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THE ECJ CONFIGURATION OF AN EU CONSTITUTIONAL PROCEDURAL STATUS FOR CONSUMER PROTECTION

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Abstract

This paper aims to study the configuration of a constitutional procedural status for consumers in the European Court of Justice case law. Although we can see Consumer Protection primary as an instrument to develop the EU internal market, it is also a relevant instrument to define the Individual Economic Status of EU citizens and residents as equality players in the EU market. Firstly, we will point out our motivation and objectives of the paper. After that we will explain our methodology, and we will study the EU regulation bases and the concept of consume. Finally, we will analyse the relevant case law which developed the EU constitutional procedural status for EU consumers.

Keywords: EU Consumer, Consumer, Consumer Protection, Consumer status, ECJ.

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MOTIVATION

Consumer protection was used primary under European Communities legislation as an instrument to drive the economic integration (Chalmers, Davies, Monti, 2014:669) but with the creation of the internal market (Mortelmans, 1998: 35) has developed as a "driving force" in the EU integration process (Benöhr, 2013).

In fact, Consumer Protection is -as we will see in this paper- not only a key instrument to achieve the internal market Chalmers, Davies, Monti, 2014:671) but also to reinforce the economic, legal and constitutional status particularly for EU citizens and residents as equality players in the market. After all, there is a duality in the images of the consumer: as a (actual) person who is in the mind of EU institutions and the (projected, and finally real) person who will emerge because of the EU regulation (Lecykiewicz and Weatherill, 2016).

Moreover, European Court of Justice (ECJ) case law in the development of EU Consumer Protection is very relevant. As we will see, in fact, the ECJ developed a constitutional procedural status for consumers which must be applied by national courts.

But to address this, we need to use multilevel methodology because we live immersed in the European legal space, comprised of legal systems with different levels which are increasingly interconnected (Gómez Sánchez, 2011: 20). Therefore, we need a theoretical basis to approach it and try to study any element or reality included in these related legal systems, and dealing meanwhile with the new constitutional horizon opened in the EU after the Lisbon Treaty (Sarrión Esteve, 2014a; 2011).

In this paper we will point out our methodology, after that we will approach to the EU regulation bases and the concept of consumer. Finally, we will analyse the relevant case law which developed the EU consumer constitutional procedural status and the actual trends on this issue in the EU.

THE MULTILEVEL METHODOLOGY APPROACH

It is typical – from the Law perspective – to describe the relationship between EU law and national ones in terms of a multilevel legal system, i.e., constitutional pluralism (MacCormick 1999) or multilevel constitutionalism (Gómez Sánchez, 2014; Freixes Sanjuan, 2013; Balaguer Callejón, 2008;Pernice, 2002; Pernice, 1999).

In both cases we speak about theoretical constructions, maybe we can call them metatheories (Bielauskaitê and Slapkauskas, 2016) - which try to explain the EU multilevel fundamental rights protection architecture (Sarrión Esteve, 2013), and therefore the relationship and interaction of different legal systems or levels, particularly EU and national ones.

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These are becoming progressively more interconnected, because we need to approach this complex 'legal reality' as Professor Gómez Sánchez pointed out some years before (Gómez Sánchez, 2014: 55), with the logic of relationships and integration (Bilancia, 2012:84).

Certainly, one of the questions that challenge Consumer Protection is if we are facing a "fundamental right". Consumer Protection is recognised in the EU Charter of Fundamental Rights, in the title IV, Solidarity, under article 38: "*Union policies shall ensure a high level of consumer protection*".

However, we can understand that "not all rights are granted equal status", and we can see several differences (Sarrión Esteve, 2010:88-89). In fact, we can distinguish several typologies of legal positions: fundamental rights, ordinary rights and policy clauses, and the consumer protection is a policy clause (Menéndez, 2003: 183-187).

So, the recognition of Consumer Protection under the EU Charter is limited to a mandate -as a policy clause- to the EU institutions -and of course for EU member states authorities in the implementation- to ensure in their policies "a high level of consumer protection", and therefore it is more like a principle and depends on the regulation of Consumer Protection in the Treaties, and the legal development of Consumer Protection policy in the EU.

