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Rafał Mańko, *The Use of Extra-Legal Arguments in the Judicial Interpretation of European Contract Law: A Case Study on Aziz v Catalunya Caixa (CJEU, 14 March 2013, Case C-415/11)*

Abstract: The Court of Justice of the EU (CJEU) is well known for its preference for extra-legal legal arguments over intra-legal ones. Indeed, in the CJEU's interpretive practice, as a rule, linguistic arguments give way to systemic and teleological ones, and the Court's prevalent approach favours policy arguments (i.e. extra-legal ones) over linguistic interpretation (i.e. a paradigmatic form of the deployment intra-legal arguments). The object of this study is a single decision of the CJEU, namely its judgment of 14 March 2013 in Case *Aziz v Catalunya Caixa* (Case C-415/11) in scope of proportion and significance of extra-legal and intra-legal arguments.

Keywords: Court of Justice of the EU (CJEU), legal argumentation, unfair terms.

1. Introduction

The Court of Justice of the EU (CJEU) is well known for its preference for extra-legal legal arguments over intra-legal ones.¹ Indeed, in the CJEU's interpretive practice, as a rule, linguistic arguments give way to systemic and teleological ones,² and the Court's prevalent approach favours policy arguments (i.e. extra-legal ones) over linguistic interpretation (i.e. a paradigmatic form of the deployment intra-legal arguments).³ As such, it is praised by some

¹ P. Marcisz, *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej* [A Conception of the Creation of Law by the Court of Justice of the European Union] (Warszawa: LEX, 2015), p. 115ff. A. Kalisz, *Wykładnia i stosowanie prawa wspólnotowego* [Interpretation and Application of Community Law] (Warszawa: LEX, 2007), p. 178-179 argues that the methods of interpretation used by the CJEU are not new (in comparison to methods used by national courts), but what is new is their treatment as equal (instead of a hierarchy of methods in which linguistic methods take precedence). Whilst that is, in principle, true, one should point out the numerous CJEU judgments which did not contain *any linguistic interpretation whatsoever*. A case in point is CJEU judgment of 19.11.1991 in Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v. Italy*, ECLI:EU:C:1991:428, where the principles of state liability *vis-à-vis* individuals for breaches of EU law are pronounced by the Court without any reference to a linguistic interpretation of any Treaty provisions.

² T. Schilling, 'Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law', *European Law Journal*, 16.1 (2010): 47-66, p. 60; A. Kalisz, 'Wykładnia prawa Unii Europejskiej' [The Interpretation of European Union Law]. In A. Zawadzka-Łojek et al. (Eds.). *Prawo Unii Europejskiej. Instytucje i porządek prawny. Prawo materialne* [European Union Law: Institutions and the Legal Order; Substantive Law], ed. A. Zawadzka-Łojek et al (Warszawa: EuroPrawo, 2014), p. 201.

³ T. Stawecki, 'O praktycznym zastosowaniu hermeneutyki w wykładni prawa' [On the Practical Application of Hermeneutics to Legal Interpretation] [in:] *Teoria i praktyka wykładni prawa* [Theory and Practice of Legal Interpretation], ed. P. Winczorek (Warszawa: Liber, 2005), p. 108; A. Arnall, 'The European Union and Its Court of Justice', 2nd ed. (Oxford: OUC, 2006), p. 612; E. Paunio, 'The Tower of Babel and the Interpretation of EU Law: Implications for Equality of Languages and Legal Certainty' [in:] *Private Law and the Many Cultures of Europe*, ed. T. Wilhelmsson (Alphen a/d Rijn: Kluwer Law International, 2007), p. 392; E. Paunio & S. Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law',

authors, who endorse this approach to legal interpretation,⁴ and criticised by others, who would prefer that the CJEU give precedence to strictly legal arguments, such as textualist, originalist and systemic ones, rather than teleological ones.⁵ The aim of this paper is not, however, to put forward a normative theory of interpretation for the CJEU or to subject its current practice to a critique. Rather, the paper aims at providing a closer analysis of how CJEU's famously teleological reasoning actually works in practice in the specific field of contract law.

It should be noted here that for instance in Poland, private law adjudication is characterised by a high reverence to textual arguments, sometimes overridden by systemic arguments; however, teleological arguments – even if invoked by the Civil Chamber of the of Poland's Supreme Court – rather do not have a decisive role.⁶ This perceived contrast between the methods of reasoning of the Polish Supreme Court and the CJEU makes is all the more worthwhile to study in-depth the approach of the latter in the field of private law.

The object of the case study undertaken in the present paper is a single decision of the CJEU, namely its judgment of 14 March 2013 in Case *Aziz v CatalunyaCaixa* (Case C-415/11).⁷ The choice of a single case, rather than an overview of the entire case-law of the CJEU on contract law, follows not only from the limits imposed by the form of a journal article, but above all from the intent to illustrate the issue by a detailed case-study, in which the formulation of the CJEU's decision can be subject to a close and attentive reading, amounting in fact to a theoretical exegesis.

European Law Journal, 16.4 (2011): 395-416, p. 399; O. Łachacz & R. Mańko, 'Multilingualism at the Court of Justice of the European Union: Theoretical and Practical Aspects' *Studies in Logic, Grammar and Rhetoric* 34 (2013): 75-92, p. 82-83.

⁴ This seems to be the view taken by P. Marcisz, *Koncepcja...*, p. 115ff.

⁵ See in particular: G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart, 2013); G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: CUP, 2014).

⁶ R. Mańko, 'The Impact of EU Membership on Private Law Adjudication in Poland: A Case Study of the Polish Supreme Courts Case Law on Unfair Terms in Consumer Contracts' [in:] *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited*, ed. M. Bobek (Oxford: Hart, 2015). For an exemplary statement of the Polish Supreme Court's fidelity towards linguistic interpretation and its primacy see Case III CZP 75/03 *Krystyna R et al v Urszula S et al* (25.11.2003): 'According to principles governing the interpretation of legal provisions, as settled in the case-law, linguistic interpretation has a fundamental significance, and only if it fails, leading to results which cannot be reconciled with the reasonable action of the legislator and the purpose, which a given norm is intended to serve, resort is permissible to directives of systemic and functional interpretation.' Cfr. Urszula Jaremba, *National Judges As EU Law Judges: The Polish Civil Law System* (Martinus Nijhoff 2014), *passim*, esp. p. 96, 161. See also L. Morawski, *Zasady wykładni prawa* [Principles of Legal Interpretation] (2nd ed. Toruń: TNOiK: 2011), p. 156, who notes that Polish courts 'underline in a staunch, and sometimes too staunch way, the subsidiary character of functional interpretation. Their cautiousness, however, is fully understandable in the context of the historical experience of former communist countries, where functional interpretation often fulfilled the role of a screen concealing often drastic practices of breaking the law.'

