (3) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the unfair nature of a term included in the general business conditions of consumer contracts by which a seller or supplier provides for a unilateral amendment of fees connected with the service to be provided, without setting out clearly the method of fixing those fees or specifying a valid reason for that amendment. As part of this assessment, the national court must determine, inter alia, whether, in light of all the terms appearing in the general business conditions of consumer contracts which include the contested term, and in the light of the national legislation setting out rights and*

*obligations which could supplement those provided by the general business conditions at issue, the reasons for, or the method of, the amendment of the fees connected with the service to be provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract. Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) and (2) thereof, must be interpreted as meaning that:*

*– it does not preclude the declaration of invalidity of an unfair term included in the standard terms of consumer contracts in an action for an injunction, provided for in Article 7 of that directive, brought against a seller or supplier in the public interest, and on behalf of consumers, by a body appointed by national legislation from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same general business conditions apply, including with regard to those consumers who were not party to the injunction proceedings;*

*– where the unfair nature of a term in the general business conditions has been acknowledged in such proceedings, national courts are required, of their own motion, and also with regard to the future, to take such action thereon as is provided for by national law in order to ensure that consumers who have concluded a contract with the seller or supplier to which those general business conditions apply will not be bound by that term.*"

A couple of years later, the Polish Supreme court was addressed by a tightly linked issue, and used the CJEU decision in Invitel as a point of reference and extended the analysis as regards the effects of *in abstracto* judgements.

Under art. 479(43) of the Polish Code of Civil Procedure a judgment declaring (abstract) abusiveness of a clause is "*effective towards third persons*", from the day of listing this clause in the public register administered by the President of the Office of Protection of Competition and Consumers. The Court of Protection of Competition and Consumers may review (on demand of the specified set of persons and entities) the fairness of standard contract terms used on the market through an *in abstracto* evaluation – i.e. regardless of integrating them into any actually concluded contract.[85] A final judgement granting the action has an effect for third parties when a provision of the model agreement considered to be prohibited is included in the public register.

[85] This specific procedure has been introduced to implement Art. 7 of 93/13/EC directive. Standardised in Article 47936-45 of the Code of Civil Procedure the proceedings in question are designed for a purpose of abstract control of contractual models and to protect the collective consumers' interest. The introduction of these proceedings is an part of the transposition of Directive 93/13 on abusive clauses in the consumer agreements. If an action for acknowledgement that a provision of the model agreement is prohibited is granted, the court cites the content of the provisions of the model agreement in an operative part of the judgement and prohibits their use. A copy of the final judgement, with the cause of action granted, is sent to the President of the Office of Competition and Consumer Protection [Prezes Urzędu Ochrony Konkurencji i Konsumentów], who maintains a public register of the provisions of model agreements considered to be prohibited.

Article 24.2.1 of the Polish Act on the Protection of Competition and Consumers of 16 February 2007 prohibits application of any practice infringing consumers' collective interests, consisting of an application of the provisions of a model agreement to be entered into the register of the provisions of model agreements considered to be prohibited.[86]

The jurisprudence regarding the objective limits of extended validity of an *in abstracto* judgements is not settled, as the Supreme Court has interpreted the limits in some cases in a narrow way,[87] whereas in other cases a broad interpretation has been adopted.[88] Similarly, subjective limits of extended validity have also been interpreted in a narrow[89] and broad way.[90]

In a motion of 16 February 2015, BSA I-4110-1/15, the First President of the Supreme Court made the following preliminary reference to the Supreme Court issue:

> *"Does an entry of a provision of a model agreement, which provision is considered to be prohibited into the register referred to in Article 479.2[4] of the Code of Civil Procedure lead to such result that extended efficiency of the final judgement provided for in Article 479[43] of the Code of Civil Procedure being the basis for such entry comes into conflict with the proceedings into the subject of the control of the provision of the same content, contained in a different model agreement used by the entrepreneur against whom such judgement has been issued or any other entrepreneur?*

On 20 November 2015 (case file No. III CZP 17/18), the Supreme Court, consisting of seven justices, made the following judgment:[91]

> *"1. Substantive validity of the judgement considering a provision of the model agreement to be prohibited excludes an action for considering the provisions of the*

[86] This regulation is designed to transpose Directive 98/27/EC on injunctions for the protection of the consumers' interests replaced by Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests.

[87] Decisions of 7 October 2008 (III CZP 80/08) and of 13 May 2010 (III SK 29/09).

[88] Resolution of 13 July 2006 (III SZP 3/06) or a judgement of 5 June 2007 (I CSK 117/07).

[89] Only for the benefit of all third parties (the Supreme Court's resolution of 7 October 2008, III CZP 80/08, a resolution of 13 December 2013, III CZP 73/13)

[90] Also against all third parties, including all entrepreneurs other than the entrepreneur who was a defendant in a given case (the Supreme Court's resolution of 13 July 2006 r., III SZP 3/06, a judgement of 20 June 2006, III SK 7/06).

[91] The decision of the Supreme Court of 20 November 2015 was taken in a form of resolution (of a board of seven judges) – i.e. a particular type of judgment not settling any particular dispute, but resolving a problem of interpretation (i.e. expressing the Court's opinion on how the particular provision of domestic law should be understood). Resolutions are taken upon a question, which can be referred to the Supreme Court both by a court of a lower instance, regarding a particular case, as well as by a limited number of authorised bodies (including the Frist President of the Supreme Court) can refer to the Court with the general problem to be resolved. Dependable on the way of making the question and the decision of the Court, the resolution can be made by various compositions of judges (from a board of three to the complete set of the Supreme Court), which is reflected in the various binding power of the interpretation given in the resolution. In principle, in the case of preliminary questions of ordinary courts, the resolution is formally binding only upon the Court that made the inquiry. However, due to the authority of the Supreme Court and its competence to review other courts' decisions, the standpoint adopted in the resolution is usually followed de facto by the entire judiciary. Therefore, the resolution of 20.11.2015 involved only interpretation of legal provisions in abstracto, without making a reference to any factual circumstances.

*same normative content to be prohibited, used by the entrepreneur who is a defendant in the case in which this judgement was issued (Article 365 and 366 of the Code of Civil Procedure).*

*2. Substantive validity of the judgement considering a provision of the model agreement to be prohibited - also after entering such provision into the register (Article $479^4$.2 of the Code of Civil Procedure) does not exclude an action for considering the provisions of the same normative content to be prohibited, used by the entrepreneur who is not a defendant in the case in which the judgement was issued (Article 365 and 366 in conjunction with Article $479^{43}$ of the Code of Civil Procedure)".*

In the reasoning of the judgment, the Supreme Court balanced the effectiveness of consumer protection from abusive clauses and the right to fair trial, in order to determine the scope of res iudicata in the "abstract" review of contract clauses. As regards the first aspect, the Supreme Court based its reasoning on Directive 93/13/EU, as well as the *Invitel* case. As regards the right to fair trial, the Supreme Court based its reasoning on art. 45 of the Constitution of the Republic of Poland, art. 6 section 1 of the ECHR and the art. 47(2) of the CFREU.

As determined by the Supreme Court, the "effectiveness of the judgment in question in favour of anyone, but with respect to the particular entrepreneur, being a defendant in the proceedings, is proportionate, as it maintains a balance between the need to guarantee the effectiveness of an abstract control [of contract clauses] and the need to respect the right to be heard, as a fundamental element of the right to fair trial, arising from the right to due process."

In its judgment, the Supreme Court interpreted the notion of "effectiveness towards third persons" (art. $479^{43}$ of the Code of Civil Proceedings) as referring only to the particular entrepreneur (who took part in the abstract review proceedings) – at the same time, however, it may be invoked by every consumer (including a consumer who did not participate in the trial). Moreover, the Supreme Court found this outcome proportionate and therefore compliant therefore with the requirement of proportionality of remedies set forth in Directive 93/13/EU.

