LIMITATION BY THE NATIONAL COURT OF THE TEMPORAL EFFECTS OF THE FINDING OF THE NULLITY OF THE THRESHOLD CLAUSES OR OF THE TROJAN HORSE THAT DID NOT ENTER THE FORTRESS: *GUTIÉRREZ NARANJO*

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Abstract

Not even the most optimistic scenario could have anticipated the impact of Directive 93/13/EEC on unfair terms on Member States' national law 25 years ago. The original formula arranged by the EU legislator (by resorting to the conditions constituting the triple test of establishing the abusive character - the lack of negotiation of the clause, the significant imbalance between the rights and obligations of the parties and the professional violation of the good faith requirement) was strengthened by the developments at the level of jurisprudence through the exercise by the Luxembourg Court of its interpretative function. The contribution of the Spanish courts to the detailing and refinement of the reading grid of the said Directive is significant. The judgment of the Grand Chamber of 21 December 2016 testifies to this "Spanish judicial activism" being pronounced following preliminary references made by the Juzgado de lo Mercantil n°1 of Granada and the Audiencia Provincial de Alicante by which the Court of Justice was called to clarify whether i) art. 6 para. (1) of Directive 93/13 must be interpreted as precluding national case-law which limits in time the restorative effects of the nullity of threshold thresholds as a result of their finding of abusive nature, ii) national courts may limit the retroactive effects of the nullity of thresholds by applying the criteria (in good faith and the risks of serious consequences) used by the Court of Justice to limit in time the effects of an interpretation of a rule of European Union law and whether iii) art. 6. para. (1) of the same directive and art. 47 of the Charter of Fundamental Rights of the European Union on the right to effective judicial protection are consistent with an automatic extension of the solution limiting the restitutive effects pronounced in a class action to an individual action finding a threshold clause declared abusive. The novelty of the case-law, however, lies in the unpredictable and misleading analogy used by the Spanish Supreme Court to limit the retroactivity of unfair terms by using the criteria applied by the Court itself to limit the effects of interpretation in its own judgments. No less, we will comment on the meanings related to the articulation between the collective action and the individual action, the Court having the possibility in the present case to refine the reasoning set out in Sales Sinués and Drame Ba regarding the legal nature and the relationship between the two actions. Finally, we will draw conclusions from the Court's silence this time regarding art. 47 of the Charter and the correct way in which it should be understood.

Keywords: *abusive clauses, commercial law, Court of Justice of the European Union, mortgage loan.*

JEL Classification: K22, K23, K33

1. Introduction

Not even the most optimistic scenario could have predicted three decades ago the impact that Directive 93/13/EEC on unfair terms on Member States' national law will have. The triple test of the abusive nature of a clause (by verifying the conditions regarding the lack of individual negotiation of the clause, the significant imbalance between the rights and obligations of the parties and the professional violation of the requirement of good faith) was the innovation that gave rise to generous jurisprudential interpretations and to questions referred by the national judges.

The contribution of the Spanish courts to the detailing and refinement of the reading grid of the said Directive is significant. The judgment of the Grand Chamber of 21 December 2016 testifies to this "Spanish judicial activism" being pronounced following preliminary references made by the Juzgado de lo Mercantil n° 1 of Granada and the Audiencia Provincial de Alicante by which the Court of Justice was called to clarify:

i) if art. 6 para. (1) of Directive 93/13 must be interpreted as precluding national case-law which limits in time the restorative effects of the nullity of threshold thresholds as a result of their finding of abusive nature;

ii) whether national courts can limit the retroactive effects of the nullity of threshold thresholds by applying the criteria (on good faith and the risks of serious consequences) used by the Court of

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Justice to limit in time the effects of an interpretation of a rule of the Union law;

iii) if art. 6. para. (1) of the same directive and art. 47 of the Charter of Fundamental Rights of the European Union on the right to effective judicial protection are consistent with an automatic extension of the solution limiting the restitutive effects pronounced in a class action to an individual action finding a threshold clause declared abusive.

The decision of the Court broadens the debate on the interpretation of the sanction provided by art. 6 para. (1) of Directive 93/13 and of the jurisdiction conferred on the national court after a declaration of invalidity in the light of a new aspect of substantive law. This is not the impossibility for a national court to review a default interest clause in a credit agreement such as in *Banco Español de Crédito*; nor about moderating in a foreclosure procedure the clause that provides for default interest whose rate is more than three times the legal interest rate as in *Caixabank*. *Gutiérrez Naranjo's* challenge is to limit in time the national court's retroactive effects to the nullity of an abusive clause, a limitation imposed by a judgment of the Spanish Supreme Court.

In line with the obvious tendency to strengthen the consumer protection with which we have become accustomed, the Court, contrary to the Opinion of the Advocate General, invalidates the time limitation of the restitutive effects resulting from the nullity of the threshold clauses.

The novelty of the case-law is the unpredictable and misleading analogy used by the Spanish Supreme Court to limit the retroactivity of unfair terms by using the criteria applied by the Court itself to limit the effects of interpretation in its own judgments. We will also comment on the significance of the articulation between the class action and the individual action, the Court having the opportunity in the present case to refine the reasoning set out in *Sales Sinués* and *Drame Ba* concerning the legal nature and the relationship between the two actions. Finally, we will draw conclusions from the Court's silence this time regarding art. 47 of the Charter and the correct way in which it should be understood.

2. Legal background: "generations" of CJEU case law on abusive clauses

Of course, neither the purpose nor the space reserved for the present study allows us a detailed analysis of the Court's contribution to the application of the safeguards established by Directive 93/13 against unfair terms. An appreciation of the stages of these jurisprudential developments is, however, welcome.

The series of cascading decisions on abusive clauses was opened by the jurisprudential trio *Océano Grupo*[2] - *Cofidis*[3] - *Mostaza Claro*[4] which established a genuine regime of ex officio judicial control of abusive clauses which was said to illustrate „the metamorphosis of the powers of the national judge under the influence of European law”[5]. Following the recognition of the national judge's right to invoke an abusive (attributive jurisdiction) clause of its own motion in *Océano Grupo*, in *Cofidis* the Court proved even bolder: the national judge's extended prerogatives operated until the expiry of a limitation period by a national regulation[6]. Moreover, in *Mostaza Claro* with reference to an abusive arbitration clause, the Court stated that the nature and importance of the public interest on

[2] CJEC, 27 June 2000, C-240/98-C-244/98, *Océano Grupo*, ECR 2000, p. I-4941

[3] CJEC, 21 November 2002, C-473/00, *Cofidis SA v. Jean-Louis Fredout*, ECR 2002, p. I-10875.

[4] CJEC, 26 October 2006, C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, ECR 2006, p. I-10421.

[5] See I. Delicostopoulos, *Le procès civil à l'épreuve du droit processuel européen*. Préface de Serge Guinchard, Librairie Générale de Droit et de Jurisprudence, Paris, 2003, apud Élise Poillot, *Droit européen de la consommation et uniformisation du droit des contrats.* Préface de Pascal de Vareilles-Sommières, Librairie Générale de Droit et de Jurisprudence, Paris, 2006, p. 155, nº 315. Regarding the preliminary reference procedure, in particular the analysis of "early" examples of the application of EU law, including the rejection of a preliminary reference by the High Court of Cassation and Justice in 2007 as well as useful examples of the first cases in Romania regarding abusive clauses see Mihai Şandru, Mihai Banu, Dragoş Călin, *Procedura trimiterii preliminare. Principii de drept al Uniunii Europene şi experienţe ale sistemului român de drept*, Ed. C. H. Beck, Bucharest, 2013, p. 68-86 and p. 110; Daniel Mihail Şandru, *Contractele încheiate cu consumatorii – jurisprudenţă europeană şi română,* Ed. Tribuna Economică, Bucharest, 2012.