⁷ ECLI:EU:C:2013:164.

The choice of *Aziz* as an exemplary judgment worth a case study is dictated by two reasons. First of all, it is a decision which interprets the Unfair Terms Directive (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts⁸ ('the Directive')) – without doubt, one of the most important legal acts in the field of EU contract law as it touches upon the very substance of contractual agreements.⁹ In fact, the Directive controversially¹⁰ resorts to general clauses (such as 'good faith'), and other open-ended terms (such as 'significant imbalance') in order to define when a contractual term is to be deemed unfair.¹¹ The use of such a legislative technique is an explicit invitation towards taking into account extra-legal considerations in the process of the Directive's interpretation.¹²

Secondly, out of some three dozen CJEU decisions interpreting the Unfair Terms Directive rendered so far, *Aziz* undoubtedly stands out for a number of reasons, regarding both its legal content and its socio-economic implications. On a legal plane, *Aziz* is the first CJEU decision on the Directive in which the Court decided to give a direct interpretation of the general clauses used in the directive – until *Aziz*, the Court had consequently abstained from doing so, leaving more discretionary power to national courts.¹³ Furthermore, *Aziz* is definitely a law-making judgment,¹⁴ in which the Court introduces legal novelty *praeter legem*, going beyond a strict

⁸ OJ L 95, p. 29-34.

⁹ S. Weatherill, 'Consumer Policy' [in:] *The Evolution of EU Law*, ed. P. Craig & G. de Burca (Oxford: OUP, 1999), p. 712; K. Kańska, 'Ochrona ekonomicznych interesów konsumentów w prawie Unii Europejskiej na przykładzie dyrektywy 93/13/EWG' [The Protection of Consumers' Economic Interests in European Union Law: the Example of Directive 93/13/EEC] [in:] *Szkice z prawa Unii Europejskiej* [Essays on European Union Law] vol. 2: *Prawo materialne* [Substantive Law], ed. E. Piontek & A. Zawidzka (Kraków: Zakamycze, 2003), p. 76; R. Mańko, *Prawo prywatne...*, p. 10.

¹⁰ For a classic critique see G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences', *Modern Law Review* 61 (1998): 11-32. Cfr. K. Kańska, 'Kluczowe problemy związane z wdrożeniem dyrektywy o niedozwolonych postanowieniach umownych w prawie polskim' [Key Issues Regarding the Implementation of the Unfair Terms Directive in Polish Law] [in:] *Prawo Unii Europejskiej w wewnętrznym porządku prawnym państw członkowskich* [European Union Law in the Internal Legal Orders of the Member States] (Warszawa: ABC, 2004), p. 270-271.

¹¹ On general clauses and open norms in (European) private law see e.g. *General Clauses and Standards in European Contract Law*, ed. S. Grundmann, D. Mazeaud (The Hague: Kluwer, 2006); M.W. Hesselink, 'The Concept of Good Faith' [in:] *Towards a European Civil Code*, ed. A. Hartkamp et al. (4th ed., Alphen a/d Rijn: Kluwer 2010).

¹² Cfr. L. Leszczyński, *Stosowanie generalnych klauzul odsyłających* [The Application of General Referring Clauses] (Kraków: Zakamycze, 2001), p. 71: 'the law-maker can, through general clauses, refer to *moral, political and economic* criteria' (emphasis added). See also *ibid.*, p. 73: 'A definitional feature of a referring clause is the directing of the attention of the subject applying the law to making *axiological choices on the basis of criteria not determined clearly* by the provisions of the legal system' (emphasis added).

¹³ This line of case-law was began by CJEU judgment of 1.4.2004 in Case C-237/02 *Freiburger Kommunalbauten v Hofstetter*, ECLI:EU:C:2004:209.

¹⁴ On the concept of judicial law-making in the CJEU context see: A. Sulikowski, 'Tworzenie prawa przez Europejski Trybunał Sprawiedliwości. Wybrane problemy' [The Creation of Law by the European Court of Justice: Selected Aspects], in: *Teoria prawa europejskiego*, ed. J. Kaczor (Wrocław: Wyd. Uniwersytetu Wrocławskiego, 2005): 221-232; P. Marcisz, *Koncepcja...*, *passim*.

interpretation of the very wording.¹⁵ In doing so, *Aziz* is not, of course, the first CJEU judgment on the Directive of this kind (the very first one – *Océano*¹⁶ – inaugurating a line of *praeter legem* case law).¹⁷ Furthermore, *Aziz* was rendered in a specific socio-economic context of the on-going economic crisis and the agonism dividing banks and consumers. This agonism has become particularly acute in such countries as Spain (from where the *Aziz* case originates), leading to a large number of home evictions. Mr Aziz, the plaintiff in the *Aziz v Catalunyaacaixa* case, was one of the victims of this shameful phenomenon, and the CJEU took his side in his “David vs. Goliath” style struggle with the powerful bank. As Sara Iglesias Sánchez points out:

‘the most salient element of the [*Aziz* judgment] lies in the particular socio-economic context (...): the preliminary reference, introduced [by the Spanish court] in 2010, was answered at a time of considerable social and political debate on the overall system of mortgage enforcement proceedings in Spain, in the context of a severe economic and financial crisis. (...) [T]he Court’s decision has had a profound effect with regard to an urgent and dramatic social problem, (...) The factual background and, particularly, the economic situation of the debtor and the terms of the mortgage loan agreement, make this case a paradigmatic example of the situation of thousands of families in Spain. (...) [T]he seriousness of the economic situation in which the effects of this judgment apply has endowed it with an immense social impact (...)’.¹⁸

All these reasons definitely make *Aziz v Catalunyaacaixa* a good sample for a case study.