However, Consumer Protection is part of the social dimension of the EU, and as ECJ pointed out before in Viking regarding social rights that the European Community doesn't have a unique economic aim and therefore there is a need of balance between the economic and social dimensions (C-438/05, *Viking Line*:79).

This legal configuration is confirmed in the article 52(5) EU Charter which establishes that "the provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union Law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality"; the article 51(1) EU Charter which outlines that the EU Charter provisions are addressed not only to EU institutions but also to the EU Member States when they are implementing EU law. The European Court of Justice's (ECJ) interpretation of this provision is very extensive, in the sense that it is linked to the concept of the scope of EU law - Not only when they implement EU law but in any case, within the scope of EU law (C-617/10, *Åkerberg Fransson*)-; and the Explanations of the EU Charter which indicates for this article that the principles set out have been based on article 169 TFEU.

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EU CONSUMER CONCEPT AND EU CONSUMER PROTECTION LEGAL FRAMEWORK

My aim in this part of the paper is to overview firstly the EU consumer concept, and secondly the legal framework regarding the EU Consumer protection which is the base to the development of the EU case law on the constitutional procedural status for consumers.

EU Consumer concept

As we known well the notion of consumer is a negative concept in contrast to a professional person, i.e., it is a natural person – in EU Law – who acts outside the scope of an economic, professional, trade, or business activity- (Sarrión Esteve, 2018). In this way, the consumer establishes a contractual relationship with a professional or a trader, a natural or legal/juristic person.

There is a concrete contractual relation between a business and a consumer (a Business to Consumer [B2C'] contract), in contrast to a Business to Business (B2B) contract (Hedegaard & Wrbka, 2016). The consumer is the weaker party due to his non-professionalism and therefore his lower degree of knowledge about the contract and its conditions in contrast to the professional who is supposed to be an expert in the field (Lazíková & Rumanosvká, 2016:2).

Although the EU legislation approach to the consumer notion can be seen as partial (there is not a common definition), the differences are minor and consider consumer as a natural person who, in contracts covered by the respective directive, is acting for purposes which are not related to or which are outside his trade, business, craft, or profession. Moreover, the ECJ helps with a restrictive and standard interpretation of the consumer as a natural person position (personal criterion) linked not to the connection with his/her professional activity (functional criterion), meaning that the judgement of the adjudication of the consumer position needs to consider the nature and aim of the specific contract.

Of course, with this concept we can always see complex cases including mixed-purpose contract situations such as Gruber (a person living in a building in which one part was used as a family home and the rest for the farm) where the ECJ clarified that the existence of private elements was irrelevant and it denied the notion of consumer, stating that person who concludes a contract concerning goods intended partly for purposes which are in part within and in part outside his profession may not rely on the notion of consumer unless the professional or trade aim is so limited as to be ineligible in the context. There also was the case of Costa in which the ECJ stated that a lawyer who concluded a credit agreement with a bank, in which the purpose of the credit was not

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specified, may be regarded as a consumer if the agreement was not linked to that lawyer's profession.

This strong restrictive approach to defining consumers has been criticized. There is a lack of protection for a person who can be acting as the weaker party – which is supposed to be the aim of consumer protection – and there also is overprotection for a well-informed person (for example, a lawyer) in a private purpose contractual relationship.

Therefore, perhaps criteria based on the person and not functional criteria could be better as suggestion *de lege ferenda* (Lazíková & Rumanosvká, 2016:10).

Being a consumer implies having the status of consumer (the Consumer EuroStatus) in a legal sense, and therefore the application of the EU Consumer regulation.

It is well known that national laws include legal entities in the concept of consumer when they act in a private way, as in Austria or Czech Republic, or when they act as final users as in Greece or Spain (Mańko 2013). This re-interpretation of consumer in national legislation and problems of national courts regarding the existence of a consumer relation may be required for an EU legal presumption (European Commission 2017a). Nevertheless, it is interesting to consider the advantages of leaving sufficient discretion for courts to value the existence of a weaker party and to protect its position as a consumer (Lazíková & Rumanosvká, 2016:2).