It is important to note that on 19 November 2014, before the preliminary reference of the First President, the Court of Appeal in Warsaw made the following preliminary reference:[92]

"*In the light of Articles 6(1) and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (1), in conjunction with Articles 1 and 2 of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (2), can the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in the register of unlawful standard contract terms be regarded, in relation to another undertaking which was not a party to the proceedings culminating in the entry in the register of unlawful standard contract terms, as an unlawful act which, under national law, constitutes a practice which harms the*

[92] Request for preliminary ruling by the Court of Appeal of Warsaw, Biuro podróży 'Partner' Sp. z o.o., Sp. komandytowa w Dąbrowie Górniczej v Prezes Urzędu Ochrony Konkurencji i Konsumentów, Case C-119/15.

*collective interests of consumers and for that reason forms the basis for imposing a fine in national administrative proceedings?*
*In the light of the third paragraph of Article 267 of the Treaty on the Functioning of the European Union, is a court of second instance, against the judgment of which on appeal it is possible to bring an appeal on a point of law, as provided for in the Polish Code of Civil Procedure, a court or tribunal against whose decisions there is no judicial remedy under national law, or is the Sąd Najwyższy (Polish Supreme Court), which has jurisdiction to hear appeals on a point of law, such a court?*"

Although no decision by the CJEU was adopted so far, it is useful to point to the Opinion of the AG to evaluate the potential effects of the forthcoming decision.

The AG reformulate the questions on the national court focusing only on the first one, and adding to its scope also the consistency of national procedural law with Art. 47 CFREU. In this framework the AG evaluates negatively the compatibility of the polish *in abstracto* review with the directive 93/13.[93] Moreover, such system was deemed as questionable vis-á-vis its compliance with art. 47 CFREU as, in the opinion, it disproportionately restricts the traders' right to be heard.[94]

3. *Analysis*

a. *Role of the Charter*

The Supreme Court explicitly addressed the balancing exercise that involved effectiveness of consumer protection (declared explicitly in the *Invitel* decision) and the fundamental right to a fair trial, underpinning the issues of the binding nature and *res iudicata* of judicial decisions in civil matters. The Supreme Court derived this right from fundamental rights located at various levels of the legal system – the Constitution of the Republic of Poland (art. 45), the ECHR (art. 6 section 1) and the CFREU (art. 47 section 2).

The judgment therefore referred to the Charter as one of the (parallel) sources of the right to a fair trial. The Court expanded upon this right in order to clarify the meaning of the domestic provision implementing the Directive 93/13/EU. The Court thereby supplemented the conclusions made by the ECJ in the *Invitel* case. The fundamental right to a fair trial was used by the Court as a key element of its reasoning.

The case did not involve any direct constitutionality review. The Supreme Court applied, however, the "pro-constitutional" interpretation of the domestic provision, thereby its compliance with the Polish Constitution. This effect was achieved by applying the reasoning related to fundamental rights – based upon the constitutional right to fair trial.

Interestingly, the AG Opinion in *Biuro* reformulated the national courts decision in the same manner, including in the analysis the compliance of the Polish system regarding in abstracto review with art 47 CFREU.

*b. Judicial dialogue*

93 See paras 41-42 of the Opinion.
94 See paras 64-69.

The Appeal court in Warsaw sought the guidance of the CJEU in order to solve an interpretative doubt that emerged from the unsettled national jurisprudence as regards the effects of *in abstracto* decisions.
The Supreme Court thus initiated a discourse with the *Invitel* case, using it for two main purposes. First of all, it expanded the point made by CJEU (which ascertained the scope of effectiveness "in favour" of the consumers). Secondly, it identified a lacuna in the CJEU conclusions (lack of determining the issue in terms of effectiveness "against" entrepreneurs) – supplementing it with an obligation to respect the constitutional right to a fair trial. Therefore, the Supreme Court's reasoning is both adopting the CJEU opinion and building on it with respect to the questions not discussed in the *Invitel* judgment.
The AG Opinion in case *Biuro* explicitly distinguished this case from *Invitel*, as it pointed to the fact that the latter referred to the case of effectiveness of decisions on behalf of third parties. The results of the opinion, then, are the same adopted by the Supreme Court.

*c. Remedies dimension*

The Court referred to the *Invitel* case as one of the main points of reference in the resolution, concluding that the CJEU explicitly found that a judgment declaring a clause abusive should be effective "in favour" of every consumer. At the same time, however, as has been pointed out in the judgment, the effects of this judgment "against" the entrepreneurs needed to be addressed. As has been pointed out in the *Invitel* case, a judicial declaration of abusiveness may be effective *erga omnes* with respect to consumers (allowing every consumer to benefit from a finding of abusiveness even if they did not participate in the original proceedings). It remains to be addressed whether the same *erga omnes* effect is also applicable to entrepreneurs – i.e. whether all entrepreneurs, regardless of whether they took part in the original court proceedings, should be legally prohibited from using the same term (or a term with a similar meaning). In light of this background, the Supreme Court supplemented the findings made in *Invitel*, defining the effects of an "abstract" declaration of abusiveness with respect to entrepreneurs – basing its conclusions upon a fundamental right (guaranteed simultaneously by the national Constitution, the ECHR and the CFREU).

*d. Impact of CJEU decision*

i. external

No impact on foreign jurisprudence acknowledged.

ii. Preliminary references connected to the case

No preliminary reference available.

Case sheet n. 4.11 – **Sales Sinues**

**Reference case**
**CJEU:** Judgment of the Court (First Chamber) of 14 April 2016. Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.). Joined Cases C-381/14 and C-385/14

***Core issues***
When national legislation provides for forms of coordination of individual and collective redress should the former prevail over the latter?
Can the individual action be suspended until the decision in the collective action is decided?

At a glance

| Area | Country | Reference to EU law | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| • Consumer protection | • SPAIN | •Directive 93/13 | •preliminary ruling | • CJEU<br>•Lower court | •collective redress |

1. *Timeline presentation*


2. *Case law description*

Mr Sales Sinués concluded an agreement for the novation of a mortgage loan with a Spanish bank, the agreement included a 'floor' clause. The latter allowed the bank to set an interest rate that remained stable regardless the market rate fluctuations. As the floor clauses were interpreted as unfair by Mr Sinués, he brought an individual action seeking the annulment of the clause before the Juzgado de lo Mercantil No 9, Barcelona.
As the defendants were also involved in a claim previously brought in a different court by a consumer protection association – seeking an injunction prohibiting further use of floor clauses in loan agreements, they asked the judge to suspend the individual proceedings until the final judgement of the collective action was delivered.
As the Juzgado deemed the national provision imposing the suspension of the individual action in conflict with EU law, it decided to stay the proceedings and to refer the following questions:

> "*Can it be considered [that the Spanish legal system provides for] an effective means or mechanism pursuant to Article 7(1) of Directive 93/13?*

> *To what extent does the suspensory effect of a stay of proceedings preclude a consumer from complaining that unfair terms included in a contract concluded with him are void, and, therefore, infringe Article 7(1) of Directive 93/13?*
> *Does the fact that a consumer is unable to dissociate himself from collective proceedings constitute an infringement of Article 7(3) of Directive 93/13?*
> *Or, on the other hand, is the suspensory effect of a stay of proceedings provided for in Article 43 of the Code of Civil Procedure compatible with Article 7 of Directive 93/13 in that the rights of consumers are fully safeguarded by collective actions, the Spanish legal system providing for other equally effective procedural mechanisms for the protection of consumers' rights, and by the principle of legal certainty?*"

The CJEU on 14 April 2016 decided the case. The CJEU joined all the questions presented by the national court and addressed the protection afforded by the Directive 93/13 under art. 7, affirming that the imbalance existing between individual consumer and sellers cannot be found neither in the relation between consumer associations and sellers, nor in the proceedings involving them.[95] Another distinction put forward by the CJEU is the fact that the objectives of individual and collective redress may be different, as the latter may also be brought for deterrent and dissuasive objective. The analysis moved then on the procedural provisions applied by the Spanish legislator to the relationship between individual and collective redress.