However, methodologically the approach based on an in-depth study of a single case definitely has its limitations. Unless supplemented by a broader pool of case studies (building up a representative sample), it allows only to draw conclusions limited to the concrete case itself. However, what could perhaps be seen as a disadvantage *in casu*, should not be viewed as such from the perspective of the discourse of legal science *in toto* – every single case study adds a brick to the edifice of knowledge, and hopefully this piece of scholarship will be useful for

¹⁵ Cfr. Sara Iglesias Sánchez, 'Unfair terms...', p. 965.

¹⁶ CJEU judgment of 27.6.2000 in joined cases C-240-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero*, ECLI:EU:C:2000:346.

¹⁷ However, it should be pointed out that following the law-making decision in *Océano* the Court’s subsequent decision in *Freiburger Kommunalbauten* signalled a deference to the division of tasks between the legislative and judicial branches. As N. Reich noted, in *Freiburger* the CJEU “implicitly opted for a theory of judicial restraint on contract law matters” (Reich, “Protection of consumers’ economic interests by EC contract law –some follow-up remarks”, 28 Sydney Law Review (2006), 50), thereby treating the legislator’s use of a ‘dilatatory formula’ as broadening the discretionary powers of the *iudicium facti* (*in casu*, the national judge) rather than granting law-making powers to the *iudicium iuris* (*in casu*, the CJEU). *Aziz* definitely departs from this trend.

¹⁸ Sara Iglesias Sánchez, 'Unfair terms in mortgage loans and protection of housing in times of economic crisis: *Aziz v. Catalunyaacaixa*' *Common Market Law Review* 51.3 (2014): 955-974, p. 955, 957, 974.

those wishing to paint a broader picture of the CJEU's approach to the judicial interpretation and application of EU law.

2. Types of Legal Arguments: Intra-Legal vs. Extra-Legal

The division of arguments into 'intra-legal' and 'extra-legal' ones does, *per se*, entail any kind of evaluation of the two types of arguments – I do not criticise here 'intra-legal' arguments as formalist, nor extra-legal ones as 'illegal' or as necessarily entailing illegitimate judicial law-making. The typology of arguments simply serves as a tool allowing to describe and understand the approach taken by the CJEU, which can be a step towards building a descriptive theory of CJEU interpretation or a comparative study of reasoning of highest courts (e.g. an analysis of the methods of interpretation of European contract law by the CJEU and by the Polish Supreme Court).

The *criterium divisionis* of arguments into 'intra-legal' and 'extra-legal', adopted in this case study, is based on the *premise* of each argument.¹⁹ Namely, if the premise of an argument refers to a legal text (its semantics or its structure) it will be treated as an 'intra-legal' argument, whereas if the premise does not refer to a legal text, it will be an extra-legal argument. This approach means that the category of intra-legal arguments is a closed one (and corresponds, essentially, to linguistic and systemic arguments²⁰), whereas the category of extra-legal arguments is an open one (the types of extra-legal arguments are not listed in the definition, but simply treated as any kind of argument which is not an intra-legal one). However, on the basis of accepted classifications of arguments in judicial discourse it is possible to list the most typical extra-legal arguments:

¹⁹ This distinction roughly corresponds to the dichotomy of 'intra-legal standards' and 'extra-legal standards' used by Marcin Matczak in his study regarding the formalism of Polish administrative law adjudication (M. Matczak, *Summa iniuria. Błąd formalizmu w stosowaniu prawa* [Warszawa: Scholar 2010], p. 37ff). Matczak, describing his 'intra-legal standards' (*standardy wewnętrzne wobec prawa*) writes: 'These standards have a formal, rather than substantive, character. This group encompasses e.g. such standards as the primacy of linguistic interpretation of a legal text, conformity of the decision with the literal meaning of the text or the systemic coherence of the law. They are approximated to values building the internal morality of the law according to Fuller; they can also be compared to the 'inner premises' which K. Pałeczki writes about.' In his empirical study, Matczak used the following typology of intra-legal standards (see *ibid.*, p. 37 n. 7): 'application of a linguistic interpretation; limitation to the effects of a literal interpretation (prohibition of interpretation of a text which does not cause any doubts); systemic interpretation (...); rationality of the legislator (*argumentum ad absurdum*); non-contradictory character of the legal system; (...) *lex specialis derogat legi generali* (...); the essence (nature) of the regulation; reference to earlier judicial decisions (...); references to legal literature (...); other internal standards.'

²⁰ Cfr. Z. Pulka, 'Wykładnia językowa' [Linguistic Interpretation] [in:] *Wprowadzenie do nauk prawnych. Leksykon tematyczny* [Introduction to Legal Sciences: A Thematic Lexicon], ed. A. Bator (4th ed., Warszawa: LexisNexis, 2012), p. 266-269; *idem*, 'Wykładnia systemowa' [Systemic Interpretation] [in:] *Wprowadzenie...*, p. 280-283.

originalist arguments – arguments which refer not to the legal text as such, but to the intent of the legislator as expressed elsewhere, e.g. in the preparatory materials²¹ (motives of the original bill, parliamentary discussions, political or policy declarations; what is essential for the demarcation of this category is the fact that the argument is based on a text which was not enacted into law;

teleological arguments – arguments which are based on a purpose which the legal rule is aimed at pursuing,²² the aim is obviously a phenomenon (state of affairs) which lies outside the legal text; however, the aim can be deduced from the legal text, especially from its preamble; the difference between a ‘teleological’ and ‘originalist’ interpretation is that searching for the *telos* of the legislation does not entail analysing the actual intent of the empirically existing legislators (e.g. members of government or of parliament who proposed or adopted the legislative act);

consequentialist arguments – arguments which analyse not so much the aim (*telos*) of the legal rule, but rather the actual consequences which a given interpretation will have on society;²³

ontological presuppositions – arguments based on a vision of socio-economic and political reality assumed by the legal text;²⁴

arguments from precedent – arguments based purely on an earlier decision as the reason to adopt the new decision; in a dichotomic classification, whereby arguments are classified as either being ‘intra-legal’ or ‘extra-legal’, the classification of case-law is always controversial, especially in legal systems in which case-law is a binding source of law, either as precedent (as in the common law system) or as established case-law (*jurisprudence constante*, as in the EU legal order).²⁵ For the purposes of the present paper, I have decided to treat argument from

²¹ Z. Tobor, *W poszukiwaniu intencji prawodawcy* [Searching for the Law-Maker’s Intent] (Warszawa: Lex, 2013), *passim*, especially p. 258ff.