One might suggest that the consumer concept may be included in the national civil codes, but the truth is that it did not appear at all in the codes until recently in someone's. So, we can find three types of solutions (Martínez Velencoso, 2017): In the first one, the concept is included usually in a special status for consumer protection – a type of compilation of consumer rules or a 'special body of norms for the protection of consumers'. For example, this is the case of Spain, where consumer protection rules are included in the Consumer Protection Act except for the Unfair Contract Terms Directive the transposition of which is out of this act, and of Austria, France, and the United Kingdom. In the second type, we can see how some countries recently decided to introduce the concept in the civil codes, as is the case of Netherlands and Germany. The Dutch Civil Code introduced the consumer concept in the reform of 1992, and Germany in the reform of 2002 included EU consumer protection regulation. It is important to outline the case of Germany modifying the civil code with the so-called 'great solution'; it may be the most important since the code entered into force in 1900 and realized a Europeanization of the Bürgerliches Gesetzbuch (BGB). And in the third type others, such as Italy and Austria, have used an intermediate solution which introduced new provisions in their respective civil codes.

EU Consumer protection legal framework

Consumer Protection was not included in the original European Community Treaty but it was

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mentioned in the competition and the common agricultural policy. The EC assumed its competence under the flexibility clause (former article 235 EECT and then article 308 ECT).[2] After that, Consumer Protection was included with the Single European Act (1986, article 100a) and reinforced under the Treaty of Maastricht with the attribution to the European Community of the competence to Consumer Protection (1992, article 129a).

The ECJ considered that although the scope of article 129a is limited, it provides the European Community the duty to contribute to the achievement of a high consumer protection level and a competence to do it (C-192/04, *Lagardère*) but although consumer protection is one of the objectives it is not the sole one (C-233/94, *Germany v. European Parliament and EU Council*) meaning that the consumer protection policy "is a cross-sectional" one creating the objectives with the internal market (Lazíková, 2016:21).

Certainly, Consumer Protection was a key instrument to achieve the internal market. But we can see an interesting development in the regulation of this issue in the Treaties: The Treaty of Amsterdam introduced the competence for promote consumer rights (1997, article 153), and confirmed the cross-sectional nature of the competence (Lazíková, 2016:22). Finally, the Treaty of Lisbon included Consumer Protection in the 'shared competences' list (a non- exhaustive catalogue) between EU and Member States (article 4(2) of the Treaty of the Functioning of the European Union, TFEU, 2009).[3]

This inclusion of Consumer Protection in shared competences mean that Member States may adopt rules in this area, and that the EU harmonisation legislation is subject to the subsidiarity principle. However, a shared competence does not mean a concurrent one, i.e., the EU and Member States may act, and therefore the State action is not excluded, but the national competence can be exercised to the extent that the EU has not exercised or ceased to exercise the shared competence (Tridimas 2012:63).

Nevertheless, the existence of the competence depends on the specific regulation,[4] ant the EU Consumer Protection is regulated in the article 169 TFEU:

> "1. In order *to promote the interests of consumers and to ensure a high level of consumer protection* [author emphasis], the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

[2] The flexibility clause was a general clause which allowed the European Community institutions to adopt any measure needed to achieve one of the aims of the Community in the functioning of the Common market required, in cases where the Treaty had not provided it. And as ROSSI outlines, the practice expanded the flexibility clause application creating new competences, including consumer protection (Rossi 2012:86)

[3] As we known article 2 TFEU recognised three types of competences: exclusive, shared and supporting. When the Treaties confer the EU a shared competence both the EU and Member States may legislate and adopt legally binding acts in the referred area, according to art. 2(2) TFEU.

[4] With the specific regulation one can interpret if the EU regulation is free to go from a minimum harmonization to a total harmonization (with a uniform standard) or less flexible. Certainly, the EU traditionally followed a minimum harmonisation approach until the recent last Directive in which EU adopted a maximum harmonisation approach. The traditional minimum approach allowed Member States to maintain their national pre-existing approaches (Kunnecke 2014: 427-428)

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> 2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:
> (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;
> (b) measures which support, supplement and monitor the policy pursued by the Member States.
> 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).
> 4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them."

Although it is true that today Consumer Protection is also a key instrument to achieve the internal market, there is a relevant change, because we are developing, as article 3(3) of the Treaty of the European Union (TEU) identifies the "social market economy" (Barnard 2010:27-30).

Furthermore, Consumer Protection is key for the development of a legal and constitutional status particularly for EU citizens and residents as equality players in the market as part of the social dimension.