Under the principle of effectiveness, the CJEU assessed the effects of the suspension of the individual action and acknowledged that, on the one hand, the decision of collective action could be binding for the individual consumer, even if he has not decided to participate into it; and on the other hand, it may prevent the national court to evaluate the individual negotiation of alleged unfair clauses. Both elements were deemed by the CJEU as able to hamper the achievement of the objectives of the Directive 93/13.

In this case, then the CJEU took into account the proportionality of national measures aimed at achieving objective of general interest, but it affirmed that neither the consistency between judicial decisions, nor the need to avoid the overburdening of courts could justify such measures.[96]

Then, the CJEU affirmed that:

> "*Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which requires a court, before which an individual action has been brought by a consumer seeking a declaration that a contractual term binding him to a seller or supplier is unfair, automatically to suspend such an action pending a final judgment concerning an ongoing collective action brought by a consumer association on the basis of Article 7(2) of Directive 93/13 seeking to prevent the continued use, in contracts of the same type, of terms similar to those at issue in that individual action, without the relevance of such a suspension from the point of view of the protection of the consumer who brought*

[95] Para 26-27.

[96] Compare with the reasoning in *Alassini*.

*the individual action before the court being able to be taken into consideration and without that consumer being able to decide to dissociate himself from the collective action.*"

The decision of the national court is to be decided.

3. *Analysis*

a. *Role of the Charter*

No reference to the Charter.

*b. Judicial dialogue*

The national court sought guidance from the CJEU in a situation where the case law at national level was not unanimous. A similar issue was already a matter of dialogue between Spanish courts and CJEU as the latter evaluated the unfairness of jurisdiction clauses to be applied to collective claims in C-413/12 (*Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL*). Thus, the national court seems to rely on the use of preliminary reference in order to trigger the intervention of the CJEU in favour of the interest of individual consumers. The preliminary reference is structured as a request to indicate the means to solve the conflict.

*c. Remedies dimension*

The individual and collective redress mechanisms, although included in the same article within the Directive 93/13, serve different purpose and different objectives. The CJEU clarified that the contractual imbalance between consumers and sellers cannot be transposed on the relationship between consumer protection associations and sellers. This implicitly allocated a relatively equal role to consumer associations and sellers, which is not always the case in practice. The fact that the consumer cannot dissociate its claim ex ante and is bound to the effect of the collective redress ex post hampers the effective exercise of consumers rights.

*d. Impact of CJEU decision*

i. External

No impact on foreign jurisprudence acknowledged.

ii. Preliminary references connected to the case

No preliminary reference so far.

Casesheet n. 4.12 – **Alassini**

**Reference cases**

**CJEU :** Judgment of the Court (Fourth Chamber) of 18 March 2010. Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08). Joined cases C-317/08, C-318/08, C-319/08 and C-320/08

**Italy:** Constitutional court, Sentenza n. 272/2012, 24 October 2012

Supreme court, decision n. 24711, 4 December 2015

Trib. Lamezia Terme, order 1 august 2011

Tribunal of Milan, sect. XI, of 24 September 2014 and 17 December 2015

***Core issues***

Should a judge consider any legal requirement for mandatory out-of-court settlement attempts in the area of consumer contracts as inconsistent with the consumer's right to effective judicial protection?

Which requirements should be applied to the mandatory ADR mechanism in order to be consistent with the right to effective judicial protection?

In the light of the principle of effective judicial protection, which procedural effects should flow from the consumer's failure to make an attempt of out-of-court settlement when required to so by law? Should the judicial proceedings be suspended or should the claim be declared inadmissible?

At a glance

| Area | Country | Reference to EU law | Judicial dialogue technique | Legal and/or judicial actors | Remedy |
|---|---|---|---|---|---|
| • Consumer protection | • ITALY | • art 47<br>•art 6 ECHR<br>•Directive 2002/21 | • preliminary ruling<br>• *proportionality*<br>• consistent interpretation | • CJEU<br>• Lower courts<br>• Legislator<br>• Constitutional Court<br>• Supreme court | • right to access to court |

*1. Timeline representation*


2. *Case law description*

Three individual consumers, namely Ms Rosalba Alassini, Ms Lucia Iacono and Ms Filomena Califano, as well as the company Multiservice Srl concluded respectively a contract with Italian providers of telephone services (in particular Wind Spa and Telecom Italia spa). As the consumers and the company experienced problems with the provision of the telephone service, they lodged a claim with the Magistrates Court of Ischia alleging a breach of the contracts.

However, pursuant to arts. 3 and 13 Italian Decision 173/07/CONS ("dispute settlement rules") issued by the Italian Communications Regulatory Authority,[97] the disputes that emerge between consumers and electronic service providers should first proceed to a settlement procedure with an out-of-court dispute resolution body. As this mandatory settlement procedure did not take place before the claimants presented their claims before the court, the defendants argued that the actions were inadmissible.

The Magistrates Court deemed the national provision could be incompatible with the principle of effective legal protection. It therefore decided to stay the proceeding and on 4 April 2008 made the following preliminary reference to the CJEU:

> "*Do the Community rules referred to above (Article 6 of the [ECHR], [the Universal Service] Directive, Directive [1999/44], Recommendation [2001/310] and [Recommendation [98]/257]) have direct effect and must they be interpreted as meaning that disputes "in the area of electronic communications between end-users and operators concerning non-compliance with the rules on Universal Service and on the rights of end-users, as laid down in legislation, decisions of the Regulatory Authority, contractual terms and service charters" (the disputes contemplated by Article 2 of [the regulation annexed to] Decision No 173/07/CONS of the Regulatory Authority) must not be made subject to a mandatory attempt to settle the dispute without which proceedings in that regard may not be brought before the courts, thus taking precedence over the rule laid down in Article 3(1) of [the regulation annexed to] Decision No 173/07/CONS?*"

The CJEU decided the case on 18 March 2010. The CJEU framed the question as seeking to ascertain if a mandatory settlement procedure applicable to disputes between end-users and providers of electronic communication services, as condition for admissibility of actions before the court, complies with EU law and in particular with Article 34 of the Universal Service Directive and with the principle of effective judicial protection.

[97] Note that, as provided by Law n. 249 of 31 July 1997, the disputes in the electronic communications field between end-users and operators, which arise as a result of non-compliance with the rules on Universal Service, and on the rights of end-users, fall within the competence of the Communications Regulatory Authority.

The CJEU applied separately the test of procedural autonomy (equivalence and effectiveness) and the test of effective judicial protection, reaching opposite solutions with respect to the compatibility of the same national procedural rule. In particular, as regards the principle of effectiveness the CJEU affirms that, if specific conditions are met, the out-of court settlement procedure does not conflict with the principle of effectiveness.[98] The conditions for the settlement procedure are the following:

- It should not prejudice the right to bring legal proceedings;
- It should not, in normal circumstances, cause a substantial delay for the purpose of bringing legal proceedings;
- It should suspend the period for the time-barring of claims;
- It should not give rise to costs (or give rise to very low costs) for the parties;
- It should not be accessible only by electronic means;
- Interim measures should be possible in exceptional cases where the urgency of the situation so requires.[99]

Therefore, the mandatory nature of out-of-court disputes is not only compatible with the principle of effectiveness, but also instrumental to the effectiveness of EU law.

When looking at the principle of effective judicial protection, the CJEU first stated that this is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in arts. 6 and 13 ECHR and which has also been reaffirmed by art. 47 CFREU. Secondly, on the basis of the case law, the inclusion of an additional step for access to court (as the mandatory attempt at settlement procedure) might in principle prejudice the principle of effective judicial protection.

However, based on a balancing exercise between the protection of the fundamental right to effective judicial protection and the objective of general interest, i.e. the effectiveness of judicial system itself,[100] as well as on the proportionality of the interference vis-à-vis the objective pursued,[101] the CJEU affirmed that the restriction might be justified.