[6] In the context of enforcement proceedings initiated by sellers or suppliers against consumers, the Court considered that the establishment by a national provision of a limitation period (of 2 years) within which the court may invalidate such clauses ex officio or on the basis of of an exception invoked by the consumer may affect the effectiveness of the protection that is the object of art. 6 and 7 of Directive 93/13/EEC because it would be sufficient for sellers or suppliers to wait until the expiry of the period laid down by the national legislature and to subsequently request the continuation of the abusive terms on which the contracts continue. See paragraph 35 of the Cofidis.

which the protection guaranteed by the consumer directive is based justifies the obligation (emphasis added) of the national court to examine ex officio of a contractual clause.

The refinement of this ex officio control regime of unfair terms was made in *Pannon GSM*[7] (2009) and *Pénzügyi Lízing*[8] (2010) and subsequently moderated by the consequences of the principle of res judicata in the controversial *Asturcom Telecomunicaciones* (2009).

In order to ensure the useful effect of the protection pursued by the provisions of Directive 93/13, *Pannon GSM* emphasizes that the role assigned to the national court is not limited to the right to rule on the abusive nature of a contractual term, but also to examine this aspect ex officio as soon as it has the necessary legal and factual elements in this respect (our emphasis)[9]. Subsequently, in *Pénzügyi Lízing* the procedural autonomy of the Member States is further visibly irritated when it is held that the national court seised of a consumer's opposition to a payment order must order *ex officio* measures of judicial inquiry to determine whether a clause which confers exclusive territorial jurisdiction (and which appears in the loan agreement concluded between the parties) falls within the scope of Directive 93/13 and, if so, it is required to examine "*ex officio*" any abusive nature of such a clause.

This first wave of jurisprudence relevant to abusive clauses, the significant result of which is the crystallization of the regime of ex officio invocation of abusive clauses - a creation of the *Kirchberg* judge for the national judge - is closed by the nuances - partially successful - that the Court tried to does in *Asturcom Telecomunicaciones*[10] in support of the idea that consumer protection is not absolute.

The limits imposed by the principle of legal certainty and the principle of res judicata seemed, unfortunately, to have a rather formal value in that judgment. Thus, according to the Court's interpretations, the national court seised of an application for enforcement of a final arbitral award is required to assess of its own motion the unfairness of the arbitration clause contained in a contract concluded between a seller or supplier and a consumer in so far as, according to internal procedural rules, it may make such an assessment in similar actions. Written in a misleading way[11] and leaving us with the impression that "he takes with one hand what he has given with the other", the "sibylline" decision of *Asturcom* is in line with the Court of Justice's tendency to erode the authority of res judicata by overestimating the principle of effectiveness[12]. The Court is not merely extending the contextuality test of *Peterbroeck/van Schijndel* to consumer law, but even manipulates the equivalence test to find that certain European provisions (in particular Article 6 of Directive 93/13) must be regarded as rules equivalent to national norms that occupy, at the level of the internal legal order, the rank of norms of public order[13]. *Asturcom* is rather representative to ask us if the principle of effective judicial protection has not become "an unruly horse"[14] and, continuing the paraphrasing of the metaphor (on the concept of public order) popularized by Burrough J. in an English case decided in the twentieth century. 19, „It is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law”[15].

In other words, these were only the beginnings of the "sneaking" of the principle of effectiveness in European consumer law, marking at the same time the increasing intrusion of the European legislator in contractual matters in the last two decades. The prerogative to invoke ex officio the abusive nature of contractual clauses expresses the recent dimension of the principle of

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[7] CJEC, 4 June 2009, C-243/08, *Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi,* in Rep. 2009, p. I-4713.
[8] CJEU, 9 November 2010, C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*, in Rep. 2010, p. I-10847.
[9] See paragraph 31 of the Pannon GSM.
[10] CJEC, 6 October 2009, C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, in Rep. 2009, p. I-9579.
[11] See C. Kleiner, *Unfair arbitration clause before the ECJ*, available at http://conflictoflaws.net/2009/unfair-arbitration-clause-before-the-ecj/, consulted on. 1.10.2020.
[12] See Mihai Șandru, Evelina Oprina, *Discuții privind posibilitatea anulării hotărârii arbitrale de către instanța de executare. Notă la hotărârea Asturcom (cauza C-40/08) în contextul legislației române*, in Daniel-Mihai Șandru, Andrei Săvescu (coord.), *Forța juridică a hotărârilor arbitrale*, University Publishing House, Bucharest, 2012, p. 6 et seq.
[13] See H. Schebasta, Does *the National Court Know European Law? A Note on Ex Officio Application after Asturcom*, in „European Review of Private Law” (2010) vol. 18, nº 4, pp. 847-880.
[14] See Anthony Arnull, *The Principle of Effective Judicial Protection in EU law: An Unruly Horse?*, „European Law Review”, Issue 1, february 2011, p. 51.
[15] *Richardson v Mellish* (1824) 2 Bing. 229 at 252; [1824] All E.R. Rep. 258 at 266 *apud* A. Arnull, *op. cit.*, p. 51.

effectiveness of the "remedial principle" and the function of "upgrading" (revaluation) of remedies that requires Member States' courts to create or effective protection of EU rights[16].

It is no longer surprising that the second stage of the Court's case-law on unfair terms - a step towards strengthening consumer protection - is marked by this beautiful career that the principle of effectiveness has pursued in Union law. The solutions pronounced in *Invitel*[17], *Banco Español de Crédito*[18] (2012) and *Aziz*[19] (2013) are part of the Court's mature tendency to make the most of the national remedies function in order to guarantee effective consumer protection against unfair terms. No less, they are illustrative of the vocation of the principle of effectiveness to be recognized as a principle of private law of the European Union.

In *Invitel*, the debate focused on the effects of a termination action brought in the public interest, on behalf of consumers, by the Hungarian Office for Consumer Protection against the *Invitel* mobile network (which had inserted additional cost clauses in the general terms of the contracts without specifying how their calculation); the Court highlighted not only the effect that the nullity of the clause entails for the individual contract containing the contested clause, but also the future effect of the future prohibition of the use of abusive clauses[20].

This intermediate phase of the case-law is also characterized by the use in specialized areas of the control system for unfair terms, such as in the foreclosure procedure in *Aziz* or in the order for payment procedure in *Banco Español de Crédito*. Both highlight how the principle of effectiveness becomes a real Pygmalion of the partial remedies offered by the national law of the Member States, which they adapt and even revolutionize in order to give effectiveness to consumer protection. Thus, in *Aziz*, under Spanish procedural law, the court of first instance (empowered to rule on the abusive nature of certain clauses in a mortgage loan agreement[21]) could not order the suspension of the enforcement proceedings initiated under the writ of execution containing abusive clauses. In particular, the finding of nullity provides the consumer with only a posteriori protection (consisting exclusively in the payment of compensation) which the Court pertinently states that „would prove incomplete and insufficient and would not be an adequate or effective means of preventing the use of these clauses further, contrary to the provisions of Article 7(1) of Directive 93/13" [22]. The unfortunate consequences of regulation (foreclosure by selling the property before the court of first instance rules on the abusive nature of the terms of the mortgage loan agreement) are practically overcome by resorting to the effectiveness of consumer protection.

This second "generation" of preliminary rulings interpreting the Abuse Clauses Directive will also highlight the particular way in which the rule of principle on ex officio invocation (crystallized in the first chapter of the case-law) in specialized areas will work. In *Banco Español de Crédito* we will see that the Court's interpretations do not require the national court to examine of its own motion the unfairness of a clause in a simplified and expeditious procedure for the recovery of claims. However, contrary to *AG Trstenjak's* findings, the Court held that the Spanish legislation which did not allow the court seized of an order for payment to assess of its own motion, *in limine litis* or at another stage of the proceedings, the unfairness of a contractual term relating to the default interest, although it has the elements of law and fact necessary for that purpose, is likely to undermine the effectiveness of the protection pursued by Directive 93/13, even in the absence of opposition from

[16] See N. Reich, *General Principles of EU Civil Law*, Intersentia, Cambridge, 2013, p. 97.
[17] CJEU, 26 April 2012, C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, curia.europa.eu.
[18] CJEU, 14 June 2012, C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*, curia.europa.eu.
[19] CJEU, March 14, 2013, C-415/11, *Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, curia.europa.eu.
[20] The provisions of art. 6 para. (1) in conjunction with art. 7 para. (1) and (2) of Directive 93/13 must be interpreted as precluding the possibility that the finding of the nullity of an unfair term in the general terms and conditions of contracts concluded with consumers, carried out in an action for termination (…), produces, in accordance with national law, effects on all consumers who have concluded a contract with that seller or supplier to whom the same general conditions apply, including to consumers who were not parties to the termination procedure See paragraphs 43 and 44 from *Invitel*.
[21] In the present case, the clauses in question were the default interest clause, the deferred interest clause and the clause on the unilateral determination of the amount of the outstanding debt.
[22] See paragraph 60 of *Aziz*.

the consumer[23]. The mere reading of the operative part of the judgment is illustrative of the jurisprudential progress made in interpreting the Directive since its entry into force. *Banco Español de Crédito* is not just a further example of the contributions already earned or the function of remedying the principle of effectiveness.