²² L. Morawski, *Zasady wykładni prawa* [Principles of Legal Interpretation] (2nd ed. Toruń: TNOiK: 2011), p. 158-159.

²³ See e.g. N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: OUP, 1978), p. 129ff. Z. Pulka, however, treats consequentialist interpretation as part of functional interpretation. See Z. Pulka, ‘Wykładnia funkcjonalna’ [Functional Interpretation] [in:] *Nauki prawne...*, p. 264.

²⁴ Cfr. M. Smolak, ‘Presupozycje ontologiczne tekstu prawnego’ [The Ontological Presuppositions of a Legal Text], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 73.4 (2011): 41-51.

²⁵ Cfr. J. Helios, W. Jedlecka, *Zasady...*, p. 77.

precedent as belonging to ‘extra-legal’ arguments, due to the fact that legal arguments are those which are based on *lex* (i.e. statutory law), whilst precedent is based on *ius*.²⁶

The first four main types of extra-legal arguments are closely interconnected; an originalist interpretation can easily blend into a teleological one, and the teleological reasoning is often supported by consequentialist considerations. Furthermore, the *telos* and assumed consequences of a legal text often follow from its ontological presuppositions.

3. The Unfair Terms Directive – a very brief introduction

The Directive, enacted in 1993, aimed at bringing about minimum harmonisation of national laws on the judicial review of terms in pre-formulated consumer contracts (standard terms contracts). It contains a general prohibition of unfair terms, which resorts to general clauses (‘good faith’ and ‘significant imbalance’), as well as a list containing examples of unfair terms. Importantly, the scope of the Directive is limited to non-negotiated terms in consumer contracts, regardless whether they were pre-formulated for a large number of contracts or only for a one-off transaction. The review of unfairness does not extend to the main subject-matter of the contract, nor to the balance between the price paid by the consumer and the counter-performance of the trader.

The Directive contains also a number of detailed rules, in particular the requirement of transparency, whereby terms must be written in clear and intelligible language and the corresponding *contra proferentem* rule which obliges courts to seek a consumer-friendly interpretation of vague terms. Finally, the Directive contains a procedural rule which requires Member States to introduce measures allowing for consumer organisations to seek, by way of an *actio popularis*, the elimination of unfair terms from standard contracts following their *in abstracto* review.

²⁶ I would like to thank Professor Witold Wołodkiewicz for his valuable critical comment about the classification of arguments from precedent for the purposes of my research. However, the treatment of precedent as ‘extra-legal’ departs from the approach taken by M. Matczak, *Summa iniuria...*, p. 37. Nevertheless, from the perspective of Polish legal culture, to argue *only* on the basis of case-law *qua* case-law (and not an interpretation of the *verba legis*) does seem to be an ‘extra-legal’ argument.

4. The Case Study: A Theoretical Analysis of Judgment of 14.3.2013 *Aziz v Catalunyaacaixa* (Case C-415/11)

4.1. Facts of the case

The facts of the case are presented here as they have been set out in the Court's decision. In 2007 Mr Aziz signed a loan agreement with the Catalunyaacaixa bank for EUR 138,000, secured by a mortgage on a house he had owned since 2003. Mr Aziz was supposed to reimburse the loan over 33 years. The contract provided for an annual default interest of 18.75%, automatically applicable to sums not paid when due, without the need for any notice (clause 6). Furthermore, the contract conferred on Catalunyaacaixa the right to call in the totality of the loan if Mr Aziz was late in his payments (clause 6a). Finally, the contract also provided that the bank could unilaterally determine the amount of Mr Aziz's debt for the purposes of enforcement proceedings (clause 15).

In June 2008 Mr Aziz stopped making his monthly payments. In October 2008 the bank unilaterally declared that his debt amounts to EUR 139 764.76 and demanded immediate payment of that sum. corresponding to the unpaid monthly instalments, including contractual and default interest. When Mr Aziz failed to pay, the bank instituted enforcement proceedings against him before the Juzgado de Primera Instancia No 5 de Martorell, seeking recovery over EUR 180.000 (including interests and costs). Mr Aziz failed to make an appearance in court, and in December 2009 the court ordered enforcement. Mr Aziz did not react.

In July 2010 a judicial auction of Mr Aziz's house was arranged, but no bid was made. Therefore, in accordance with the provisions of the Spanish Code of Civil Procedure, the Juzgado de Primera Instancia No 5 of Martorell adjudicated the house to the bank at 50% of its value. The court decided that the house would be reposessed by the bank on 20 January 2011 with the result of evicting Mr Aziz from his family home.

Before the eviction took place, on 11 January 2011, Mr Aziz applied to the Juzgado de lo Mercantil No 3 de Barcelona for a declaration seeking the annulment of clause 15 of the mortgage loan agreement, i.e. the one which allowed the bank to determine Mr Aziz's debt in a unilateral fashion. Mr Aziz pleaded that it is unfair.

However, Spanish law made it very difficult for the debtor to plead the unfairness of the mortgage loan contract at the stage of mortgage enforcement proceedings. In particular, such

objections could be made only at a later stage and without the effect of suspending the eviction from the house. The Spanish court considered that those rules of national law made it extremely difficult for a Spanish court to ensure effective protection of the consumer.²⁷ Furthermore, the Spanish court considered that the loan mortgage contract could also contain more unfair terms, in particular the term providing for very high default interest rates.

Therefore, the national court submitted two questions to the ECJ, one procedural one, regarding the possibility of analysing the unfairness of terms at the stage of mortgage enforcement proceedings and a substantive one, regarding the fairness of certain clauses in Mr Aziz's contract. Regarding the substantive question, the national court wanted to know how to understand 'disproportion' in the rights and duties of the parties with regard to three terms of the contract:

the acceleration clauses, allowing the bank to demand repayment of the whole debt in case of consumer default, whilst that debt was to be spread over 33 years;

very high default interest rates exceeding 18%;

the right of the bank to unilaterally determine the consumer's debt for the purposes of enforcement proceedings.