Thus, the CJEU decided the case affirming that:

> "*Article 34 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and users' rights relating to electronic communications networks and services (Universal Service Directive) must be interpreted as not precluding legislation of a Member State under which the admissibility before the courts of actions relating to electronic communications services between end-users and providers of those services, concerning the rights conferred by that directive, is conditional upon an attempt to settle the dispute out of court.*

[98] By contrast, "*such legislation, in so far as it ensures that out-of-court procedures are systematically used for settling disputes, is designed to strengthen the effectiveness of the Universal Service Directive*", para. 45.

[99] Paras. 50-60.

[100] Par. 64: "*the aim of the national provisions at issue is the quicker and less expensive settlement of disputes relating to electronic communications and a lightening of the burden on the court system, and they thus pursue legitimate objectives in the general interest*".

[101] Note that the CJEU refers both to own case law but also to ECHR case law.

> *Nor do the principles of equivalence and effectiveness or the principle of effective judicial protection preclude national legislation which imposes, in respect of such disputes, prior implementation of an out-of-court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.*"

The issue of mandatory mediation, however, was still subject to lively debate as, shortly before the decision of the CJEU in *Alassini*, the Italian legislator enacted legislative decree n. 28 of 4 March 2010 covering both cross-border and domestic disputes in which the legislator introduced a mandatory settlement procedure.[102] The law was the national implementing measure of the Directive on mediation in civil and commercial disputes of 2008/52/EC. Art 5 of the Directive allowed all national courts to stay proceedings and attempt mediation, if this would be conducive to the resolution of a cross-border dispute and does not prevent the parties' access to a court after the mediation process has taken place.

The choices adopted by the legislator as regards mandatory legislation, then pushed several magistrate courts and administrative courts to again address the question of constitutionality of the mandatory settlement procedure before the national Constitutional court.[103] The question of constitutionality focused on the compliance of legislative decree instituting the mandatory settlement procedure with art 24.1 Cost, on the right of defence and right to a cause of action, and art 3.1 Cost, on the right to equal treatment, as the lower court deemed that it could emerge an unjust disparity of treatment between the matters covered by mandatory settlement procedures and those that were not.[104]

On 24 October 2012, the Constitutional Court decided the case and held that art 5.1 d.lgs. 28/2010 is unconstitutional and thus null and void.[105] In its reasoning, the Constitutional Court

[102] The legislative Decree introduced two mediation procedures: a mandatory one applicable to litigation emerging in insurance, banking and financial agreements, as well as other matters such as joint ownership, property rights, division of assets, hereditary and family law, leases in general, gratuitous loans, leases of going concern, compensation for damages due to car/nautical accidents, medical liability or defamation/libel; and a non-mandatory one applicable to civil and commercial litigation.

[103] Giudice di pace di Parma, ordinanza del 1° agosto 2011; Tribunale amministrativo regionale per il Lazio, ordinanza del 12 aprile 2011; Giudice di pace di Catanzaro, ordinanze del 1° settembre e del 3 novembre 2011; dal Giudice di pace di Recco, ordinanza del 5 dicembre 2011; Giudice di pace di Salerno con ordinanza del 19 novembre 2011; Tribunale di Torino con ordinanza del 24 gennaio 2012; Tribunale di Genova, ordinanza del 18 novembre 2011.

[104] Note that previous jurisprudence of Constitutional court had already deemed such a disparity compliant with constititutional principles in Corte Costituzionale, Ordinanza n. 51/2009 (11 February 2009); Corte Costituzionale, Ordinanza n. 355/2007 (22 October 2007); Corte Costituzionale, Sentenza n. 403/2007 (21 November 2007); Corte Costituzionale, Sentenza n. 276/2000 (6 July 2000).

[105] Sentenza n. 272/2012, para 12.1-12.2.

– referring to the Resolution from the European Parliament of 25 October 2011 (2011/2117-INI) –finds the non-compulsory nature of alternative dispute resolution as being grounded on the right to action provided by art 24 It. Const. It acknowledges the conclusions of the CJEU decision in the *Alassini* et al. case, with special reference to the paragraph in which the compulsory proceedings are deemed compatible with the principle of effectiveness, whereas the non-compulsory mechanisms are deemed "*not as efficient*". However, the Constitutional Court considers this decision as having been made in a specific context, not permitting an extensive interpretation beyond the area of communication service contracts. On this (and other) basis, the decision concludes that the act of implementation of the 2008/52/EC Directive could not be interpreted as requiring the compulsory nature of out-of-court procedures regulated by D.lgs. n. 28/10. This element was not present in the 'legge delega' which defined the scope of the subsequent legislative decree; thus according to the Constitutional Court, the d.lgs. 28/2010 did not comply with art 76 and 77 Cost, since it exceeded the allocation of tasks provided ('*eccesso di delega*').[106]

The legislator, after the declaration of unconstitutionality, deemed it necessary to again intervene and on 9 August 2013 a new Law n. 98/2013 was enacted. [107] The Law amended the content of the d.lgs 28/2010, introducing a new art 5.1 formulated so as to reintroduce the mandatory settlement procedure, no longer as an admissibility condition for the action before the court, but as a condition to proceed and continue the claim before a court.

On this point, the Supreme court intervened with decision n. 24711, 4 December 2015. The Supreme court faced a contractual claim filed by a client against a communication service provider. The claim addressed the problem whether the mandatory settlement procedure shall be interpreted as a condition for admitting the claim or for proceeding with the claim before the court. Whereas the wording of the CJEU decision rendered in the *Alassini* case referred to the issue of admissibility, the Supreme Court interpreted the principles therein stated as referring "in substance" to the possibility to proceed with the claim and to the possibility for the claim to be admitted in Court. The reference to the principle of effectiveness, as stated in art. 47, CFREU, represents the legal basis for such interpretation. The Supreme Court concluded that, if an attempt of settlement has not been started by the client, the judge shall suspend the proceeding for the time needed for the settlement within the legal time limitation with no prejudice for the claim already filed before the court.

After the decision of the Supreme court, however, Italian jurisprudence was not settled. Some lower instance courts consistently interpreted national provisions in accordance with the approach of the CJEU in *Alassini*, holding that the right to effective protection may be subject to restrictions to the extent these are proportionate to general interest goals pursued through the restriction (Trib. Lamezia Terme, order 1 august 2011). Other courts went further, and adopted a consistent interpretation of art 111 Constitution and the right to a reasonable duration of

[106] In a decision adopted before the *Alassini* case and having regard to a compulsory mediation attempt in the field of communication services, the Constitutional Court had already considered such compulsion compatible with the constitutional right of action (art. 24, Const. C.) provided that the out-of-court procedure is interpreted as not precluding the recourse to interim measures (Const. Court, n. 403/2007).

[107] Note that in this case in order to avoid the risk of 'eccesso di delega', the law was the ratification of a Government's decree law 63/2013, passed on 21 June 2013.

judicial procedures, to hold that mandatory mediation is inadmissible if it occurs after the judicial action has commenced and therefore the consumer claim, which is brought before the court before any attempt of mediation has been started, must be considered inadmissible without bringing to a mere suspension of the proceeding (see part. judgments of Tribunal of Milan, sect. XI, of 24 September 2014 and 17 December 2015). This result then implicitly departs from the conclusions adopted by the Supreme Court.