It also represents the transitional episode towards the third wave of case law relevant to unfair terms because, by conducting a test of the proportionality of the remedy with the objective of the directive, the Court ruled that the national court cannot complete the contract by amending the content of that clause[24]. We are witnessing, practically, the transition from the procedural register of the repression of abusive clauses to the material one related to the effects of the nullity of abusive clauses. The Court's concern (itself fueled by the questions referred by the national courts) on matters of substantive law - how to fill the gap left in the contract after the clause has been removed, whether the national court may reduce default interest after finding that the clause is unfair - it will become more and more pregnant in this third stage (in the development of which we are still today).

It does not mean that the Court will now give up strengthening the procedural regime for the ex officio review of unfair terms in response to situations on which it has not yet had the opportunity to rule. We can even see that the reasoning already gained is used to solve open (and quite technical) questions about the problem of the relationship between two closely related (or even different) procedures. *Sánchez Morcillo* and *Abril García*[25], *Finanmadrid*[26] and *Sales Sinues* and *Drame Ba*[27] are illustrative of the approach described.

Using as a premise the deductions already established in previous case law and applying them to more complex facts and procedural contexts, the Court draws up true syllogisms in this regard, its interdisciplinary assessments of different principles and institutions becoming increasingly awaited not only by judges. national stakeholders and also by the national legislator who is often obliged to renew its legislation. Following *Aziz,* the Spanish legislature amended the Code of Civil Procedure (*Ley de enjuiciamiento civil,* LEC) to introduce the debtor's right to oppose enforcement when the presence of an abusive clause in the credit agreement constituting the enforceable title is claimed. In *Sánchez Morcillo* and *Abril García*, through the preliminary questions, the referring court seeks to find out whether the provisions of art. 7 para. (1) of the Directive 93/13 and Article 47 of the Charter of the EUSF on the right to a fair trial and equal arms must be interpreted as opposing a procedural rule such as art. 695 para. (4) of the LEC on the procedure of opposition to foreclosure. Basically, it was a procedural provision according to which when the court of first instance admits the opposition to the execution of the debtor, the creditor can appeal it, while, for the hypothesis in which the opposition is rejected, the debtor does not have the right to appeal[28].

Of course, the Court's arguments that this imbalance between the procedural means made available to the consumer, on the one hand, and to the seller or supplier, on the other hand, only exacerbates the imbalance between the contractors[29] (in terms of information system), which is likely to undermine the effectiveness of the system of protection established by Directive 93/13 in conjunction with Article 47 of the Charter - may seem to us quite predictable today.

Even more relevant for strengthening consumer protection and refining the regime of ex

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[23] See paragraph 53 of the *Banco Español de Crédito*.

[24] According to the argument set out in paragraph 69 of the judgment, the possibility of allowing the court to change the content of the unfair terms „would help to eliminate the discouraging effect on sellers or suppliers that such unfair terms are not simply applied in respect of the consumer (...), in so far as they would still be tempted to use those clauses, knowing that, even if they were invalidated, the contract could still be completed by the national court to the extent necessary, thus guaranteeing the interest of those sellers or suppliers".

[25] CJEU, 17 July 2014, C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA*, curia.europa.eu.

[26] CJEU, 18 February 2016, C-49/14, *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others*, curia.europa.eu.

[27] CJEU, 29 November 2016, C-381/14, *Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA*, curia.europa.eu.

[28] For developments, see G. Orga-Dumitriu, *About the recent interpretation of CJEU in the matter of unfair terms of consumer credit contracts. Relevant meanings for the national case law*, in „Perspectives of Business Law Journal" volume 3, Issue 1, 2014, p. 24-25, n°24-26, Mihaela Mazilu-Babel, *Despre creditul ipotecar și executarea silită*, March 20, 2013, available at www.juridice.ro, consulted on 1.10.2020.

[29] Ibid, paragraph 46.

officio control of unfair terms (proper to this more advanced stage of jurisprudence) is the *Finanmadrid* judgment which raises the issue of extending the powers of the court in issuing a payment order and its execution. Since the *Banco Español de Crédito*, the Court has ruled that the court's power to establish of its own motion and in limine litis the abusive nature of a clause also extends to the simplified order for payment procedure. In *Finanmadrid*, the new hypothesis is that the Spanish court, seised of a request for enforcement of a payment order, wishes to know whether it is entitled to raise of its own motion the ineffectiveness of an abusive clause as long as no review of the abusive clauses could take place in the phase of examining the request for payment order. Advocate General Szpunar, after identifying 3 reasons why such control is not adequate at the execution stage[30], does not hesitate to give priority to the effectiveness of art. 6 of Directive 93/13 and, by way of exception, to confer such jurisdiction on the executing court where national procedural rules[31] did not provide for such an ex officio review at any earlier stage. Furthermore, consistent with the approach of *Asturcom and Kapferer*[32], the Court favors the effectiveness of consumer protection by straining the authority of the res judicata. While reiterating the principle solution that Union law does not require a national court to remove the application of internal procedural rules conferring res judicata on a decision, even if this would remedy a breach of a provision of Union law, subsequent interpretations prioritize the application effective of art. 6 of Directive 93/13. The procedure used is the usual double test of the principles of equivalence and effectiveness which the detailed rules for implementing the judicial authority of the Member States must follow.

The details of the Court's interpretation of Directive 93/13 will subsequently become even more strengthened. From the reasoning given in *Finanmadrid* by the order for payment procedure followed by the enforcement procedure, the Court's analysis in *Sales Sinués* and *Drame Ba* will focus on the different nature of individual and collective actions in terminating abusive clauses. Given the connection with *Gutiérrez Naranjo*, more detailed assessments of the Court's interpretations of the relationship between individual action and collective action will be set out in the Comments section.

Returning to the tendency of this wave of jurisprudence on abusive clauses to go beyond the procedural level of the ex officio control regime and enter even more sacred areas of the rules of substantive law on the effects of the nullity of clauses, we conclude this presentation with some clarifications on novelty registered by *Asbeek Brusse* and *Man Garabito, Kasler* and *Caixabank.*

In *Asbeek Brusse* and *Man Garabito*[33] (2013), concerning a criminal clause contained in a contract for the rental of a dwelling (concluded between a trader and a tenant acting for private purposes), the Court refutes the jurisdiction of the national court to limit - as permitted by national law - to reduce the amount of penalties which this clause imposed on the consumer, but requires him to simply exclude the application of the clause when establishing its abusive nature.

However, the well-deserved notoriety enjoyed the preliminary decision of *Kasler*[34] (April 30, 2014) whose legal implications, in the context of interpreting the meaning of art. 4 para. (2) of Directive 93/13, concern 3 more relevant aspects: i) whether an exchange rate clause applicable to a foreign currency loan agreement falls within the scope (principal, emphasis added) of the contract[35],

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[30] Summarizing the reasons described, reference is made to the ill-adapted nature of the enforcement procedure to the analysis of the merits of the claims, to the risk of undermining the res judicata by controlling abusive clauses in the enforcement phase and, finally, to an element of comparative law - guidance would allow the court to censor unfair terms in the execution of a title issued following the order for payment procedure "would be difficult to reconcile with the model laid down by acts of Union law establishing the European order for payment procedure and the European Enforcement Order for uncontested claims", see paragraph 55-57 Conclusions AG.