4.2. The reasoning of the CJEU

4.2.1. The first (procedural) question

Considering the first (procedural) question, the ECJ pointed to economic considerations of unequal bargaining power:

‘44. In replying to that question, it should be noted first that the system of protection introduced by the directive *is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge* (*Banco Español de Crédito*, paragraph 39).’ (Emphasis added.)

This argument, opening the CJEU's reasoning on the Directive, is a classical passage which occurs in almost all judgments on the Directive. The Court states that ‘the directive is *based on the idea that...*’. It seems that this argument could be classified as an intentionalist (originalist)

²⁷ For a detailed discussion of the Spanish provisions see e.g. S. Iglesias Sánchez, *op.cit.*, pp. 957-958.

one, if we assume that ‘the idea’ on which the Directive ‘is based’ is an actual idea which was in the heads of the drafters back in the early 1990s. However, because the Court does not refer to any empirical materials, such as the motivation of the original draft or the parliamentary records, it cannot be said that the statement that ‘the directive is based on the idea that the consumer is in a weak position’ is actually an originalist argument. Rather, it refers to the objective assumptions of the Directive’s normative framework. As such, it refers to the state of affairs in the real world of socio-economic affairs as assumed by the legislative text, i.e. it refers to the *ontological presuppositions* of the text, and therefore is an extra-legal one.

Analysing the normative meaning of Article 6(1) of the Directive, which stipulates that unfair terms are ‘not binding’ upon consumers, the CJEU did not engage in a linguistic analysis (e.g. it did not check what is the dictionary definition of the term ‘to bind’, as a Polish court would usually do in this situation). Instead, it relied on a number of extra-legal arguments. The CJEU wrote:

‘45. As regards that weaker position, Article 6(1) of the directive provides that unfair terms are not binding on the consumer. *As is apparent from the case-law*, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with *an effective balance which re-establishes equality* between them (see Banco Español de Crédito, paragraph 40 and case-law cited).’

First of all, the Court once again reiterated the statement about the ‘weaker position’ of the consumer, i.e. referred to an *ontological presupposition* attributed to the legal text. Then it recalled the text of the law, i.e. that ‘unfair terms are not binding on the consumer’. However, it did not subject this rule to any analysis with reference to intra-legal arguments (linguistic or systemic). Instead, it first invoked the (extra-legal) argument *from precedent*, indicating the ‘[a]s it is apparent from the case-law...’. The authority of a statement beginning from these words stems purely from the Court’s earlier decisions, i.e. it is an argument from precedent. This precedent is authority for classifying Article 6(1) as *ius cogens* (‘this is a mandatory provision’).

Following that, the Court went on to indicate the purpose (*telos*) of the rule, indicating that it ‘*aims* to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them’. The contractual balance established by ordinary rules of contract law is dubbed as ‘formal balance’, whereas the *telos* of the Directive is presented as providing for an ‘effective balance’.

The Court builds, therefore, a binary opposition of ‘formal’ vs. ‘effective’, which essentially is a distinction of form vs. substance, a classical philosophical and legal *topos* of European legal culture. This ‘effective’ or substantial balance is, in the words of the CJEU, a factor enabling to re-establish ‘equality’ between the parties (trader and consumer). Incidentally, one could observe that the Court does not explain what exactly ‘equality’ should mean in this context.

Turning to the duty of the national court to analyse the fairness of terms *ex officio*, the ECJ relied on two arguments: (1) from its own case law (*Pannon GSM, Banco Español de Crédito*), and (2) a socio-economic argument:

‘46. In that context, *the Court has already stated on several occasions* that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, *compensating in this way for the imbalance which exists between the consumer and the seller or supplier*, where it has available to it the legal and factual elements necessary for that task (*Pannon GSM*, paragraphs 31 and 32, and *Banco Español de Crédito*, paragraphs 42 and 43).’ (Emphasis added.)

Once again, in order to justify the duty of the national court to analyse the fairness of terms *ex officio*, the ECJ did not refer to a linguistic-logical or even systemic analysis of the Directive. The normative source of this duty is to be found purely in the ECJ's own case-law, which is additionally justified by socio-economic considerations (‘compensating this way for the *imbalance which exists* between the consumer and the seller or supplier’).

The court further adduced its earlier case-law (*PéNZügyi Lízing*) according to which a national court must assess the fairness of terms of the underlying contract also in proceedings not considered with the merits of the litigation, *in casu* when a consumer lodges an objection against an order for payment:

‘47. Thus, in ruling on a request for a preliminary ruling submitted by a national court before which inter partes proceedings, initiated following an objection lodged by a consumer against an order for payment, had been brought, *the Court held that* that national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer falls within the scope of the directive and, if it does, assess of its own motion whether such a term is unfair (Case C-137/08 *VB PéNZügyi Lízing* [2010] ECR I-10847, paragraph 56).’ (Emphasis added.)

It is characteristic that in para 47 the ECJ relied exclusively on an argument from its own case-law, without adducing even any socio-economic arguments to support its view. The commented paragraph is an example of a pure argument from precedent, where an earlier decision of the adjudicating body constitutes a sufficient reason to adopt a given view.

In the following paragraph of the judgment's grounds, the ECJ referred to *Banco Español de Crédito* regarding the court's duty to analyse the fairness of terms even in the absence of a consumer's objection, at any stage of the proceedings whatsoever:

‘48. *The Court has also held that the directive precludes legislation of a Member State which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, in limine litis or at any other stage during the proceedings, even though it already has the legal and factual elements necessary in that regard, whether a term concerning interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, where that consumer has not lodged an objection (Banco Español de Crédito, paragraph 57).*’ (Emphasis added.)