3. *Analysis*

a. *Role of the Charter*

The decision of the CJEU in *Alassini et al.* is one of the first decisions after the Charter of Fundamental Rights became binding. The reference to art. 47 CFREU clearly sets the Charter within the legal sources applicable, and marks a clear continuity between the constitutional traditions of Member States, the articles of the ECHR (namely art 6 and 13) and the Charter.
The CJEU does address the issue of effective judicial protection as a separate issue and does not distinguishes its analysis from an analysis of the principle of effectiveness. In this case, the CJEU includes within the concept of effective judicial protection the right to bring an action before a court. As the mandatory settlement procedure includes an additional step before the court proceedings may start, the CJEU deemed it as capable as such to prejudice the right of effective judicial protection.
Under a different, though connected, perspective the Charter may be deemed relevant in respect of the principle of proportionality pursuant to art. 52.1, CFREU, although this provision is not specifically cited. Indeed the Court holds that the compulsory nature of the mandatory settlement procedure does not infringe the principle of proportionality.[108]

b. Judicial dialogue

The Magistrate court of Ischia sought to solve a conflict of norms between the national regulation on the mandatory attempt of out-court-settlement in the field of communication services and EU law in respect of the right to an effective remedy and a fair trial. The issue of whether a compulsory out-of-court procedure fosters effective judicial protection is critical in the Italian landscape, where similar procedures have been made compulsory by law in many areas (including, e.g., insurance, banking and financing services) and legal practitioners have challenged such procedures as a burden limiting effective access to justice before the judicial action.

[108] See para 65: "the imposition of an out-of-court settlement procedure such as that provided for under the national legislation at issue, does not seem – in the light of the detailed rules for the operation of that procedure, referred to in paragraphs 54 to 57 of this judgment – disproportionate in relation to the objectives pursued. In the first place, as the Advocate General stated in point 47 of her Opinion, no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. In the second place, it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives."

CJEU decision applied a proportionality test to the conflicting values, striking a balance in favour of the possibility of mandatory settlement procedures. It based this balance on principles and limitations that are applicable in both cases of compulsory and voluntary ADR mechanisms. The case law that followed the CJEU decision shows how consistent interpretation was used by different courts and the different outcomes that it may trigger: (1) the Constitutional court used consistent interpretation in order to clarify that compulsory proceeding was not an obligation emerging neither from EU law nor from the CJEU decision, rather it was the result of the choices of the national legislator; (2) the Supreme Court limited the consequences deriving from the CJEU decision in favour of compulsory proceedings, distinguishing between admissibility (as addressed by CJEU) and a procedural precondition; (3) lower courts followed more strictly the reasoning of the CJEU (implicitly contradicting the position of Supreme court).

*c. Remedies*

The judgment deals with access to remedies only indirectly to the extent that these remedies may be sought through a procedure including, as a precondition, the initiation of an out-of-court settlement procedure.

The right to an effective remedy may be considered here as included in the right to effective judicial protection protected by art. 47 CFREU. On the balance between this right and the right to a fair trial and a judicial action, see the analysis above.

d. Impact of CJEU decision

i. External

No impact on foreign jurisprudence acknowledged.

ii. Preliminary references connected to the case

> *Request for a preliminary ruling from the Sąd Najwyższy (Poland) lodged on 21 May 2015 — Prezes Urzędu Komunikacji Elektronicznej, Petrotel sp. z o.o. w Płocku v Polkomtel sp. z o.o. Case C-231/15*

Must the first and third sentences of Article 4(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) be interpreted as meaning that — in the event that a network provider contests a decision of the national regulatory authority setting call termination rates in the network of that undertaking (MTR decision), and that undertaking then contests a subsequent decision of the national regulatory authority amending a contract between the addressee of the MTR decision and another undertaking so that the rates paid by that other undertaking for call termination in the network of the addressee of the MTR decision correspond to the rates set in the MTR decision (implementing decision) — the national court, having found that the MTR decision has been

annulled, cannot annul the implementing decision in view of the fourth sentence of Article 4(1) of Directive 2002/21/EC?[109]

*Request for a preliminary ruling from the Tribunal of Verona – 28 January 2016 - nyr*

Is article 3 par. 2 of dir. 2013/11, in so far as it provides that the directive applies "without prejudice to the dir. 2008/52", to be understood in the sense that it does not prejudice the possibility for Member States to provide for mandatory mediation only in those situations that do not fall within the scope of dir. 2013/11, i.e. the contractual disputes arising out of contracts other than sale or service ones and those that do not affect consumers, pursuant art. 2, par. 2 dir. 2013/1?

Is article 1 par. 1 dir. 2013/11, inasmuch as it ensures consumers the possibility to complaint against traders before alternative dispute resolution bodies, to be interpreted as meaning that that provision precludes national legislation which provides for mediation, in a dispute falling into article 2, par. 1, dir. 2013/11, as a condition to proceed the claim of the party qualified as a consumer, and in any case, a national provision which provides for mandatory lawyer support, and the related costs, for the consumer who participates in such kind of mediation, as well as the possibility not to participate in mediation unless in the presence of a justified reason?[110]

[109] Note that in the decision of the Supreme Court of 18 February 2015 (III SK 18/14), referring the preliminary question to the CJEU, the Court used *Alassini* to explain that art. 4 (1) of the 2002/21 directive can be considered as a limitation of effective judicial protection - and that this right (as has been ascertained in *Alassini*) is not absolute and can be restricted.

[110] Not yet lodged to CJEU. Translation by Author.

## Part III - Hypotethicals

### Hypothetical n. 1 - Ex officio judicial powers

*Case (general frame)*
Mr Verbeek purchases a holiday cottage from a real estate company (REC). A 10 installments payment scheme is agreed upon, with delivery of the cottage to take place after the payment of the 5th installment. Upon default of the following installments a 30% penalty for each installment is applied plus interest. The contract includes a clause setting the jurisdiction as the place of REC's headquarters, located 200 kilometers from Mr Verbeek's habitual residence.
Upon payment of the first five installments Mr Verbeek acquires possession of the cottage. Installments nos. 6, 7 and 8 are paid regularly. Mr Verbeek fails to pay installments nos. 9 and 10. As a consequence REC claims the due amount together with the penalty indicated in the contract and interest. The buyer refuses to pay the penalty claiming it is excessive and should be reduced.
The case is brought before the court in accordance with the jurisdiction clause.
The consumer contests the claim and seeks reduction of the excessive penalty.

*E.U. legal context*

*Art. 47, CFREU*

**Right to an effective remedy and to a fair trial**
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

*-Principle of effectiveness as limitation to the principle of procedural autonomy*

"the Court has consistently held that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding

rights which individuals derive from EU law, but the Member States are nevertheless responsible for ensuring that those rights are effectively protected in each case (see Case C-268/06 Impact [2008] ECR I-2483, paragraphs 44 and 45, and Mono Car Styling, paragraph 48). On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness)" (Alassini, C-317 to C-320/08)

## *1. Assessment of consumer status and applicability of consumer law*

### *1.1.Availability of legal elements to assess the consumer status of the buyer in order to apply the directive on unfair contract terms*

(*see Faber, Pannon, Pénzügyi*)
Please assume that neither REC nor Mr Verbeek invoke the application of consumer law to assess the enforceability of the penalty clause.

a) Would the judge have the power/duty to assess the status of Mr Verbeek as a consumer in order to apply consumer protection remedies?
b) Would the answer to the previous question differ depending on the availability of factual elements providing evidence of such a status? Could/should the judge actively investigate the plaintiff's status?
c) Moving from the perspective of Your own legal system, which obstacles, if any, would arise to the use of ex officio powers to investigate the legal status of the parties?
d) Would ECJ case law be a sufficient ground for conform interpretation or disapplication of internal procedural rules prohibiting inquiry into the status of the parties?
e) Would the principle of effectiveness, as established in the ECJ case law, be of particular help for making conform interpretation, disapplication and/or preliminary reference? Is the definition of the consumer status ex officio part of the right to effective judicial protection?
f) Would reference to article 47, CFREU, contribute to define ex officio power to determine the status of the parties?
g) Could you refer to any existing example in Your national case law, that You wish to discuss in this international panel?

### *1.2. Availability of factual elements to assess the clause unfairness and power to investigate further. The ex officio power to seek additional evidence*

(*See Pannon, Pénzügyi , Sanchez, Aziz, Kušionová*)
The applicability of directive 93/13 is now assumed. Parties had not made reference to consumer law in their pleadings.

a) Can the judge, once the consumer status of the buyer has been assessed, apply domestic law on unfair contract terms implementing dir. 93/13?