[31] After the reform intervened in the Spanish procedural law by the Law no. 13/2009, the jurisdiction regarding the payment order procedure was transferred to the court clerk (judicial secretary), the court cannot intervene in the procedure unless the judicial secretary deems it appropriate to intervene or if the debtor objects. The situation is different from that of ERSTE Bank Hungary where the Court, taking the opinion of Advocate General Villalõn, held that the rule on ex officio control of unfair terms also does not apply to notaries, given the differences between the judicial function of the courts and the non-contentious activity of the notary public.

[32] CJEC, 16 March 2006, C-234/04, *Rosmarie Kapferer v Schlank & Schick GmbH.* Rep. 2006, p. I-02585.

[33] CJEU, 30 May 2013, C-488/11, *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV,* curia.europa.eu.

[34] CJEU, 30 April 2014, C-26/13, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt,* curia.europa.eu.

[35] The prohibition on examining the unfairness of clauses relating to the main object of the contract must be interpreted, according to the Court, strictly (para. 42) and can be applied only to clauses establishing the essential performance of the contract (para. 49), stating that, only the referring court has jurisdiction to rule on the classification of that clause in the light of the circumstances of the case (para. 45). Moreover, the Kásler judgment also indicates to the national court the criteria by reference to which a contractual clause is

respectively whether the exchange rate difference depends on the contract price[36]; ii) to what extent it can be considered that such a clause is drafted in a clear and intelligible way so that it can be exempted from the examination of its abusive character and iii) finally, for the hypothesis that, after the elimination of the abusive clause, the contract would not could it still exist, with what do we fill the gap left in the contract? Summarizing the Court's reasoning on the first two issues, *Kasler* points out that although a priori the exchange rate clauses applicable to foreign currency loan rates can be considered to be the main object of a foreign currency loan agreement, they are not they are necessarily excluded from the assessment of their abusive nature. Clauses which provide, for the release of a loan in foreign currency, for the application of an exchange rate different from that applicable to the repayment of the loan shall be exempted from the examination of their abusive nature only if they are drafted in a clear and intelligible manner[37].

With regard to the consequences of the nullity of the clause, after the *Banco Español de Crédito* the Court ruled that the national judge could not complete the contract by rewriting the clause (solution also confirmed by *Asbeek Brusse* and *Mann Garabito* when it was held that the text of Article 6 para. 1) of Directive 93/13 does not allow the national court to reduce the amount of penalties imposed on the consumer), *Kasler* refines the interpretation of the text in a particular context. According to the Court's reasoning, where the removal of the unfair term would undermine the existence of the contract, the national court may order that the contested unfair term be replaced by a supplementary provision of national law[38].

The fact that the prerogative of the national court to replace the space left in the contract by a supplementary provision is restricted to the situation where the annulment of the clause would oblige the court to annul the contract as a whole (thus exposing the consumer to harmful consequences) is also reconfirmed by the approach subsequently promoted in *Caixabank*[39] (2015). The solution was occasioned by the application of the transitional provisions of Law 1/2013 adopted in Spain after *Aziz,* according to which the national court seized of a mortgage procedure has the obligation to order the recalculation of amounts owed under a mortgage loan which provides default interest. exceeds the legal interest rate by more than three times by capping an amount of default interest that does not exceed these thresholds.

The *Caixabank'*s decision requires a careful reading. The abdication from the line of thinking promoted so far is only an apparent one when it is held that the national court can moderate the extent of the default interest. The exclusion of the application of the default interest clause when it is found to be abusive is far from being questioned by *Caixabank'*s interpretations. The extent of the powers of the national court manifested by the moderation of interest is recognized only under the double condition that the national judge does not prejudge the assessment of the abusive nature of that clause and does not prevent him from removing the clause when he finds it abusive.

3. *Gutiérrez Naranjo* - the facts and the questions referred

In recent years, Spanish courts have added a new "intrigue" to the heterogeneous content of

to be considered as establishing an essential performance of the contract, namely „the nature, general scheme and provisions of the contract and its legal and factual context" (para. 51).

[36] Specifically, the clause merely established, for the purpose of calculating the rates, the exchange rate between the Hungarian forint and the Swiss franc, without, however, providing for the provision of an exchange service by the lender; therefore, the monetary burden resulting from the difference between the exchange rate at the purchase and the exchange rate at the sale and which had to be borne by the borrower cannot be considered as remuneration due in exchange for a service. The natural conclusion was that a contractual stipulation such as the clause in the *Kásler* contract which imposes a pecuniary burden on the consumer without this being the equivalent of a specific service provided by the lender can be analyzed in terms of its abusive nature.

[37] For a larger monographic study on abusive clauses in credit agreements see Miscenic, Emilia and Petric, Silvija, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima (Unfairness of Currency Clause in CHF and HRK/CHF Loans)* (February 5, 2020). Narodne Novine, 2020, Available at SSRN: https://ssrn.com/abstract=3532574.

[38] Failing to recognize this prerogative, the court would have been obliged to cancel the contract as a whole, which would have meant for the consumer the immediate maturity of the entire outstanding amount due; practically, the specific solution proposed by Kasler is in line with the objective of art. 6 para. (1) of the Directive 93/13 and allows a real balance to be struck between the rights and obligations of the contractors.

[39] CJEU, 21 January 2015, connected causes C-428/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco, SA v José Hidalgo Rueda and Others and Caixabank SA v Manuel María Rueda Ledesma and Others*, curia.europa.eu.

the topics that have contributed to the implementation of the protection system established by the Directive 93/13: the debate on the threshold clauses introduced in mortgage contracts. According to these clauses, regardless of the fluctuation of the rates on the banking market, the minimum interest rate in the mortgage contract cannot be lower than a default value of the bank; in other words, even if the interest rate becomes lower than this predetermined threshold level, the consumer is required to pay interest equivalent to the threshold value. The growing number of referrals - gradually forming what Advocate General Mengozzi calls a veritable "threshold clause dispute"»[40] - reaffirms the Spanish courts' strategic choice to see in consumer protection rules enshrined in Union law and the fundamental rights in the Charter source - maybe even just a safe one - of legal solutions to a perceived social emergency scenario, at least in the short term»[41].

The three actions brought by F. Gutiérez Naranjo, AM Palacio Martinez, E. Irles López and T. Torres Andreu respectively against Cajasur Banco, Banco Bilbao Vizcaya Argentaria and Banco Popular Español had as their object the annulment of the existing threshold clauses in the credit agreements. mortgage and the refund to the plaintiffs of the amounts unduly collected by the banks. By reference for a preliminary ruling in Cases C-154/15, C-307/15 and C-308/15 (hereinafter linked), the referring courts express doubts as to the direction laid down in a number of judgments of the Tribunal Supremo (Spanish Supreme Court) according to which consumers can obtain a refund of the amounts they have paid to banks under the threshold clauses only from the date of the first judgment (9 May 2013) by which the highest court in Spain found that these clauses were abusive.

The legal debate in Spanish judges can be structured around three different aspects.

By the questions referred in Case C-154/15 and the first question common to Cases C-307/15 and C-308/15, the main issue raised is whether the limitation of the restitutive effects of the nullity of the threshold clauses (found to be abusive) is compatible with article 6 (1) of the Directive 93/13 provides that unfair terms do not create obligations for the consumer. In fact, *Juzgado de Io Mercantil n° 1 de Granada* - Commercial Court no. 1 of Granada in Case C-154/15 and *Audiencia Provincial de Alicante* - Provincial Court of Alicante, Spain in Cases C-307/15 and C-308/15[42] expresses doubts as to the restriction of the effects of the nullity of the unfair terms only after the abusive. In reality, although according to art. 6 para. (1) of the directive unfair terms do not create obligations for the consumer and the settled case law of the Court rules that the national court has no jurisdiction to amend the content of unfair terms, the Supreme Court in its judgment of 9 May 2013 practically limited the recognizing of the right to a refund only in respect of amounts unduly collected by banks from the date of its judgment finding that those clauses are abusive.