Characteristically, here too the only argument adduced is that from the Court's own case-law. Just like in the preceding paragraph, the Court does not even attempt to justify its findings in any different way – be it a textual, intentionalist or even pragmatic argumentation. Passages of this kind are, as a matter of fact, the best evidence providing that, taking the internal point of view²⁸ of the CJEU, one must admit that case-law is, indeed, a source of law.²⁹ Incidentally, it should also be added that the questions referred to the CJEU by the national court were actually based on the premise that earlier CJEU case-law interpreting the Directive in a creative way (*praeter legem*), is binding and in fact sought a clarification and development of this judge-made law.³⁰

²⁸ Of course, adopting an external point of view, i.e. reading the Treaties and secondary EU legislation in an impartial one may lead to a different result. Nevertheless, for all practical purposes, anyone wishing to participate in the discourse of the CJEU (e.g. by pleading a case) must accept this assumption regardless of its validity. Cfr. P. Marcisz. { }

²⁹ This is a position held by the CJEU itself, as clearly visible is such decisions as Case 283/81 *CILFIT* [1982] ECR 3415 (cfr. A. Arnulf, *op.cit.*, p. 626-628). For a theoretical justification of judicial law-making by the CJEU see e.g. A. Sulikowski, ‘Tworzenie prawa przez Europejski Trybunał Sprawiedliwości. Wybrane problemy’ [The Creation of Law by the European Court of Justice: Selected Aspects], in: *Teoria prawa europejskiego*, ed. J. Kaczor (Wrocław: Wyd. Uniwersytetu Wrocławskiego, 2005): 221-232. Another aspect is the acceptance of this position by national legal communities which varies from country to country. A radical solution was adopted in the UK where a domestic statute – the European Communities Act 1972 – explicitly invested ECJ case-law with the authority of binding precedent (cfr. P. Craig & G. de Búrca, *EU Law: Text, Cases and Materials* (5th ed., Oxford: OUP, 2011), p. 286. See also J. Helios, W. Jedlecka, *Zasady stosowania prawa Unii Europejskiej* [Principles of Application of European Union Law] (Toruń: TNOiK, 2013), p. 75-80.

³⁰ Cfr. S. Iglesias Sánchez, *op.cit.*, p. 964-965.

In the subsequent paragraphs the court engages into a form of reasoning known to the Common Law system, namely distinguishing of cases. It begins by pointing out that:

‘49. However, the case at issue in the main proceedings can be distinguished from those which led to the abovementioned judgments *VB Pénzügyi Lízing* and *Banco Español de Crédito* because it concerns the definition of the duties of the court hearing declaratory proceedings linked to mortgage enforcement proceedings, with the objective of ensuring the effectiveness of any judgment in the declaratory proceedings declaring unfair the contractual term on which the right to seek enforcement and thus to initiate those enforcement proceedings is based.’ (Emphasis added.)

After recalling the principle of procedural autonomy of the Member States, and a detailed analysis of the Spanish rules in question, the ECJ concluded that that the present case cannot be distinguished from *VB Pénzügyi Lízing* and *Banco Español de Crédito*. The ECJ's conclusions with that regard are based on an argument from legal practice (law-in-action). It pointed out that the possibility for the consumer to make a preliminary registration of his claim of unfairness would be highly unlikely in practice:

‘58. In that regard, taking into account the *progress and the special features of the mortgage enforcement proceedings* at issue in the main proceedings, such an eventuality must however be regarded as remote because there is a significant risk that *the consumer in question will not make that preliminary registration within the period prescribed for that purpose*, either because of the *rapidity of the enforcement proceedings* in question or because he is *unaware of or does not appreciate* the extent of his rights (see, to that effect, *Banco Español de Crédito*, paragraph 54).’

Here we have an interesting combination of an argument based on law-in-action (rapidity of enforcement proceedings) with an argument based on social considerations, i.e. the consumer's lack of legal knowledge and experience ('unaware of or does not appreciate the extent of his rights'). It is characteristic that the court uses psychological statements ('unaware of', 'does not appreciate'), referring to the consumer's state of mind in a profoundly realistic perspective. By admitting that consumers are usually unaware of their rights or do not understand their true extent, the ECJ departs from the classical maxim *vigilantibus iura scripta sunt*. The consumer need not be *vigilans*.³¹ This reasoning is corroborated by a purely social argument:

³¹ Cfr. R. Mańko, *Prawo prywatne w Unii Europejskiej: perspektywy na przyszłość* [Private Law in the European Union: Future Perspectives] (Warszawa: PSPE UW, 2004), p. 89.

‘61. That applies all the more strongly where, as in the main proceedings, the mortgaged property is *the family home of the consumer* whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the *definitive and irreversible loss of that dwelling*.’

The ECJ essentially points out that it is crucial for the national court to analyse the unfairness of the terms at the stage of enforcement proceedings, because if it does so only later, the consumer will lose his home irreversibly, even if in the end he will obtain adequate financial compensation. The court does not treat the object which is encumbered by mortgage just as an abstract *res* of private law, but enters into the social context, underlining that it is the ‘family home of the consumer’ and that the enforcement proceedings, if uninterrupted by the court on account of the unfairness of certain terms in the contract, will lead to the ‘definitive and irreversible loss of that dwelling’. The abstract *res* becomes a concrete *domus*.³²

In conclusion, the ECJ found that the Spanish legislation violates the principle of effectiveness, and therefore is not caught by the principle of procedural autonomy of the Member States, but must be set aside in order to ensure the full effectiveness of the Directive.

4.2.2. The second (substantive) question (what is an unfair term?)

In its second question the national court sought guidance on applying *in concreto* the prohibition of unfair terms to three controversial clauses in the mortgage loan contract between Mr Aziz and the CatalunyaCaixa. The ECJ started from pointing out that the concepts of ‘good faith’ and ‘significant imbalance’ used in the Directive ‘merely defin[e] in a general way the factors that render unfair a contractual term that has not been individually negotiated’ (para 67). By stating that the general clauses ‘merely define in a *general way*’ the notion of unfairness, the ECJ openly downplays the role of linguistic-logical reasoning. What is most characteristic, is that the ECJ does not enter into an analysis of the meaning of the terms ‘good faith’ and ‘significant imbalance’, as the Polish Supreme Court does in similar cases.³³

³² Cfr. S. Iglesias Sánchez, *op.cit.*, p. 960, 971-972.