Assume that in the national system there is a general rule that regulates contractual penalty and a consumer contract rule that makes clauses related to high penalty for breach unfair and hence not binding.

a) Would the judge have the power/duty to assess the unfairness of the clauses related to the penalty and the choice of jurisdiction?
b) Would the judge have the power/duty to make further investigation about factual elements enabling this assessment (e.g. about the consumer's residence or the modes of pre-contractual negotiation, for example whether the penalty clause had been individually negotiated)?
c) As a judge would You make a different assessment for each of the two clauses (penalty clause and choice of jurisdiction clause)? For example, would You take into account the different availability of public information concerning the residence of the consumer (jurisdiction clause) or how the penalty clause was negotiated?
d) Does the existence of the consumer's claim for penalty reduction reduce or increase the power of the judge to assess the unfairness with the aim of declaring the clause not binding?
e) Moving from the perspective of Your own legal system, which obstacles, if any, would exist to the use of ex officio powers in these circumstances?
f) Would ECJ case law be a sufficient ground for adopting a conform interpretation or disapplication of internal procedural rules that would otherwise prevent an ex officio declaration that the clauses (penalty clause and choice of jurisdiction clause) are non-binding?
g) Alternatively, on which basis could You conceive of the possibility of a preliminary reference to the ECJ concerning the interpretation of EU law in respect of any national rule opposing to the judicial power to ex officio declare the clauses as non-binding (rather than, e.g., simply reducing the penalty clause as valid)?
h) Would the principle of effectiveness, as established in the ECJ case law, be of particular help for adopting a conform interpretation, disapplication and/or preliminary reference?
h) Would a reference to article 47 CFREU contribute to create an ex officio power to declare the clauses non-binding?
i) How should the judge raise the issue of the non-binding nature of the clauses? Should the judge give parties the opportunity to present their observations? Would internal procedural rules allow for this?
i) Could you refer to any existing example in Your national case law, that You wish to discuss in this international panel?

### *1.3.Consumer's interest in a judgment declaring the non-bindingness of the clause*

(*See Pannon, Banif*)

a) How should the judge proceed in order to assess the interest of the consumer? Should the judge also ensure a fair trial in consideration of the defendant's position? Which procedural steps should be taken?
b) Does the principle *audi alteram partem* play a role when the judge raises ex officio questions to ensure consumer protection?
c) Moving from the perspective of Your own legal system, could the consumer oppose the judicial declaration of non-bindingness?
d) Could the consumer oppose the non-binding nature of either clause if ever he has an interest in doing so?

*2. Non-binding nature of the penalty clause and judicial clause modification/adaptation/replacement*

(*See Asbeek*)

a) Suppose that a partial payment of the penalty has been made by Mr Verbeek. Moving from the perspective of Your own legal system, could the judge reduce the amount of the penalty or should he declare the contractual term non-binding and as a consequence set aside the penalty and oblige the seller to return the partial payment made by the buyer in respect of the penalty?
b) Suppose that the rule is to reduce the penalty but according to CJEU the clause should be declared non-binding. Would the EU principle of effectiveness or art. 47 be a sufficient ground for the disapplication or adopting a conform interpretation of internal rules providing for a reduction of a penalty to enable the judge to declare the penalty clause non-binding?
c) If the judge declares the clause non-binding, could the professional still seek alternative measures against consumer's default, e.g. damages?
d) Moving from the perspective of Your legal system, would this amount to a separate claim to be enforced through a separate action or could this claim be considered under the original claim through which the plaintiff invoked the penalty as a measure against the consumer's default?

Level II

*Case (Variation I)*

Please assume that during the course of action described above neither the parties nor the judge invoke consumer protection legislation on contract terms unfairness. No use of an ex officio power is made. The judge reduces the penalty and determines the amount due to be paid by the consumer.

A foreclosure procedure starts over the holiday cottage bought by Mr Verbeek, whose property has been transferred upon delivery in accordance with contractual terms.

Mr Verbeek seeks legal advice in order to understand whether and how to suspend and/or put an end to the foreclosure procedure. The consulted lawyer points out that the penalty clause the enforcement of which has given rise to the foreclosure procedure, may be considered non-binding under EU consumer law.

(*see Aziz, Asturcom*)

a) Moving from the perspective of Your legal system, would there be any means to suspend or terminate a foreclosure procedure initiated to enforce title that itself is based on a clause which may be declared unfair and thus non-binding in light of EU principles and legislation?
b) If not, would the EU principle of effectiveness or art. 47 be a sufficient ground for the disapplication or adopting a conform interpretation of internal procedural rules preventing the executor judge from raising the issue of validity before the competent authority?
c) Alternatively, on which basis could You conceive of the possibility of a preliminary reference to the ECJ concerning the interpretation of EU law in respect of any national rule preventing the possibility of the executor judge raising the issue of validity before the competent authority?
d) If the judgment ascertaining the right of the vendor has become res judicata, is it still possible to terminate the foreclosure procedure? If not, on which basis could You conceive the possibility of a preliminary reference to the ECJ concerning the interpretation of EU law in respect of any national rule precluding this result?

*Level III*

*Case (Variation II)*
The same as in Variation I (consumer law and non-bindingness of the penalty clause is not invoked during the main proceedings; the penalty is reduced; a foreclosure procedure is commenced based on the contractual title confirmed in the cause of action). However, the sale concerns a family home used as a primary residence and not a holiday cottage or second home.

(*see Kušionová* )

a) Should the judge take into account the intended use of the foreclosed estate when deciding whether foreclosure should be suspended/terminated in the light of EU consumer law?
b) Would ex officio powers be more extended in light of the need to protect other fundamental rights such as the right to one's home (art. 7, CFREU)?
c) Which ex officio powers would be more extended, if any? Those of the judge when invoking the consumer status? Those of the judge to assess the unfairness and gather evidence in relation to any such unfairness? Those of the executory judge when suspending or terminating the foreclosure?
d) Which link should be established between art. 47 and art. 7 (on fundamental right to respect for one's home) CFEU under this respect?
e) Could You please consider and raise any relevant case law from the perspective of Your legal system?

**Hypothetical n. 2 - Remedies for non-conformity of goods**

*Case A*

In June 2010 Mrs Brown orders a car from a car dealer. She chooses a model with leather seats. This model also includes a seat heating system. One month after delivery Mrs Brown realizes that the leather cover easily cracks in several spots.

Mrs Brown promptly asks for the adoption of corrective measures. Initially, the car dealer cooperates and transfers the request to the car manufacturer. The manufacture claims that the defect arose after the car left its premises.

Mrs Brown files a claim for repair or, if the latter is not possible or excessively onerous, for replacement of the car with a new car matching the consumer's expectations. The car dealer opposes the claim and asks the court to reject both remedies.

*Case B*

In June 2010 Mrs Brown orders a car from a car dealer. Mrs Brown informs the car dealer about her special needs related to her physical handicap, partially impeding access to an ordinary car unless specific adaptations are made to the doors' opening mechanisms and the internal car setting, allowing entrance for a wheel chair, whose structure and size is specifically described by the consumer.

At the time of delivery only the passenger entrance appears to be accessible for the wheel-chair whereas the driver entrance is impeded by the lack of space between the seat and the driving-wheel due to the structure of the driving wheel and the connected front car setting.

Mrs Brown promptly asks for the adoption of corrective measures. Initially, the car dealer cooperates and transfers the request to the car manufacturer. However the latter refuses to intervene because the information of the consumer's expectations had not been adequately conveyed by the car dealer to the car manufacturer.

Mrs Brown files a claim for repair or, if the latter is not possible or excessively onerous, for replacement of the car with a new car conforming to the consumer's special needs. The car dealer opposes and asks for rejection of both remedies

*E.U. legal context*

Directive 99/44 establishes a hierarchy of remedies for non-conformity. For minor non-conformity repair, replacement and price reduction are available. For major non-conformity termination can also be available, if other remedies are unavailable.