By its other questions referred in Case C-307/15, the *Audiencia Provincial de Alicante* seeks clarification as to i) the autonomous meaning in European Union law of the criteria of good faith and the risk of serious consequences as established by *RWE Vertrieb* decision, and (ii) the application appropriate to these criteria by the Tribunal Supremo, when it limited the restitutive effects of the nullity of the unfair terms.

Finally, by its last question referred in Case C-308/15, the Audiencia Provincial de Alicante raises the question of the relationship between the solution given in a class action and that given in an individual action, namely to what extent the automatic extension of the limitation of effects restitutions (arising from the nullity of the threshold clause) found in the class action brought by a consumer association against financial institutions to individual actions against professionals who were not parties to the collective procedure is compatible with the principle of non-binding consumer abuse clauses and the right to an effective jurisdictional protection enshrined in art. 47 of the Charter of Fundamental Rights of the European Union.

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[40] See paragraph 1 of the AG Conclusions. Judgment of 14 April 2016, Sales Sinués and Drame Ba (C 381/14 and C 385/14), Ordinance of 26 October to which are added the cases pending at the time of the pronounced judgment C 349/15, C 381/15, C 431/15, C 525/15, C 554/14, C 1/16 and C 34/16 and which, following the judgment of Gutiérrez Naranjo, were deleted by order.

[41] Fernando Gómez Pomar, Karolina Lyczkovska, *Spanish Courts, the Court of Justice of the European Union, and Cosumer Law. A Theoretical Model of their Interaction*, „Revista para el Análisis del Derecho", n°4, Barcelona, October 2014, p. 6.

[42] Audiencia Provencial de Alicante was invested with the judgment of the appeal declared by the borrower A.M. P. Martinez against the solution given by the Juzgado de lo Mercantil n° 1 of Alicante in case C-307/15, respectively of the one declared by Banco Popular Español against the judgment of the Juzgado de lo Mercantil n° 3 of Alicante in the case C-308/15.

4. *Gutiérrez Naranjo* - opinion of the Advocate General

Taking the view that the answer to the questions referred in Case C-154/15 and the first question common to Cases C-307/15 and C-308/15 is sufficient for the referring court to settle the disputes, the Advocate General develops his analysis around two issues, namely the level of protection afforded to consumers by the case law of the Supreme Court in relation to that offered by Directive 93/13 and, subsequently, the content of the obligation laid down by the Member States in art. 6 para. (1) of Directive 93/13.

The Supreme Court submits that it exceeded the level of consumer protection afforded by Directive 93/13, which, by making minimum harmonization in that field, allows the Member States to take more stringent measures. Specifically, the Tribunal Supremo found that the threshold clauses were clauses relating to the main object of the contract, the control of which is abusive, as a rule, is excluded provided that those clauses are drafted in a clear and comprehensible manner. The Spanish Supreme Court held that although these clauses were grammatically intelligible, they therefore fulfilled the condition of formal transparency control, they did not instead satisfy the requirement of material transparency, as professionals did not provide consumers with sufficient information to explain their real meaning.

The Advocate General has serious doubts as to whether the *Tribunal Supremo* has enriched the review of the transparency of clauses with a requirement of material transparency by which it is alleged that the level of protection afforded by Directive 93/13 has been exceeded and the limitation of the restitutive effects justified. The Advocate General (AG) shows that the requirement of writing in a clear and intelligible language is stated by its 20th recital and by art. 5 of the Directive 93/13 which the Court invoked in para. 43 of the *RWE Vertrieb* judgment of 21 March 2013, which held that „for a consumer, information, before the conclusion of a contract, of the contractual terms and consequences of that contract is of fundamental importance", since „the latter decides, in especially on the basis of that information, if it wishes to undertake in accordance with the conditions laid down in advance by the seller or supplier"[43]. The extensive interpretation of the requirement for clear wording of contractual clauses, in the sense that "the requirement of transparency cannot be reduced to their formal and grammatical intelligibility"[44] was later confirmed by the judgment of 30 April 2014, *Kasler* and the judgment of 9 July 2015, Bucura. Although the last two were delivered after the judgment of the Supreme Court of 9 May 2013, they only refined the interpretations of the Court's previous case-law, including the judgment of 21 March 2013, *RWE Vertrieb* to which the Supreme Court referred. Therefore, the AG's finding that the *Tribunal Supremo* (when classifying the threshold clauses as abusive due to a lack of sufficient prior information) did not act outside Union law, offering a higher level of consumer protection than offered by Directive 93/13 but, on the contrary, applied the provisions contained therein[45] is relevant and convincing.

The broad analysis of the content of the obligation imposed on the Member States by art. 6 para. (1) of the Directive 93/13 is developed by the AG in three stages, starting from a) the unedifying literal interpretation of the text, continuing with the reasoning extracted from b) returning to jurisprudence and ending with c) application in the present cases.

We know that according to art. 6 para. (1) of the directive abusive clauses "in accordance with national law, do not create obligations for the consumer". As Advocate General Trstenjak points out in his Opinion in *Invitel*, the formula used by the European Union legislature to refer to the sanction of unfair terms is perfectly neutral[46], without reference to a more precise technical expression such as nullity, annulment, resolution or other sanction. The Advocate General Mengozzi considers that the use of the present indicative does not reveal anything about the possible intention of the legislator to ensure a retroactive dimension to the absence of a binding effect and, more importantly, wonders whether this neutral expression is sufficient to leave Member States free to specify, under the

[43] *RWE Vertrieb*, para. 44.
[44] *Kasler*, para. 71
[45] Concluziile AG, *Naranjo*, para. 50.
[46] *Invitel*, para. 48.

conditions they wish, the lack of binding nature of the unfair terms.

In order to clarify the meaning of art. 6 para. (1) of the Directive 93/13, the AG uses a retrospective examination of the case-law of the Court. Thus, in *Banco Espanol de Credito* the Court found that „on the one hand, the first sentence of that provision, although granting Member States a certain margin of autonomy as regards the definition of legal regimes applicable to unfair terms, nevertheless expressly imposes an obligation to to provide that those clauses do not create obligations for the consumer"[47]. Invoking the reasoning formulated in *Invitel* and reiterated in *Unicaja Banco and Caixabank*[48], AG Mengozzi concludes that the nullity of the abusive clauses is not the exclusive way to meet the requirement provided by art. 6 para. (1). The corroborated interpretation of art. 6 para. (1) and art. 7 para. (1) and (2) of the Directive 93/13 mean that „the application of the penalty of nullity of an unfair term (...) ensures that that clause is not binding on such consumers, but without excluding other appropriate and national laws"[49]. Prefacing the content of his developments on the cases in this case, the Advocate General argues that the Luxembourg court "did not cover (...) the inaccuracy of art. 6 para. (1) of the Directive 93/13. He did not go beyond this apparent neutrality - and probably could not do so. Thus, if the Court were to rule at present that that article must be interpreted as meaning that, in the presence of an abusive clause, the national court must declare that those clauses invalid and allow a correlative right to restitutio in integrum, in other words, from at the time of the conclusion of the contract, the express reference made by that provision to national law would have no useful effect and in that case it would be difficult to evade criticism of praetorian harmonization".

Furthermore, although it is not denied that, in the Spanish legal system, the penalty for unfair terms is null and void (the right to a full refund is a direct consequence of its application), AG Mengozzi's observations are subtly oriented to justify limiting the restitutive effect. His arguments, chained in an almost Cartesian scheme of thought in which the principle of procedural autonomy, the principle of equivalence and the principle of effectiveness are skillfully used, can seduce the reader but, as we shall see, not the Court.

Pointing out that „Union law does not harmonize the sanctions applicable to the recognition of the abusive nature of a clause (72) nor the conditions under which a supreme court decides to limit the effects of its judgments", the Advocate General considers that the situation falls within the national legal order. Member States, on the basis of the principle of procedural autonomy. Next, the double test of equivalence and effectiveness is used as the classic limits of that principle. As the Supreme Court has apparently used to limit the temporal effects of its judgments and in purely internal situations, not only in disputes concerning rights protected by the legal order of the Union, it is considered that the power of the Spanish Supreme Court to limit the temporal effects of its decisions is in accordance with the principle of equivalence.