³³ For instance, in Case I CSK 694/09 *MZ v Inter Polska* (judgment of 13.10.2010) the Polish Supreme court interpreted the criteria of unfairness by resorting to linguistic methods of interpretation. For instance, it ruled that ‘good customs’ (the equivalent of ‘good faith’ in the Polish Civil Code) can mean either ‘customary and moral norms, commonly accepted conduct, customary principles of honest behaviour’; or ‘traditional elements of ethics, principles of loyalty, respect for other people, as well as behaviour not making use of disinformation, ignorance, credulousness or insufficient information’ of the consumer. As regards second standard in the general prohibition of unfairness in the Polish Civil Code, i.e. a ‘flagrant violation of consumer interests’, the Court explained that: ‘Synonymous with the adjective ‘flagrant’ are the words ‘dramatic’ and ‘screaming’. The adjective ‘flagrant’ means, in the sense of a negative feature, ‘clear’, ‘uncontested’, ‘obvious’. In other words, the violation of

Instead of opting for a linguistic analysis, the Court immediately jumps a judicial *fiat*, proposing a solution without any specific arguments:

68. [...] in order to ascertain whether a term causes a ‘significant imbalance’ in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered *what rules of national law would apply in the absence of an agreement by the parties in that regard*. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract *places the consumer in a legal situation less favourable than that provided for by the national law in force*. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.

What the ECJ essentially did, is a reception of the German notion of *Leitbild des dispositiven Gesetzrechts*, i.e. the idea that unfairness should be assessed against the background of *ius dispositivum* which would apply should there be no contractual term on a given topic.³⁴ What is characteristic, the Court does not provide any arguments (linguistic, systemic, teleological) in order to justify its approach. The German notion of a *Leitbild* is simply imposed by way of a judicial *fiat*, without any explanation why this is the correct reading of the notion of a ‘significant imbalance’.³⁵

However, on a somewhat more favourable reading it could be said that the ECJ's *fiat* contains implicitly a systemic argument to support it, because it refers to the background rules of national law, i.e. to the systemic context. Nevertheless, this is not a systemic reading of the directive as such, therefore, it cannot be treated as a systemic argument.

consumer interests must be characterised by a high level of intensity. The term ‘consumer interests’ is understood broadly, as encompassing not only economic interests, but also the discomfort resulting from the loss of time, inconvenience, or satisfaction with the conclusion of the contract, etc. Such a broad understanding of consumer interest is reduced in this way that it may not infringe the justified interests of entrepreneurs engaged in an economic activity.’

³⁴ Cfr. K. Kańska, ‘Ochrona...’, p. 83-84. The idea is enshrined in § 307 II(1) BGB: ‘An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision: 1. is not compatible with essential principles of the statutory provision from which it deviates (...).’ BGB translation according to: http://www.gesetze-im-internet.de/englisch_bgb/ (13/12/2015).

³⁵ It should be recalled once again that the object of the analysis in this paper is the *reasoning* of the CJEU, and not the substantive quality of the interpretive choices made.

As regards the ECJ's interpretation of the notion of 'good faith' (*bona fides*),³⁶ the Court makes a textual reference to the preamble to the Directive:

'69. With regard to the question of the circumstances in which such an imbalance arises 'contrary to the requirement of good faith', having regard to the sixteenth recital in the preamble to the directive (...), the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, *could reasonably assume that the consumer would have agreed* to such a term in individual contract negotiations.'

However, the Court does not engage in a textual exegesis of Recital 16.³⁷ The conclusion reached by the ECJ, namely that the requirement of good faith is fulfilled only if the consumer would have agreed to the term in question in individual contract negotiations does not follow in a logical and necessary manner from Recital 16. Recital 16 mentions the 'strength of the bargaining positions', an 'inducement to agree to the term', 'dealing fairly and equitably', and 'legitimate interests', which are quite open notions, nevertheless it seems that the ECJ's interpretation goes farther (in favour of the consumer) than the text of Recital 16. Furthermore, owing to the fact that the preamble is to be an aid in the interpretation of the main part of the Directive, and not a source of normative content in its own right, it must be observed that the ECJ's interpretation is not based on the text of Article 3(1) of the Directive.

However, it should also be observed that 'good faith' is a general clause, that is an open norm which serves to make the law more flexible. In the European legal tradition, to which the CJEU did not refer, good faith was understood as referring to the parties acting to one another *bona fide*, i.e. in good faith. Indeed, this meaning is enshrined in Recital 16 when it says that the trader must 'deal fairly and equitably' and take the consumer's 'legitimate interests' into consideration.

³⁶ The notion of *bona fides* has, of course, a very long tradition dating back to Roman law (see e.g. W. Dajczak, 'Doświadczenie prawa rzymskiego a pojęcie dobrej wiary w europejskiej dyrektywie o klauzulach niedozwolonych w umowach konsumenckich', *Zeszyty Prawnicze UKSW* 1 (2001): 79-99. Unfortunately, the CJEU does not refer to that tradition at all.

³⁷ That recital provides, with regard to good faith, as follows: 'Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account'.

Nevertheless, stating that anything in the standard terms to which the consumer would not have agreed in free negotiations goes beyond that text. In particular, the Court did not analyse (by way of a systemic interpretation) how this fits with, on the one hand, the explicit prohibition of analysing the *essentia* negotii and, on the other hand, the possibility (mentioned in Recital 19) of taking the price/quality ratio into account.³⁸ For in effect in order to answer the question whether a consumer would agree to a certain term in free negotiations one must take into account the *quid pro quo* – if the price is very low, the consumer is more likely to agree to a more unfavourable term.

Commenting on the CJEU's notion of *bona fides* Sara Iglesias Sánchez pointed out that:

‘as to compliance with the requirement of “good faith”, the Court sets up a test that seems to differ from an objective conception of this notion. Although, admittedly the “good faith” of the seller is assessed regardless of the subjective will of the seller or provider, following the 16th recital of Directive 93/13, the judgment of the Court seems to imply a notion of the “rational consumer”: the national court must assess whether the consumer would have agreed to the term in question in the framework of individual negotiations.’

Indeed, Iglesias Sánchez is correct in pointing out that the test put forward by the CJEU in *Aziz* is a normative novelty which cannot be deduced logically neither from the text of the Directive, nor even from its preamble. The present paper being limited to an analysis of the Court's reasoning, and not the substantive merit of its decision in *Aziz*, it will suffice here to observe that the introduction of the fragment of the judgment stating that ‘the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations’ is indeed a normative *novum*. As such, it is not directly supported by any specific arguments, neither intra-legal nor extra-legal. It should also be underlined that the formula itself requires the Court to analyse the hypothetical psychological will of the consumer (‘would have agreed’), which, arguably, establishes a link between the

³⁸ Recital 19: ‘Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; *whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms*; whereas it follows, inter alia, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer’. Cfr. K. Kańska, ‘Ochrona...’, p. 54-55.

strictly legal criteria and the actual economic circumstances (what would a *concrete consumer* agree to).