**Directive 99/44/EC (Consumer sales of goods directive)**
**Art. 3, *Rights of the consumer***
1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.
2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.
3. In the first place, the consumer may require the seller to **repair** the goods or he may require the seller to **replace** them, in either case free of charge, unless this is impossible or disproportionate.
A remedy shall be deemed to be *disproportionate* if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account:
- the value the goods would have if there were no lack of conformity,
- the significance of the lack of conformity, and
- whether the alternative remedy could be completed without significant inconvenience to the consumer.
Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.
4. The terms "free of charge" in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.
5. The consumer may require an appropriate **reduction of the price** or have the contract rescinded:
- if the consumer is entitled to neither repair nor replacement, or
- if the seller has not completed the remedy within a reasonable time, or
- if the seller has not completed the remedy without significant inconvenience to the consumer.
6. The consumer is not entitled to have the contract **rescinded** if the lack of conformity is minor.

***Art. 7, Binding nature***
1. Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer. (…)

***Level I.***
*The choice of remedies along the hierarchy provided by law.*

At this level remedies are defined in the law; no contractual clause relates to remedies against non-conformity.

*1.Judicial power and parties' power: general issues*

a) Is the national judge constrained by the choice of remedy made by the parties?
b) What are the criteria upon which the parties' choice should be assessed?
c) What is the relevance of the principles of effectiveness, proportionality and dissuasiveness?
d) If the remedies sought by one or both parties turn out to be impossible or disproportionate to the non-conformity can the national judge:
- propose
- recommend a different remedy to the parties?
e) In exercising this power or in executing this duty is the national judge bound to follow the legal hierarchy of remedies defined by art. 3.3 of consumer sales directive?
f) Should the judge give the parties the opportunity to express their views after a new remedy is proposed? (compare with Banf Plus Bank)
g) Is the consumer's opposition to the solution binding for the judge? (compare with Pannon)

*2. Comparing repair and replacement (see Weber and Putz)*

a) Upon which criteria should the judge assess the consumer's right to repair?
b) What should she/he compare the costs of repair with?
- The contract price of the car?
- The costs for car manufacturing?
- The costs of car replacement?
- The seriousness of the defect?
- Its impact on the consumer?
c) Do You see any substantial difference in this respect between Case A and Case B?
d) In Case B, to what extent should the judge take into account the special nature of the consumer's expectation, this being connected to her personal conditions (physical handicap)?

*3. Assessing the claim for replacement in cases in which repair is not possible or excessively onerous (see Weber and Putz)*

Let us assume that, for any of the reasons above, the judge rejects the claim for repair for either impossibility or its disproportionate nature.

a) Upon which criteria should the judge assess the consumer's claim for replacement?
b) Is there a substantial difference between Case A and Case B?

c) In particular should the consumer's request for a special entrance give rise to a different application of the principles of effectiveness and proportionality to the remedy of replacement? Can a remedy, considered disproportionate if the non conformity is minor, be instead held proportionate because it responds to the consumer's specific expectation?
d) In Case B, should the judge award replacement as the only remedy apt for a satisfaction in kind of the special needs of the consumer, regardless its onerous costs for the seller?

*4. Allocating the costs of replacement*

*(see Weber and Putz)*

a) When replacement is granted could the seller validly refuse to cover the whole costs of replacement and can the judge charge part of these costs to the consumer, absent a rule in the national legal system that regulates the matter?
b) Is there a substantial difference between Case A and Case B in this respect?
c) What, if any, would be the obstacles to this solution in Your legal system?

*5. Considering the price reduction option*

(*see Soledad Duarte Hueros; Banif*)

a) If repair is impossible and replacement disproportionate can the judge order price reduction even if this had not been raised by the parties in their pleadings?
b) Could the judge reduce the sale price despite the fact that the consumer has not filed such a claim? Does your legal system expressly recognize an ex officio power of the judge to propose a remedy that is regulated by legislation but not sought for by the parties?
c) To what extent should the judge take into account the special needs made clear by the consumer and engage in an assessment of the real effectiveness of the remedy for the specific consumer? (*compare this case with Duarte Hueros*)
d) If the judge was to use this power, should she/he invite both parties to set out their views on the matter and remedy? (*see Banif*)
e) Can the consumer object to a price reduction and seek termination of the contract? If she/he does not object at first instance, can the consumer appeal the judgment, challenging the rejection of repair/replacement as a remedy?

*6. Considering the contract termination option*

Let us assume that, for some of the reasons discussed above, the judge rejects the claims for repair/replacement and does not apply the remedy of price reduction because not effective.

a) Could the judge then conclude that the contract should be terminated and restitution should be ordered, since none of the above remedies provide effective protection to the consumer?
b) Would the evaluation of non-conformity and the possibility of granting termination differ in cases A and B, when the alternative remedies are unavailable?

c) Let us assume that in case A the judge concludes that defect is minor, does lack of an effective remedy modify the evaluation of non-conformity also in this case?

***Level II***

*Choice of remedies and contract private autonomy*

Assuming the sale contract has been individually negotiated.

a) Can the parties negotiate a different hierarchy of remedy from that defined by art. 3, dir. 99/44? In other words is the hierarchy mandatory or the parties can redefine the hierarchy?
b) E.g., assuming that the contractual modification favors the consumer, could the parties have validly agreed that the consumer could seek price reduction without being obliged to seek repair or replacement? If it was so agreed, could the seller object to the consumer request for price reduction in circumstances in which the former is willing to repair the goods?
c) Can the parties exclude some of the remedies, for example termination? Would the evaluation differ if termination is sought by the consumer e.g. the consumer seeks termination claiming that the clause excluding termination is invalid because it violates the hierarchy of art. 3.3 of Consumer Sales directive?
d) What are the criteria that national judges must use to assess whether such a clause is enforceable?
e) Can they refer to the principles of effectiveness, proportionality, dissuasiveness?
f) Would art. 47 CFREU be applicable to such an assessment?

Let us assume that the case was brought before an arbitration committee or an arbitral tribunal:

g) would arbiters be subject to and apply the above principles to the same extent and in the same manner as courts?

***Level III***

*Right to effective protection and out-of-court settlements*
*(see Alassini)*

Please assume that, in this type of disputes, the national law obliges the parties to make an initial attempt to achieve a resolution through an out-of-court settlement procedure and that Mrs Brown files her judicial claim having failed to engage with the ADR procedure (generally mediation).

a) Could the judge reject the substantive claims, finding the action inadmissible in the absence of an attempt to use ADR, for example mediation?

b) Or would the judge be merely obliged to suspend the judicial procedure, assigning a term within which the parties should engage in the ADR procedure?
c) When considering these options, should she/he consider whether the ADR mechanism provides effective (opportunity for) consumer protection or whether it represents a disproportionate burden for the plaintiff?
d) Which elements should be considered under this respect? (e.g. duration of the ADR mechanism, costs of the procedure, impact on the dispute evolution, e.g. in terms of interim measures or the opportunity to collect/lose evidence of the grounds for the claim)

## Hypothetical n. 3 – Individual and Collective redress

**Legal sources:**

Art 7 Directive 93/13/EC

'1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.'

Art 38 CFREU - Consumer protection

Union policies shall ensure a high level of consumer protection.

Art 47 CFREU - Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and

impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Procedural autonomy:

In that regard, in the absence of harmonisation of the national mechanisms for enforcement, these are a matter for the national legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by European Union law (principle of effectiveness).

Differences exist in national legal systems regarding the relationship between individual and collective redress. National legal systems differ in regulating procedures that separate or integrate individual and collective redress in consumer enforcement. Art. 7 of directive 93/13 provides some guidance but the different modes of coordination are subject to the principles of equivalence and effectiveness as evaluated by CJEU.