In order to determine whether the temporal limitation of the effects of the judgment of the *Tribunal Supremo* undermines the effectiveness of the Directive 93/13, the argument is focused on the one hand, by taking into account the objective pursued by the directive and the principles of national law which justified limiting the effects of the judgment on the other hand.

As the Court has consistently held in its case-law, the objective pursued by the Directive 93/13 is to restore the real balance between the consumer and the professional and the deterrent effect on the consumer. AG's conclusion that "the deterrent effect is fully ensured, as any professional who introduces such clauses in his contracts after 9 May 2013 will be obliged to remove those clauses as well as to refund the amounts paid under them" and "the effectiveness of the directive is fully ensured for the future" is only partially convincing. Continuing its syllogism and acknowledging the "completely exceptional" nature of such a limitation, the AG then bases its argument on the Asturcom Court's finding that consumer protection is not absolute. It goes on to say, "it does not seem obvious that, in order to restore the balance between the consumer and the professional, it was necessary or

[47] *Banco Espanol de Credito*, para. 62.

[48] In its judgment of 21 January 2015, the Court notes that „the national court (must) be able to infer all the possible abusive consequences, in relation to Directive 93/13, of clause (...), proceeding, if necessary, to annul" (C-482/13, C-484/13, C-485/13 and C-487/13).

[49] *Invitel*, para. 40.

even possible in each case to reimburse all amounts paid under a threshold clause"[50]. Moreover, "the consumer bound by a credit agreement containing a threshold clause could easily refinance his credit and change the banking institution and the application of the clause would not have resulted in a substantial change in the amount of monthly amounts owed by consumers"[51]. Adding to these allegations the need to take into account the principles of the national legal order, namely legal certainty which requires a time limit on the effects of the Supreme Court judgment - given the economic implications of jeopardizing the stability of the banking system - the Advocate General concludes that neither the rights recognized nor does the objectives pursued by Directive 93/13 affect the decision of the *Tribunal Supremo* to limit the temporal effects of the decision finding the abusive terms to be invalid.

However, at the end of its considerations, it is felt necessary to emphasize that the proposed solution is of an exceptional nature, being limited only to the specific circumstances of those cases. More importantly - and somewhat surprisingly compared to the line of thinking promoted in the Opinion - the Advocate General states that the proposed solution "should by no means appear as a validation of the view that national courts can or must apply the criteria used by the Court itself when calls on it to limit the effects of its own decisions." Consequently, the criteria of good faith and the risks of serious consequences are repudiated as effective criteria for limiting national courts' effects of their own decisions, despite the "endemic dimension of the problem" or the "macroeconomic implications for the already weakened banking system" who had previously referred the Advocate General to justify his opinion.

5. CJEU solution

The Court's answer to the questions referred by the national courts in the three related cases was eagerly awaited by the mortgage borrowers, the banking market and the Spanish Government at the time of the decision.

The Court of Justice redrafted the two questions in Case C-154/15 and the first questions in Cases C-307/15 and C-308/15, holding that the referring courts are essentially asking whether „Article 6 (1) of Directive 93/13 must be interpreted as precluding national case-law which limits in time the effects of restitution in relation to a finding of an abusive nature within the meaning of article 3(1) of that directive, of a clause contained in a contract concluded by a professional with a consumer only to the amounts unjustifiably paid in application of this clause following the pronouncement of the decision which found this to be abusive in court”[52].

The defense of the Spanish Government, *Cajasur Banco* and *Banco Popular Español* to the effect that the question of the abusive nature of the threshold clauses would not fall within the scope of Directive 93/13 has been removed. Assuming (only) here the view expressed by the Advocate General and confirming the line of thinking expressed in *RWE Vertrieb and Kasler*, the Court has shown that the requirement of transparency set out in Article 4 (2) of that Directive is not limited to respect for formal transparency of the contractual clauses, but also to respect their material transparency, more precisely to "the adequacy of the information provided to the consumer regarding the legal and economic scope of his contractual commitment".

Summarizing the case-law on the interpretation of Articles 6 (1) and 7 of the Directive, the Court reiterates that that rule is a matter of public policy and is an imperative provision which, as stated in *Banco Español de Crédito*, seeks to replace the formal balance established by the contract between the rights and obligations of the co-contractors a real balance likely to restore equality between the latter[53]. The focus of the Court's argument is on the deterrent effect for the professional which the sanction imposed by Article 6 (1) must provide. As the national court cannot change the content of the unfair terms, the finding of nullity must have the consequence of re-establishing in fact

[50] Conclusions of AG Paolo Mengozzi, para 73.
[51] Idem.
[52] *Naranjo*, para. 46.
[53] *Banco Español de Crédito*, para. 63.

and in law the situation in which the consumer would have been in the absence of that clause. Or, the absence of such a restitutive effect would be likely to call into question precisely that deterrent effect.

Although it acknowledges that consumer protection is not absolute, the Court intends to accept this reasoning only to find that the Supreme Court was entitled to rule, in its judgment of 9 May 2013, that the latter was not such as to affect situations definitively resolved. by previous court decisions that enjoy the authority of res judicata. Instead, it points out the distinction between „the application of a procedural procedure, such as a reasonable limitation period, and a limitation in time of the effects of an interpretation of a rule of European Union law", the latter being the exclusive competence of the European Union. The Court then adds an important remark, stating that „the conditions laid down by national law, referred to in Article 6 (1) of Directive 93/13, are without prejudice to the substance of the right which that provision confers on consumers, as interpreted. of the case law of the Court (...) Or, the limitation in time of the legal effects deriving from the finding of the nullity of the "threshold" clauses made by a Supreme Court in its judgment of 9 May 2013 is equivalent to the general absence of any consumer who concluded, prior to that date, a mortgage loan agreement containing such a clause of the right to obtain a full refund of the amounts it has unjustifiably paid under this clause to the banking institution prior to May 9, 2013"[54]. Consequently, the limitation of the restitutive effects provides only limited consumer protection and is not an appropriate and effective means of preventing the use of threshold clauses within the meaning of Article 7 (1) of Directive 93/13, which means that the referring courts are required not to apply the time limitation of effects operated by the *Tribunal Supremo* through its case law.

In the light of that reasoning, and contrary to the Advocate General's view, the Court contends that „Article 6 (1) of Directive 93/13 must be interpreted as precluding national case-law which limits in time the restorative effects of the finding that a clause contained in Article 3 (1) of that directive is abusive. a contract concluded by a professional with a consumer only to the amounts unduly paid in application of such a clause, following the pronouncement of the decision which found this to be abusive in court".

Finally, in view of the answer given to the two questions in Case C-154/15 and to the first questions in Cases C-307/15 and C-308/15, the Court considers that there is no need to answer the other questions referred.

6. Comment

6.1. The effects over time of court decisions vs. the time effects of nullity - a hybrid interpretation vs. an autonomous interpretation

In a more general register, *Gutiérrez Naranjo* testifies in an unexpected way about the implications of Europeanization for the private law of the Member States. "Europeanization" is not only the emergence of a new legal order at European level - Union law, but also the interaction between the latter and the laws of the Member States, namely the transformations to which national law is exposed under the impact of Union law. *Gutiérrez Naranjo* is an illustrative example of the phenomenon of synergy that can manifest itself in this interaction and the consequences of the national judge's borrowing of institutions or techniques constituting creations of Union law deserve serious consideration. In practice, by its judgment of 9 May 2013, the Supreme Court uses the procedure of limiting the effects of the judgment in time using the very criteria defined by the CJEU to limit the effects of its own judgments. The time limitation of the effects of the judgment becomes the Trojan horse by which the Spanish supreme court invalidates the retroactive effects of the sanction of nullity of the threshold clauses in the credit agreements concluded by consumers with the banks. A more detailed description of the content of the case law of the Supreme Court becomes necessary in this context.