Passing towards an evaluation of the specific terms in the contract, the CJEU underlined that the annex to the Directive is only indicative:

‘70. In that regard, it should be recalled that the annex, to which Article 3(3) of the directive refers, contains only an indicative and non-exhaustive list of terms which may be regarded as unfair (see *Invitel*, paragraph 25 and case-law cited).’

The only argument invoked in support of the legal view that the Annex is ‘indicative and non-exhaustive’ is an argument from case-law (*Invitel* case).

In the following paragraph the Court found that:

‘71. Furthermore, pursuant to Article 4(1) of the directive, the unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of it (*Pannon GSM*, paragraph 39, and *VB Pénzügyi Lízing*, paragraph 42). It follows that, in that respect, *the consequences of the term under the law applicable* to the contract must also be taken into account, requiring consideration to be given to the national legal system (*Freiburger Kommunalbauten*, précité, paragraph 21, and the order in Case C-76/10 *Pohotovost* [2010] ECR I-11557, paragraph 59).’

The part of the Court’s reasoning is mainly supported by intra-legal arguments. Let us recall that it is Article 4(1) of the Directive which explicitly mentions the criteria to be taken into account when assessing an unfair term:

‘(...) the unfairness of a contractual term shall be assessed, taking into account the *nature of the goods or services* for which the contract was concluded and by referring, at the time of conclusion of the contract, to *all the circumstances* attending the conclusion of the contract and to *all the other terms* of the contract or of another contract on which it is dependent.’

A comparison of para. 71 sentence one of the *Aziz* judgment and the very wording of Article 4(1) of the Directive reveals that the references to case-law at the end of that sentence (pointing to *Pannon GSM*, paragraph 39, and *VB Pénzügyi Lízing*, paragraph 42) are patently superfluous

– the norm restated by the Court is a word-by-word reproduction of the Directive’s text. The fact that the Court nevertheless cites its case-law as additional authority shows how important argument from precedent is in the hierarchy of argumentative strategies employed by the CJEU.

In the second sentence of para. 72 of the *Aziz* judgment the Court adds that ‘[i]t follows that (...) *the consequences of the term under the law applicable* to the contract must also be taken into account, requiring consideration to be given to the national legal system’, citing two cases (*Freiburger Kommunalbauten* and *Pohotovost*) as authority. Although the duty of the national court to analyse the legal significance of the contentious terms under national law is not *explicite* mentioned in the Directive, it would be an absurd not to accept such a duty. Indeed, a term of contract understood as a set of signs, in order to have a meaning must be read in light with juridical rules of meaning, i.e. in the light of the applicable law. The need to refer to national law follows, therefore, not from the wording of the directive, but rather from the fundamental principles of language and meaning, whereby *omnia sunt interpretanda*.

Departing from its earlier prevailing practice of not giving national courts direct guidelines as to the fairness of individual terms, the CJEU in *Aziz* decided to give such guidance (thereby following e.g. the practice of the Polish Supreme Court which, although being a *iudicium iuris*, regularly pronounces itself on such issues in cassation proceedings).³⁹ However, this part of the judgment⁴⁰ do not contain any arguments, but simply apply the earlier considerations to the terms at hand. One can therefore speak here of a subsumption of the facts (the wording of the terms) under a legal norm (formulated in the preceding paragraphs). Therefore, these paragraphs will not be the subject of my analysis. Likewise, the final paragraph of the judgment which contains the conclusions⁴¹ (repeated later in the operative part) also does not contain any new legal argumentation and therefore is left outside the present exegesis.

5. Conclusions

The case study has illustrated the way in which the CJEU deploys extra-legal arguments in its judicial reasoning. In answering both questions submitted by the national court – the procedural and the substantive one – the Court resorted to a number of extra-legal arguments. In particular,

³⁹ Mańko, *The Impact...*, p. 86. As of mid-April 2014, the Polish Supreme Court has analysed the fairness of specific contract terms in 17 decisions in various areas of private law (six times in banking contracts, four times in insurance contracts, three times in telecommunications services contracts, as well as one timeshare contract, one education services contract, one leasing contract, and one housing development contract).

⁴⁰ *Aziz*, paras. 72-75.

⁴¹ *Aziz*, para 76.

with regard to the first question, the Court considered the weaker economic position of the consumer, the practical aspects of the enforcement proceedings in Spanish law which make it very difficult for the consumer to protect his rights, and finally the nature of the object of such proceedings, namely the family house of the consumer. In finding that rules such as those in force in Spain violate the Directive as read in conjunction with the principle of effectiveness, the Court relied not so much on a textual comparison (wording of Spanish law as compared to the wording of the Directive), but rather focused on the functioning of Spanish law in practice (law-in-action) and the social interests at stake (irreversible loss of family home). The dominant role of extra-legal arguments is clearly visible here.

Answering the second, substantive question, the Court's reasoning is clearly thinner. The test for a violation of good faith – a normative *novum* proclaimed in the judgment and, as regards the private law aspects one of the most significant developments in the Court's case-law on the Directive, is announced as a simple judicial *fiat*. From the standpoint of the quality and persuasiveness of legal reasoning, that part of the judgment could certainly be more substantiated. In particular, the Court could have elaborated its position both on the introduction of a German-style '*Leitbild* rule' (seemingly modelled on § 307 II BGB) and on the 'hypothetical will' test.

As such, the *Aziz* judgment is symptomatic for the CJEU's style of case-law. Firstly, modes of interpretation which traditionally have been given precedence – linguistic and systemic interpretation – do not play a significant role. As a matter of fact, in *Aziz* not a single legal view expressed by the Court was based on either of the two arguments. Secondly, extra-legal arguments are deployed broadly and used to support many of the views expressed by the court. Thirdly, however, many legally significant developments are introduced as a simple judicial *fiat*, lacking a persuasive support in the form of intra- or extra-legal arguments.