According to article 169(1) TFEU EU institutions must guarantee a high level of protection for consumers through a) measures adopted within article 114 TFEU in the completion of the internal market -article 169(2a)-, and b) measures adopted to support, supplement and monitor the policy pursued by the Member States -according to article 169(2b), without preventing national measures which maintain or introduce a higher protection following article 169(4) TFEU.

Therefore we can see two bases to legislate:

a) The first one is not a general competence or legislative power for EU harmonisation (Micossi 2016:11; Lazíková 2016:23;Weatherill 2013:352), but the limits can be unclear (Chalmers, Davies, Monti 2014:685) and it is an important legal base to legislate. One can interpret that the EU has the flexibility to develop a traditional minimum harmonisation approach or a maximum one.[5]

Nevertheless, in the first important case on article 114 TFEU, the Tobacco Advertising I (C-376/98, Germany v. Parliament and Council -Tobacco Advertising I), the ECJ annulled the Tobacco Directive because the ban on all tobacco advertising in media exceeded the legal basis of article 114 which purpose is to prevent the emergence of future obstacles to trade, and the Court didn't viewed the general prohibition measure -taking into

[5] As we said before with the specific regulation one can interpret if the EU regulation is free to go from a minimum harmonization to a total harmonization (with a uniform standard) or less flexible. The EU traditionally followed a minimum harmonisation approach until the recent last Directive on Consumer Rights, in which EU adopted a maximum harmonisation approach. The traditional minimum approach allowed Member States to maintain their national pre-existing approaches (Kunnecke 2014: 427-428).

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account the numerous types of advertising- fall into that category;[6] and provided "a framework of legal principle which continues to define the scope of Article 114" (Chalmers, Davies, Monti 2014:680) which can be seen as a subsidiary legal base to legislate, to establish minimal harmonisation if there are actual or potential obstacles, but the measures adopted must be limited to the strictly minimum required (Micossi 2016). This doctrine is confirmed in Tobacco Advertising II (C-380/03, *Germany v. Parliament and Council -Tobacco Advertising II-* and regarding the validity of the introduction of maximum mobile phone roaming charges as a pre-emptive harmonization regulation in C-58/8, *Vodafone* case (Chalmers, Davies, Monti 2014:682).

b) The second legal base is clearly complementary to the Member States, in the sense that EU measures are adopted in support, supplement and monitor the national policies (article 169(2b) TFEU), without preventing national measures which maintain or introduce a higher protection following article 169(4) TFEU.

Certainly, one can ask if the dormant competence or the called pre-emption doctrine can be applied to this area of consumer protection shared competences, preventing Member States to regulate in a way that "jeopardize" a existing EU regulation.[7] But readed both legal bases, article 169(2b) in conexion with article 169(2a) one can argue that the pre-emption doctrine is explicit limited in Consumer Protection and Member States are free to maintain (if there are yet) or introduce new measures in consumer protection if they guarantee a higher protection, i.e., Member States are only precluded for regulate a lower protection for consumers.

European Community and after that EU developed several initiatives to ensure a better harmonisation of Consumer Protection. We can outline:

1. The Directive on Consumer Rights (2011/83/EU).[8] This important Directive replaced -on 13 June 2014- the former Directive 97/7/EC on the protection of consumers in respect of distance contracts[9] and the Council Directive 85/577/EEC to protect consumer in respect of contracts negotiated away from business premises.[10]

[6] However, the decision was based on the general prohibition, and the ECJ admitted considering that the market distortions could be a basis for recourse to article 114 to prohibit certain forms of sponsorship (C-376/98, Tobacco Advertising I: 111)

[7] Certainly, authors argue about the application of the USA Constitutional Dormant doctrine or the pre-emption doctrine to the EU shared competences. In this sense, EU law can be interpreted to incorporate a restraining effect on the national powers, i.e., Member States shall -when implementing their own legislation in shared competences- guarantee EU law, including EU principles, and must avoid to jeopardizing the EU regulation (Rossi 2012: 88; Tridimas 2012: 74-76; Luif 2014: 38-40; Schütze 2006; Weatherill 2002).

[8] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. OJEU L304/64 22.11.2011

[9] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts OJ L 144 4.6.1997.

[10] Council Directive 85/577/EEC of 20 December 1985 to protect consumer in respect of contracts negotiated away from business premises. OJ L 372 31.12.1985.