The argument is based on the idea that, being linked to price or consideration, the threshold clauses were related to the main object of the contract, being exempted in the protection system

[54] Idem, para. 71-72.

established by Directive 93/13 from the control of unfairness as long as they are drafted clearly and intelligibly. Reiterating the *Caja de Ahorros*, the Supreme Court considers that art. 4 (2) of the Directive considers only a formal control of the transparency of the clauses that define the object of the contract so that the control exercised by the Spanish court based on art. 80 paragraph (1) of the LGDCU, which also takes into account the material nature of the transparency of the clauses (which takes into account the sufficient nature of the information provided to consumers at the conclusion of the contract on the consequences of the effective application of the threshold clauses) provide the consumer with a higher level of protection.

This enhanced control of the transparency of threshold clauses supports, in the view of Spanish judges, the solution of limiting retroactivity by recourse to the principles of legal certainty, fairness and prohibition of unjust enrichment as well as the two conditions imposed by the Luxembourg Court for time limitation its own decisions, namely the good faith of the persons concerned and the risk of serious economic consequences[55]. Thus, invoking the criteria established by the Court in *RWE Vertrieb*, the *Tribunal Supremo* limited the effects of its judgment from the date of its judgment, ruling that the annulment of the threshold clauses would not affect situations definitively resolved by judgments vested with res judicata and - what which are of particular interest to us - no payments made before the date of the judgment of 9 May 2013[56]. Basically, only the amounts collected after this date were subject to refund.

The additional arguments for the proposed solution are presented with meticulousness and seem to be part of a type of discourse that, although it does not spare either economic or legal considerations, seems rather to express a political option for resolving a social conflict between consumers and banks. Specifically, the *Tribunal Supremo* stated that i) the "threshold" clauses were legal as such, ii) they were based on objective reasons, iii) they were neither unusual nor excessive, iv) their use had long been tolerated in the real estate loan market, v) their nullity was found not due to the intrinsically illegal nature of the effects produced by them, but due to their lack of transparency caused by insufficient information of borrowers, vii) national regulation was observed by banking institutions, viii) the establishment of a minimum interest rate corresponded to the need to maintain a minimum yield on mortgage lending to enable banking institutions to cover their production costs incurred and to continue to provide financing, ix) the clauses were calculated so as not to cause significant changes in regarding the amounts to be paid initially, amounts which the providers took into account when deciding on their behavior economic, ix) Spanish law authorized the subrogation of the creditor so that a dissatisfied consumer could have easily changed the credit institution, and x) the retroactivity of finding the nullity of the clauses in question would cause serious economic disruption[57].

Following the decision 241 of 9 May 2013 in the collective action brought by a consumer association against the three banking institutions, the Tribunal Supremo, being invested with the resolution of two individual actions brought against one of the defendant banks in the collective procedure, ruled no. 139 of March 25, 2015 and no. 222 of April 29, 2015 limiting the refund of the amounts collected under the threshold clauses to those paid after the pronouncement of the judgment of May 9, 2013. In other words, it extended the solution pronounced in the collective action and to the individual actions.

The Supreme Court's approach is misleading. *Mutatis mutandis*, the Spanish Supreme Court limits the effects of its own judgment by using the criteria established by the CJEU (good faith and serious economic repercussions) to overturn the retroactive effect of the nullity of an abusive clause. Limiting the effects of the judgment and limiting the effects of nullity seem to coincide, and their overlap creates a bizarre effect - invalidating the *ex tunc* effects of the sanction and, implicitly, limiting the restitutive effect of the nullity of the threshold clauses. Basically, two different institutions - the time limitation of the effects of the CJEU judgment and the retroactive effects of nullity are subjected to an unusual alchemy by the Supreme Court to obtain a result that would temper

[55] Ibid, para. 20.
[56] Ibid, para. 25.
[57] Ibid, para. 24.

a social conflict whose economic stake is far from being ignored. The hybrid "product" of the reasoning set out in the judgment of 9 May 2013 is surprising for Spanish civil law and the theory of nullity in general. The retroactive effects of nullity are not only an old knowledge of the private law of the Member States but, above all, a fundamental knowledge for beginners. The unconstitutional twist of invalidating the *ex tunc* effects of nullity by manipulating the criteria that justify, for the CJEU, limiting in time the effects of its own judgments can only be the desperate or, on the contrary, autocratic option of a court under pressure. The reasoning supporting the dethronement of the retroactive effect, namely the reliance on the general notion of legal certainty by referring to the macroeconomic consequences of the refund of all amounts received under the threshold clauses, is only seemingly relevant. Doesn't the disregard of the legal consequences of nullity in general and the nullity of abusive clauses in particular alter legal certainty to the detriment of the legal protection of individual rights?

Going beyond the strict framework of nullity of abusive clauses, *Gutiérrez Naranjo* contains the "ferment" of a much more subtle and complex debate on the effect of court decisions over time. If the law provides, in principle, for the future, court decisions rendered in application of the law usually produce retroactive effects. It is not unimportant to point out that this is not a decision of the Tribunal Constitutional de España, but a decision of the Tribunal Supremo in the context in which it is known that the statutes of the constitutional courts of the Member States contain provisions on the effect of decisions pronounces as well as the competence to modulate their temporal effect[58]. Summarizing the results of the research from the reports prepared by experts from several Member States[59], three observations are identified on the fundamental issues underlying the inter-temporal effects of court decisions, regardless of the legal system and the nature of the review: the need for flexibility, wide discretion assumed by the courts and variations in the *a priori* weighing of the arguments[60]. In *Gutiérrez Naranjo*, the bold conduct of the Tribunal Supremo is an invitation to reflect on the manifestation of the *Kompetenz-Kompetenz* theory in European private law. Has the informed voice of Prof. Chantal Mak already noted that the case law raises the question of verifying the extent to which the powers of national higher courts can be restricted by the CJEU in areas that are governed by a combination of national rules of private law and EU law?[61]

6.2. Limiting in time the effects of the interpretation of a rule of Union law. The exclusive competence of the CJEU vs. jurisdiction of national higher courts: *intra vires* vs. *ultra vires*

Counterbalancing the content of its previous observations, AG Mengozzi nevertheless feels the need to recall how „the Court remains fundamentally competent in the name of the supremacy and uniform application of Union law to assess compliance with Union law of nationally defined conditions regarding the limitation of time of the judgments of the supreme courts rendered in their capacity as courts of common law in application of Union law"[62]. The doubt that national courts can apply the criteria used by the Court itself when asked to limit the effects of its own judgments had already been expressed. By rejecting any interference, the Court reaffirms its "exclusive jurisdiction" to limit in time the effects of the interpretation of a rule of European Union law.

The analysis of the issue involves two observations.

The first concerns the distinction between the time limitation of the effects of a judgment and

[58] For a comparative look at the time-effect regimes of judgments in various legal systems, see Patricia Popelier, Sarah Verstraelen, Dirk Vanheule and Beatrix Vanlerberghe, *The Effect of Judicial Decisions in Time: Comparative Notes*, in Patricia Popelier, Sarah Verstraelen, Dirk Vanheule and Beatrix Vanlerberghe, *The Effect of Judicial Decisions in Time*, Intersentia, Cambridge-Antwerp – Portland, 2014, p. 1 et seq.

[59] The contributions presented at the seminar held at the University of Antwerp on 8-9 November 2012 concern judgments handed down by i) constitutional court's ruling on the retroactive effect of decisions (report of Germany and Belgium), ii) constitutional courts applying the immediate effect (Austrian reports, Hungary, France and Italy), iii) supreme courts (report of Great Britain, the Netherlands and Israel), iv) European jurisdiction (CJEU and ECHR).

[60] Patricia Popelier, Sarah Verstraelen, Dirk Vanheule and Beatrix Vanlerberghe, *op. cit*., p. 2-3.

[61] Chantal Mak, *Gutiérrez Naranjo – On limits in law and limits of law*, Amsterdam Law School Research Paper No 2017-38, Centre for the Study of European Contract Law, Working Paper Series No. 2017-06, p. 1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3034210, consulted on 1.10.2020.

[62] See AG Conclusions, para. 80.

the time limitation of the effects of (interpretation of) a rule of European Union law. The two tend to overlap in *Gutiérrez Naranjo* and this can lead us into a wrong dialectic whose consequences cannot be ignored.

