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EFFECTIVE JUDICIAL PROTECTION IN CONSUMER PROTECTION IN THE ECJ's CASE LAW

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The aim of my paper is to examine the effective control that ECJ exercises on national law applying the right for citizens to benefit from effective judicial protection, particularly in the matter of consumer protection.

As we know, when there is not a regulation in EU law, Member States possess a procedural autonomy. However, this called procedural autonomy must respect and guarantee the exercise of UE fundamental rights. ECJ developed a relevant jurisprudence in this matter that is very interesting. In this sense, I study the cases *Unibet* (C-432/05), *Pannon GSM* (243-08), *Penzugyi* (C-137/08), *Domínguez* (C-282/10), *Banco Español de Crédito* (C-618/10), and *Aziz* (415/11). And finally I highline the recent case *Sánchez Morcillo* (C-169/14).

Thanks to this study we will be able to understand better actual perspectives of procedural autonomy and the right for citizens to benefit from effective judicial protection in the matter of consumer protection as a limit to this EU law principle.

Structure

1.- Motivation. 2.- Multilevel constitutionalism as theoretical perspective. 3.- The procedural autonomy of EU Member States regarding consumer protection law. 4.- Trends in the procedural autonomy principle of EU member States regarding particularly consumer protection law. 5.- Conclusions. Bibliography.

1.- Motivation.

From the perspective of fundamental rights protection in the European Union integration process one of the most important actual trends is the relationship between different legal systems, and particularly EU law and national European Union Member States law.

As we know European Court of Justice (ECJ) defined relations between European Union law and national law thanks to the primacy principle of EU law. Nevertheless, European Union law's formal authority not depends exclusively on European Court of Justice position. It is conditioned largely by characteristics of each national legal system and national supreme or constitutional courts case law.

When there is not a regulation in EU law, Member States possess a procedural autonomy. However, this called procedural autonomy must respect and guarantee the exercise of UE fundamental rights.

ECJ developed a relevant jurisprudence in this matter that is very interesting. This paper aims to study this jurisprudence, from *Unibet* (C-432/05) until recent cases as *Pénzügyi* (C-137/08), *Banco Español de Crédito* (C-618/10), *Aziz* (C-415/11), and finally *Sánchez Morcillo* (C-169/14).

The aim of this paper is to study the trends of these case law, in order to understand better actual perspectives of fundamental rights protection in the European Union in relation to procedural autonomy of EU Member States, regarding particularly consumer protection.

2. Multilevel constitutionalism as theoretical perspective and EU law prevalence

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

From the EU law perspective, the ECJ conceives Union law as an autonomous system which is governed by a set of principles among which the direct effect and primacy over national law of the Member States (*Van Gend en Loos*, C-26/62, *Costa v. Enel*, C-6/64).

However, formal authority, which may take the law of the European Union in national legal systems will not depend solely on the jurisprudence of the Court. It is conditioned largely by the characteristics of each national system, and jurisprudence of national constitutional or supreme courts. Therefore, we can say that this formal authority will depend on the way in which primacy is assumed by Member States (Chalmers, 2010: 189).

Whether we approach the relationship between the law of the European Union and national law from a monistic perspective as dualistic one, we can see that the fundamental rights and principles are not identical in EU law and in national law, and therefore it is true that they will have certain national character and they will be defined by the competent national court (Rossi, 2008: 69).

But with the exception of constitutional limits that a lot of constitutional and supreme courts have argued against the primacy of Union law (Sarrión Esteve, 2011b), we might consider that otherwise the relationship will clearly be determined in favour of European Union law thanks to primacy and direct effect principles, also in the interpretation of fundamental rights protection as ECJ pointed out in *Melloni* case the last year 2013 (Melloni, C-399/11)

Certainly from my point of view (in line with Ridola, 2002) article 53 of the Charter of Fundamental Rights of the European Union should be interpreted in the sense of the prevalence of the highest standard of protection of fundamental rights (between European Human Rights Convection standard, EU standard, and national constitutional standard) (Sarrión Esteve, 2014).

In this sense, article 53 stipulates that:

> *"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR] and by the* ***Member State's constitutions****."*

Nevertheless, ECJ interpreted it [this article] in another way, reinforcing the effectiveness of EU law primacy principle in the sense that *"national courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised"* (Melloni, C-399/11 , paragraph 60)

But, the prevalence of EU law needs two requirements: we need to be within the scope of European Union law, and furthermore the ECJ need the jurisdiction to guarantee the uniformity of the interpretation of EU law, and primacy and direct effect principles (the jurisdiction of ECJ is clear when we are in the scope of EU law, with limits in Judicial Cooperation in Criminal matters and External relations and foreign affairs)

Leaving aside the second question, and regarding the first one, it should be noted that the scope of Union law is not confined exclusively to the characteristics of European Union competence matters, since as it was stated by the ECJ a State Member exclusive competence matter does not excluded it automatically (*ratione materia*) of EU law scope of application. Therefore, EU Member States in the exercise of its exclusive

powers should also respect EU law except in the case of a domestic situation without connection therewith.