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2. The Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.[11]
3. The Council Directive 93/13/EEC on unfair terms in consumer contracts.[12]

Moreover, European Commission outlined in several communications that Consumer Protection is an essential part of its strategic plan, as under Europe 2020 Strategy for smart, sustainable and inclusive growth; the Action Plan implementing the Stockholm Programme, the Citizenship Report, and the Digital Agenda (European Commission 2017b).

Of course, EU member States can maintain or introduce higher consumer protection measures according to article 169(4) TFEU without preventing national measures which maintain or introduce a higher protection following article 169(4) TFEU.

In any case, as we will see, the role of the ECJ in the development of EU Consumer Protection is very relevant, and in fact, the Court developed through the effective judicial protection principle (Sarrión Esteve 2014a) the called constitutional procedural status for consumers which must be applied by national courts, a position that can be called as a constitutional procedural Eurostatus for consumers which must be applied by national courts in civil proceedings.

THE DEVELOPMENT OF A CONSTITUTIONAL PROCEDURAL STATUS FOR CONSUMERS IN THE ECJ CASE LAW

In the absence of EU legislation, EU member states are free to regulate the procedure for implementation of EU law, according to each domestic legal system, therefore, including the EU consumer protection legal framework.

Nevertheless, according to the principle of cooperation laid down in article 4 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 the ECJ considered in the Unibet case in 2007 (C-432/05, *Unibet*) in the treaty there is no national

[11] 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. OJ L 171 7.7.1999
[12] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. OJ L 95 21.4.1993.

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procedural remedy for the reservation of EU law other than those laid down in national law. EU law requires, however, the national configuration of procedural rules to ensure the respect for rights deriving from EU law. That national regulation must not be less favourable than those governing similar domestic actions (principle of equivalence), and nor should it render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). The national courts must interpret 'as far as possible' the procedural rules so that the application of these rules contributes to the goal of ensuring effective judicial protection of EU law rights attributed to litigants (C-432/05, *Unibet:* 38-44 and 54). Thus, the procedural autonomy would be strongly held by the principles of equivalence and effectiveness, changing the old procedural autonomy freedom to a limited one (Sarrión Esteve 2014b:446).

The so-called ex officio (control) doctrine (Mickilitz 2013) started in 1998 with *Oceano Grupo* (C-240/98 to 244/98, *Oceano Grupo joined cases*) as a tool which could be used by national courts to enforce and apply EU consumer law (European Commission 2017a: 188-189). And there has been a coherent development of this doctrine, however, reinforcing the effectiveness of the consumer protection (Sarrión, 2014a).[13]

In fact, in the Pannon case in 2009 (C-243/08 *Pannon GSM*) the court stated 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. Also, the national court is required to examine ex officio the unfairness of a contractual term as soon as he/she has the facts and law that need to do it. Moreover, in the Pénzügyi case a year later, the ECJ ruled that a national court can examine ex officio and declare a contractual term unfair, although in the case that the parties have not requested it, and under national procedural law the tests can be performed only at the request of a party in the civil process (C-137/08 *Pénzügyi*).

The ex officio doctrine is an application of the principle of effectiveness that involves not a simple interpretation of national procedural law, but it allows the courts an ex officio action not provided under national procedural law and therefore against national legislation (Sarrión Esteve 2014b:442).

Although in the Dominguez case in 2012 (C-282/10, *Dominguez*: 27) the ECJ's ruling may seem a backward step, it is not. The ECJ said the national court must determine the applicable procedural rules and, considering all elements of the national legislation and applying the interpretative methods recognized in this, do everything within its power to ensure the full effectiveness of EU law (Sarrión Esteve 2014b: 443).

After that case, the court confirmed that when there is no possibility to guarantee an effective protection for consumers, national courts should exercise ex officio control, overcoming national law (although national law doesn't allow the national court to do it), i.e. they must apply the *Pénzügyi* doctrine. We can see this action

[13] Some authors argue instead that there is an unpredictability application of ex officio doctrine by the ECJ (European Commission 2017a:189; Beysen & Trstenjak 2011).