The second observation updates an older debate in European constitutional law on the relationship between the EU legal order and the laws of the Member States, namely the monistic and pluralistic currents of thought conveyed to understand this legal reality. In my view, the first observation has immediate effect in *Gutiérrez Naranjo* and precedes the second, which makes the case-law analyzed a good pretext for broadening the answers given to earlier questions.

While the legislature usually provides for the future, *ex tunc* effects (retroactivity of the law) of an exceptional nature, the effects of judgments are usually retroactive and settlement with *ex nunc* or *pro futuro* effect is the exception. The approaches differ from one jurisdiction to another and a "prescription" according to which these exceptions operate cannot be extracted. Instead, different factors can be identified that can justify and have justified in the case law of the national courts of the Member States derogations from the ordinary effect of judgments: impact of the rule[63], predictability of the court decision[64], nature of the matter (criminal, tax or even in the field of private law on refunds), new external developments (legal, technological or strategic), compliance with the law[65].

Regarding the second aspect, the institutional framework of the European Union is an international legal order that operates in accordance with the principle of assigned competences enshrined in art. 5 TEU (ex-art. 5 TEC). Under article 19 (1) of the TEU, the Member States are required to ensure effective judicial protection in areas governed by European Union law and the CJEU ensures that the law is observed in the interpretation and application of the Treaties. Art. 267 details the competence of the CJEU to interpret EU law through the preliminary referral mechanism.

Therefore, the interpretation of the rules of EU law as well as the limitation in time of the effects of the interpretation are the exclusive competence of the Luxembourg court. National courts, including the supreme courts, when called upon to rule on rights protected by the EU legal order, act, as AG Mengozzi points out, as "common law courts in the application of Union law". They must recognize the "exclusive" and "fundamental" competence of the CJEU to rule not only on the time limits of its judgments but also on the conformity with Union law of the criteria established at national level for limiting the time effects of judgments of the supreme courts. application of Union law. In other words, the position of AG Mengozzi and the CJEU is part of the monistic view of the relationship between the EU legal order and the laws of the Member States. This approach often slips into a judicial monologue to the detriment of the judicial dialogue that would have preserved the pluralistic view that the different legal orders of the EU and the Member States cannot be legally linked to each other (radical or systemic pluralism) or the legal relationship between the different legal orders is coordinated by meta-principles in a non-hierarchical manner (constitutional pluralism)[66]. Fortunately, in *Gutiérrez Naranjo*, this exclusive competence of the judge on the Kirschberg plateau to decide on the interpretation of the rules of EU law, extended and on time constraints has played in favor of consumers and it remains to be seen to what extent national courts will prefer not to the judicial conflict but, in the application of the principle of loyal cooperation enshrined by art. 4 para. (3) of the TEU, will engage in judicial dialogue triggering changes in consumer law and, not least, procedural law.

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[63] By way of example, with regard to prospective overruling in the United Kingdom, Lord Nichols noted that «*There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions*», see Ben Juratowitch, *The Temporal Effect of Judgments in the United Kingdom*, in Patricia Popelier, Sarah Verstraelen, Dirk Vanheule and Beatrix Vanlerberghe, *op. cit*., p. 169.

[64] In common law, the retroactive effect of decision-making can be "dramatic" when courts create a new rule or reverse previous case law, see developments on Kleinwort Benson v. Lincoln City Council, in Ben Juratowitch, *op. cit., p. 161-162.*

[65] See Patricia Popelier, Sarah Verstraelen, Dirk Vanheule and Beatrix Vanlerberghe, *op. cit*., p. 5-6.

[66] See N. Walker, *The Idea of Constitutional Pluralism*, 2002, „Modern Law Review" 65, 317-359, M. Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. Walker (ed), *Sovereignty in Action*, Oxford. Hart Publishing, 2003, 501-537 *apud* Chantal Mak, *op. cit*., p. 4.

6.3. The relationship between individual action and collective action in cessation: lack of interpretation

Gutiérrez Naranjo's contribution to the interpretation grid of Directive 93/13 is welcome. However, in the absence of the answer to the eighth question referred in Case C-308/15, Gutiérrez Naranjo is also a missed opportunity. The Court lost the opportunity to refine the interpretations given in *Invitel* and *Sales Sinués* and *Drame Ba* regarding the nature of individual actions and collective actions in cessation as well as the relationship between them. The *Audiencia Provincial de Alicante* wishes to know whether the automatic extension of the limitation of the restitutionary effects resulting from the nullity of a threshold clause (limitation found in the collective procedure initiated by a consumer association) and on individual actions against professionals who were not parties to the collective action (judged by the Supreme Court) is in accordance with art. 6 of Directive 93/13 and with the right to an effective jurisdictional protection enshrined in art. 47 of the CDFUE. The situation is different from *Sales Sinués* and *Drame Ba* where the analyzed problem concerned the compatibility of art. 7 of Directive 93/13 with the suspension of individual actions (brought in parallel a collective action in cessation) until a final court decision to complete the collective procedure.

A few clarifications become necessary. Although the European Union legislature did not expressly regulate the relationship between individual actions and collective actions, some of the provisions of Directive 93/13 and the case-law of the Court may give rise to guidelines based on the different nature of those requests. The actions introduced by the consumers harmed by the abusive clauses represent the usual remedy for their legal protection according to art. 7 para. (1) of Directive 93/13. The collective actions for cessation referred to in paragraph 2 of the same article shall constitute a complementary legal means of ensuring such protection. In the Commission's view, consumer protection is one of the areas in which further ensuring private respect for the rights conferred by Union law in the form of collective action is useful[67].

The complementary nature of terminating class actions on general abusive contractual conditions is closely linked to the fact that they aim at a general and abstract control of the possible abusive nature of contractual clauses. Or, the individual actions involve a concrete control exercised by the court, which must take into account all the circumstances existing at the date of concluding the contract, and all the clauses in the contract or in another contract on which it would depend. In *Océano Grupo* and *Cofidis* the obligation to examine ex officio in individual actions the abusive nature of a contractual clause compensates for the consumer's weak position vis-à-vis the professional. Instead, in the *Asociación de Consumidores*, the Court held that consumer associations are not in an identical situation, namely the collective procedure "is not characterized by the imbalance that exists in an individual action involving a consumer and his co-contractor"[68]. Of course, the complementary nature of collective actions is also supported by their preventive and deterrent purpose. Furthermore, in *Invitel*, the Court ruled that those clauses in the general terms and conditions of contracts concluded with consumers which have been declared abusive in a cessation action against the professional concerned should not be binding on consumers who are parties to the termination procedure, nor for those who have concluded a contract with this professional to whom the same general clauses[69] apply. In *Gutiérrez Naranjo*, not the extension of the solution regarding the finding of the abusive character of the threshold clauses is subject to analysis, but the automatic extension of the limitation of the restitutive effect of the nullity of the threshold clauses, which can only strain art. 6 para. (1) of the Directive and art. 47 CDFUE.

7. Conclusion

The contribution of the *Gutiérrez Naranjo* case-law is not limited to enhancing the

[67] See Commission Recommendation of 11 June 2013 on common principles for collective redress and compensation in Member States in the event of infringements of Union law, OJ 2013 L 201, recital (7), p. 60.
[68] *Asociación de Consumidores*, para. 50.
[69] *Invitel*, para. 38.

effectiveness of consumer protection. It is also an opportunity to analyze and reconsider the interaction between the European legal order and the national law of the Member States when national courts risk-taking elements specific to CJEU judgments. Moreover, *Gutiérrez Naranjo* testifies to the growing pressure that national courts and the Luxembourg Court have to deal with when called upon to mediate conflicts between consumers and influential economic actors.

Economic markets and, no less, laws are dynamic realities, but the social justice that the courts are called upon to provide requires the protection of legal certainty[70], even when time seems to be used against this guarantee.

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[70] On the legal protection of international economic markets see Cristina-Elena Popa Tache, *Introduction to International Investment Law*, ADJURIS – International Academic Publisher, Bucharest, 2020, p. 132-170.