*Case*

John Greens concluded a credit contract with ABC bank to finance the purchase of a house. The mortgage loan is for a sum of 20,000 euro. The credit contract includes a clause that sets the interest rate in case of annual renewal of the loan at 15%. After a couple of years, Greens, experiencing economic difficulties, consults a lawyer and seeking to know whether the interest rate included in his contract may be deemed unfair. He then decides to bring an action for the annulment of the clause arguing that it had been imposed unilaterally and without any negotiation. The action seeks both to declare the clauses null and void and to recover the sums unduly received by the bank under the clause.

**Level I**

Assume that the individual claim follows the collective claim.

In order to bring the action, Greens decided to participate in a collective claim managed by HELP Consumer protection association seeking an injunction prohibiting the use of the above mentioned contract clause on interest rates. After one year of waiting for the procedure to commence, due to normal length of the collective redress procedural rules, Greens decided to start an individual claim for invalidity of the same contract clause, as well as for restitution of the amount of the interest paid upon the basis of the unfair clause. The two claims are both lodged before the first instance court of City A.

a. Can the consumer bring the individual claim under your national procedural rules if a collective claim is pending based on the same ground (same cause of action or causa petendi)?
b. If the consumer has joined the collective procedure, does he have to opt out from the collective procedure or can the consumer have the two actions together?

i. if the consumer has not joined can he start the individual procedure without joining the collective one? Can he participate in both?

c. Are there procedural rules applicable to the opt-out of a consumer from a collective redress action when that consumer initiates individual proceedings in your countries? (see Sales Sinues)
d. Are there specific procedural rules applicable to claims presented by consumer protection associations? (e.g. as regards standing, representativity, mandatory registration, etc.)
    a. Which specific limits are applicable to actions presented by consumer protection associations (see above)?

e. What is the relationship between individual and collective redress in unfair contract terms (art. 7.1 and 7.2) in your country? Are they complementary or alternative? Does individual redress have priority status vis-à-vis the collective one? Which features of national procedural law support this approach? See Sales Sinues
f. Does the right to effective remedy and the principle of effectiveness influence the relationship between individual and collective claims?
g. Does art. 47 of the Charter influence the relationship between individual and collective remedies?
h. What are the effects of the judgement on collective redress for the individual claims for restitution that may be subsequently raised? (for instance, the judgment may bind only the parties also in case of declaration of invalidity, or the judgement of invalidity may have the effect of res judicata also for other individual actions against the same professional)
i. For the countries that allow also in abstracto scrutiny (e.g. Poland), is it possible to obtain a declaration of invalidity of contractual terms that will apply *erga omnes* to the contracts concluded after the judgement? Please note the CJEU decision in Invitel.

**Level II**

Assume that the individual claim precedes collective claim.

Greens decided to start an individual claim for invalidity of the contract clause regarding the interest rates, as well as for restitution of the amount paid upon the basis of the unfair clause. After a couple of months, collective claim managed by HELP Consumer protection association seeking an injunction prohibiting the use of the contract clause on interest rates was lodged before the same court.

a. Which are the procedural rules applicable in Your country as regards the effects of a subsequent action for collective redress seeking injunction (and compensation) on the previous individual one?
b. Is an individual consumer, who already filed a claim as an individual plaintiff in a previous cause of action, obliged to join the collective action?
a. Must the consumer withdraw from the previous individual action in order to join the collective action?
b. Must the consumer withdraw the claim of invalidity (but not the one on restitution) in order to join the collective action?
c. To what extent does the right to an effective remedy and the principle of effectiveness influence the relationship between individual and collective claims in these circumstances?
d. To what extent does art. 47 of the Charter influence the relationship between individual and collective remedies in this case?
e. Is the individual claim supposed to be suspended until the collective action has reached its conclusion?

f. If no suspension occurs and the individual cause of action ends before the collective one, to what extent can the judge in charge of the collective claim take into account evidence adduced and conclusions made by the judge adjudicating the individual claim?

**Level II.a**

Mandatory suspension of individual claims.

Assume that you are the judge of City A deciding the claim of Greens. Suppose that the procedural law imposes the suspension of individual disputes until the collective dispute is solved. The suspension is based on a general procedural provision affirming that:

"*Where, in order to give a ruling on the subject-matter of a dispute, it is necessary to decide an issue which itself constitutes the main subject-matter of other proceedings pending before the same or a different civil court, the court shall order the proceedings to be stayed as they currently stand, until such time as the proceedings concerning the preliminary issue are concluded.*"

a. Would you interpret your national procedural law provision as conflicting with art. 7.1 Directive 93/13 in the light of the principle of effectiveness?
b. Would you interpret your national procedural law provision as conflicting with art. 38 CFREU?
c. Would consider it possible to disapply, in light of a combined reading of arts. 7.1 and 38 CFREU, the national provision and allow the individual claim to remain separated?
d. Would you interpret your national procedural law provision as conflicting with art. 47 CFREU? Upon which ground?
e. Would you consider it useful to file a preliminary reference to the CJEU in order to provide guidance regarding the criteria to consistently apply national and EU law?

**Level II.b**

Mandatory integration of individual claims in collective claims.

Assume that you are the judge of City A deciding the claim of Greens. Suppose that the national procedural law prohibits separation between individual and collective claims related to the same violation. The procedural provisions affirm that:

*"Where, in order to give a ruling on the subject-matter of an individual dispute, it is necessary to decide an issue which itself constitutes the main subject-matter of other collective proceedings pending before the same or a different civil court, the court shall order the two actions to be joined."*

a. Would you interpret your national procedural law provision prohibiting claim separation as conflicting with art. 7.1 Directive 93/13 in the light of the principle of effectiveness?
b. Would you consider that your national procedural law provision conflicts with art. 38 CFREU?

c. Would consider it possible to disapply, in light of a combined reading of arts. 7.1 and 38 CFREU, the national provision and allow the individual claim to remain separated?
d. Would you consider your national procedural law provision to conflict with art. 47 CFREU? Upon what grounds?
e. When would you deem it useful to file a preliminary reference to the CJEU?
a. Vis-à-vis the situation under Level II.a would you weigh the options between preliminary ruling and disapplication differently?

**Level II.c**

Mandatory joinder.

Assuming the same facts as the previous case. Suppose that the legal system of Country A imposes, *as a general rule*, that in case of individual and collective claims on the same facts, individual and collective claims can remain independent. However, *in case of consumer claims*, the cases are joined and the individual claim is to be included into the collective one.

a. Would you consider your national procedural law provision to conflict with art. 7.1 Directive 93/13?
b. Would you consider your national procedural law provision to conflict with the right to fair trial as enshrined in art 47 CFREU providing for a different treatment between consumers and non-consumers? Please note the CJEU decision in Sanchez Morcillo I
a. In the affirmative, would you consider it possible, upon a combined reading of art. 7.1 and art 47 CFREU, to disapply the national provision and allow the individual claim to remain separate, also in consumer cases?

**Level III**

Assume that in Country B, a Supreme Court judgement has declared that the unfair clause included in the standard contract form provided by ABC Bank across Europe is unfair, and thus declares its invalidity. The judgement in Country B has an *erga omnes* effect and affects all the contracts signed by Country B consumers before and after the judgement.

Suppose that You are a Country A judge deciding the invalidity of the same contract terms upon the claim presented by the HELP consumer protection association as operating in Your country.

a. In the case that the judgment declaring the unfairness of the clause has been officially recognised in the Country A, can you base your finding on a foreign judgment declaring the clause invalid?
b. In the case that the judgement declaring the unfairness of the clause has not been officially recognised in Country A, based on art 38 and 47 CFREU would you justify the fact that you based on the Country B decision your evaluation of invalidity of a clause? Please note the Preliminary ruling in GIC case
c. In the case that the judgement declaring the unfairness of the clause has not been officially recognised in Country A, can you use the judgment to justify your evaluation of unfairness of the clause through comparative reasoning?