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confirmed in several cases focused on Spain as:

a)Banco Español de Crédito in 2012 (C-618/10 *Banco Español de Crédito*). The 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 facts 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 raise opposition to it.

b)Aziz in 2013 (C-415/11 *Mohamed Aziz*). The ECJ stated that Spanish legislation was incompatible with EU law because in regulating mortgage enforcement proceedings, it did not provide the possibility of formulating grounds of opposition based on the unfairness of a contractual term (which is the basis of an ejection title). At the same time, the law did not allow the judge of the declarative process (which is the power to assess the unfairness of the clause) to take precautionary measures, including the suspension of the mortgage enforcement proceeding when it is necessary to ensure the full effectiveness of the court's final decision. The problem with the Spanish legislation was that it did not cover and guarantee the rights of a consumer in relation to banks because they could discuss the unfairness of a clause only in the declarative process, not in the mortgage enforcement proceedings. At the same time, in the mortgage enforcement proceedings, the consumer could not argue the unfairness of a clause. In this sense, according to that legislation, the consumer usually lost the mortgage enforcement proceedings, and after that if he/she won the declarative process, it would be impossible to gain recuperation of the house, impacting the protection of rights of the Spanish consumer.

c)Sánchez Morcillo (C-169/14 *Sánchez Morcillo*) in 2014, in which the ECJ tried to reinforce the consumer position to guarantee the equal arms principle in the judicial process. The ECJ mentioned the previous Banesto and Aziz cases, and observed that 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'.

d)Gutiérrez Naranjo in 2016 (C-154/15 *Gutiérrez Naranjo*). The ECJ rules incompatible to the EU consumer protection framework a national case law such as the Spanish Supreme Court doctrine which restricts the restitutory effects connected with the invalidity of an unfair term to the amounts overpaid after the delivery of the decision; from the ECJ perspective, the restoring effect has a retroactive effect

Therefore, we can say that the so called procedural autonomy principle is 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 including consumer protection framework. Of course, the national court may use national law

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to provide EU consumer protection, but the court should overcome national rules when they can affect the EU consumer status; within this we can see included a strictly equal arms principle in the judiciary process.

The effectiveness and primacy of EU law thus limits the freedom of the procedural autonomy of the national power, and today there is only a functionalized or oriented procedural autonomy to ensure the EU legal framework (Sarrión Esteve 2014b; Arzoz Santiesteban 2013), which guarantees a a constitutional procedural status for EU consumers.

It is a good solution from the perspective of a multilevel system: EU member states must regulate national procedures, even in the cases when they have the exclusive competence, but they must do it to achieve and guarantee rights guaranteed not only at national level, but also at the EU level.

CONCLUSIONS

Although we can see Consumer Protection primary as an instrument to develop the EU internal market, it is also a relevant instrument to define the Individual Economic Status of EU citizens, residents, and persons in general [consumers] as equality players in the EU market.

Moreover, we can outline that the ECJ has an important role because the Court developed and configurated a constitutional procedural status for EU consumers. In fact, the ECJ used the effectiveness and primacy EU law principles to limit the the freedom of the procedural autonomy of the national power, and today there is only a functionalized or oriented procedural autonomy, in a way that guarantees a constitutional procedural status for EU consumers.

A CONFIGURAÇÃO DO TRIBUNAL DE JUSTIÇA EUROPEU DE UM ESTATUTO PROCESSUAL CONSTITUCIONAL DA UNIÃO EUROPEIA PARA A DEFESA DO CONSUMIDOR

Resumo

Este artigo tem por objetivo estudar a configuração de um estatuto processual constitucional do consumidor na jurisprudência do Tribunal de Justiça Europeu. Embora seja possível perceber que a Proteção do Consumidor seja primariamente um instrumento para desenvolver o mercado interno da UE, também é um instrumento importante para definir de forma igualitária o status individual de cidadãos e residentes da UE no mercado europeu. Primeiramente, iremos apontar a motivação e os objetivos do artigo. Em seguida, explicaremos a nossa metodologia e estudaremos os fundamentos da legislação da UE e o conceito de consumo. Por fim, analisaremos

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a jurisprudência relevante, que desenvolveu o estatuto processual constitucional da UE para os consumidores da UE.

Palavras-chave: Consumidor da União Europeia. Consumidor. Proteção do consumidor. Estatuto do consumidor. Tribunal de Justiça Europeu.

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