



UvA-DARE (Digital Academic Repository)

A missed opportunity? CJEU judgment in Case C-49/14 (Finanmadrid)

van Duin, A.

Publication date

2016

Document Version

Final published version

License

Unspecified

[Link to publication](#)

Citation for published version (APA):

van Duin, A. (Author). (2016). A missed opportunity? CJEU judgment in Case C-49/14 (Finanmadrid). Web publication/site, Recent developments in European Consumer Law. <http://recent-ecl.blogspot.co.uk/2016/02/a-missed-opportunity-cjeu-judgment-in.html>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.



Meer ▾

Blog maken Inloggen

Recent developments in European Consumer Law

THURSDAY, 18 FEBRUARY 2016

A missed opportunity? CJEU judgment in Case C-49/14 (Finanmadrid)

Today the Court of Justice of the European Union delivered its judgment in [Case C-49/14 \(Finanmadrid\)](#). We have reported earlier on AG Szpunar's [opinion](#) in this case. The questions referred for a preliminary ruling gave the CJEU an opportunity to clarify the relation between the general principles of effectiveness and equivalence in EU law and Article 47 of the EU Charter of Fundamental Rights, which safeguards the right to effective judicial protection.

The Court's judgment

The Court has not seized this opportunity. Instead, it deals with the case entirely and exclusively in the framework of the effectiveness of Directive 93/13/EEC (Unfair Contract Terms), without any reference to Article 47 of the Charter. The Court merely concludes that the referring court "has not stated the reasons which have led it to doubt the compatibility" with Article 47 of the national legislation at issue and that, for lack of "information which is sufficiently precise and complete", it is not able to give "a useful reply" (para. 57). The Court does not clarify why it is "not necessary" to answer the questions concerning Article 47, nor does it state what (additional) information would be needed exactly. At the same time, the Court does examine the case in detail in the light of the principle of effectiveness. It seems that the Court's consideration that the questions by the referring court must be understood broadly (para. 31) applies only to the questions concerning Directive 93/13.

What was this case about? The referring court was confronted with an application for the execution of an order for payment obtained by Finanmadrid against the defendants in enforcement proceedings, which had only involved a Secretario judicial (court registrar), not a judge. Spanish procedural law provides for intervention by a court only where the amount claimed is apparently not correct or where the debtor contests the proceedings. The referring court was precluded from an examination of the potentially unfair nature of the terms of the contract which gave rise to the enforcement proceedings, because the Secretario judicial's decision (the order for payment) is an enforceable instrument with the force of *res judicata*.

The Court's conclusion that such a procedural arrangement is liable to

BLOG ARCHIVE

- ▶ [2019](#) (72)
- ▶ [2018](#) (107)
- ▶ [2017](#) (78)
- ▼ [2016](#) (79)
 - ▶ [December](#) (5)
 - ▶ [November](#) (5)
 - ▶ [October](#) (4)
 - ▶ [September](#) (8)
 - ▶ [August](#) (1)
 - ▶ [July](#) (7)
 - ▶ [June](#) (11)
 - ▶ [May](#) (4)
 - ▶ [April](#) (8)
 - ▶ [March](#) (10)
 - ▼ [February](#) (8)
 - [Towards a true European Market for retail financia...](#)
 - [Transparency of energy offers](#)
 - [Consumer vulnerability study published by the Comm...](#)
 - [A missed opportunity? CJEU judgment in Case C-49/1...](#)
 - [ODR-Platform online](#)
 - [Conference and publication on consumer ADR and ODR...](#)
 - [AG Szpunar's opinion in case C-421/14 \(Banco Primu...](#)
 - [New safe harbour agreement reached](#)
- ▶ [January](#) (8)
- ▶ [2015](#) (84)

undermine the effectiveness of the protection intended by Directive 93/13 is, perhaps, not very surprising. The Court refers, among other things, to its judgments in *Banco Español de Crédito* and *Sánchez Morcillo* (reported by us [here](#) and [here](#)) to conclude that effective protection under Directive 93/13 can only be guaranteed if the national procedural system allows the court, either during the order for payment proceedings or before granting leave for execution, to check of its own motion whether the terms of the contract at issue are unfair. The involvement of a Secretario judicial is insufficient, because they can only check formalities; it does not fall within their powers to assess the potentially unfair nature of a term in a contract on which the debt is based (para. 50). There is also a significant risk that the consumers concerned will not lodge any objection (para. 52). In these circumstances, the Spanish rules on *res judicata* appear to run counter to the principle of effectiveness.

A missed opportunity?

While the Court performs an extensive analysis of the Spanish procedural rules at issue, it makes no reference to Article 47 of the Charter.

Article 47 of the Charter safeguards the (fundamental) right to an effective remedy and a fair trial before a court of law for the violation of rights within the scope of EU law. In a speech at a conference on the Charter (Brussels, 17-18 December 2014; click [here](#)), Mr. A. Rubio González, Agent for the Spanish Government before the CJEU, pointed out the growing importance of the Charter and Article 47 in particular for Spanish legal practice and effective consumer protection. In this respect, he specifically mentioned *Finanmadrid* as a pending case, and he observed that AG Jääskinen believes that the principles of effectiveness and equivalence should be brought under the umbrella of Article 47 of the Charter (opinion in [Case C-562/12](#), para. 47).

However, in *Finanmadrid*, the relation between the principle of effectiveness and Article 47 seems to be overlooked by the Court. In his [opinion](#), AG Szpunar remarks that it is as yet unclear whether Article 47 offers additional protection, or whether it replaces the principle of effectiveness. Other judgments (e.g. [Sánchez Morcillo](#), paras. 35 and 50) suggest that the effectiveness of consumer protection intended by Directive 93/13 should be read in conjunction with Article 47 of the Charter. It is unclear why AG Szpunar disconnects Article 47 and the principle of effectiveness, but his opinion may have given the Court an argument to avoid answering the questions concerning Article 47 altogether.

The judgment is therefore inconclusive as regards Article 47 of the Charter. There are more (Spanish) cases pending before the CJEU referring to this Article in the context of Directive 93/13 (see, e.g., [here](#) and [here](#)). What role Article 47 has to play in this context remains yet to be seen.

Posted by [Anna van Duin](#) at 17:29



Labels: [Aziz](#), [cjeu](#), [curia](#), [directive 93/13](#), [EUCFR](#), [fundamental rights](#), [unfair contract terms](#), [unfair terms](#)

No comments:

Post a Comment

- ▶ [2014](#) (136)
- ▶ [2013](#) (220)
- ▶ [2012](#) (276)
- ▶ [2011](#) (155)
- ▶ [2010](#) (92)

CONTRIBUTORS

Admin: [Joasia Luzak](#)

Author: [Anna van Duin](#)

Author: [Andrea Fejos](#)

Author: [Agnieszka Jabłonowska](#)

Author: [Eleni Kaprou](#)

Author: [Candida Leone](#)

BIOS

[Agnieszka Jabłonowska](#)

[Andrea Fejos](#)

[Anna van Duin](#)

[Candida Leone](#)

[Eleni Kaprou](#)

[J.A. \(Joasia\) Luzak](#)

SUBSCRIBE TO

Posts

Comments

LINKS

[Master European Private Law at UvA](#)

[European Journal of Legal Studies ECJ](#)

[DG Sanco](#)

LABELS

[access to justice](#) (29)

[Action Pan](#) (1)

[Action Plan](#) (2)

[ADR](#) (16)

[advertising](#) (38)

[aggressive practices](#) (5)

[air](#) (1)

[air fare](#) (1)