This has allowed the ECJ to control:

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

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

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

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

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

3.- The procedural autonomy of EU Member States regarding consumer protection law.

In the absence of EU legislation, EU Member States are free to regulate the procedure for the implementation of EU law, according to each domestic legal system.

Nevertheless, according to the principle of cooperation laid down in art. 4 of the Treaty on European Union (EUT), Member States shall take the necessary measures to ensure fulfilment of the obligations under the Treaty, and in particular, national courts shall provide appropriate judicial protection of rights which EU law confers on individuals.

In this sense, we can say that the principle of procedural autonomy implies that the EU Member States are free to configure the appropriate procedural rules to guarantee EU law, and particularly rights recognized in EU legislation, because national judges are the EU ordinary judges and courts.

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

And that regulation (the national one) must not be less favourable than those governing similar domestic actions (**principle of equivalence**); and nor should render impossible in practice or excessively difficult the exercise of rights conferred by EU law (**principle of effectiveness**). Corresponding to the national courts to interpret "as far as possible" the procedural rules applicable so that the application of these rules contributes to the goal of ensuring effective judicial protection of EU law rights attributed to litigants (*Unibet*, paragraphs 38 to 44 and 54).

Thus, **the procedural autonomy would be strongly influenced by the principles of equivalence and effectiveness.**

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

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

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

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

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

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

4.- Trends in the procedural autonomy principle of EU member States regarding consumer protection law

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

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

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

The problem of the Spanish legislation was that it did not cover and guarantee the rights of a consumer in relations to banks because they could discuss the unfairness of a clause only in the declarative process, not in the mortgage enforcement proceeding. At the same time, in the mortgage enforcement proceeding the consumer could not argue the unfairness of a clause.

In this sense, according to that legislation, the consumer usually lost the mortgage enforcement proceeding, and after that if he/she wins the declarative process, in that moment it will be impossible the recuperation of the house, with the impact of this situation in the protection of rights of the Spanish consumer.

After the Aziz case, the Spain changed the legislation to adapt it to the ECJ jurisprudence. Nevertheless, very recently (14 July 2014) in the case *Sánchez Morcillo* (Juan Calros Sánchez Morcillo y María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria S.A., C-169/14), the ECJ once again failed against the Spanish legislation regarding the mortgage enforcement in order to guarantee consumer protection.

ECJ mentioned Banesto and Aziz cases, and observed that actually Spanish legislation in relation to mortgage enforcement "gives the seller or supplier, as a creditor seeking enforcement, the rights to bring an appeal against a decision ordering a stay of enforcement or declaring an unfair clause inapplicable, but does not permit, by contrast ,the consumer to exercise a right of appeal against a decision dismissing and objection to enforcement" (Sánchez Morcillo, C-169/14, paragraph 44).

And from the point of view of Consumer protection (Directive 93/13, and article 47 of the Charter of Fundamental Rights) is clear that this regulation is not conform with the principle of equality of arms (Sánchez Morcillo, C-169/14, paragraph 49) and therefore ECJ concluded that the Spanish procedure system is precluded because "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" (Sánchez Morcillo, C-169/14, paragraph 51)

Therefore, we can say [as we point out in the conclusions] that the so called procedural autonomy principle is actually greatly reduced, and that EU Member States when implementing and regulating their legal system must always guarantee the exercise of rights covered in EU law.

From our point of view, in a multi-level system it is very important to take account of these relations between legal levels, because EU Member States must regulate the national procedures, even in the cases when they have the exclusive competence, in order to achieve and guarantee rights guaranteed not only at national level, but also at EU level.

5.- Conclusions.

The principle of procedural autonomy implies that the Member States are to configure the appropriate procedural rules to ensure compliance with EU law, and in particular the rights recognized to citizens.

In fact, this autonomy is limited by the principles of equivalence and effectiveness: the regulation should not be less favourable than those governing similar domestic actions (principle of equivalence); and nor should render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).

National courts shall interpret "as far as possible" the national procedural rules applicable in order to contribute to achieving the objective of ensuring effective judicial protection of rights under EU law, and if this is not possible, under the perspective of ECJ recent case law, national law would be incompatible with EU law, and national courts must apply EU law according to primacy principle.

Therefore, we can say that the so called procedural autonomy principle is actually greatly reduced, and that EU Member States when implementing and regulating their legal system must always guarantee the exercise of rights covered in EU law.

And of course, from our point of view, in a multi-level system it is very important to take account of these relations between legal levels. And EU Member States must regulate the national procedures, even in the cases when they have the exclusive competence, in order to achieve and guarantee rights guaranteed not only at national level, but also at EU level.

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