# CONSUMER'S CONTRACTUAL PROTECTION SCOPE IN EUROPEAN DIRECTIVE AND GEORGIA'S JUDICIAL SPACE

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**Abstract**

The article focusing on "Consumer's contractual protection scope in European directive and Georgia's judicial space" determines the consumer's legal place in the contractual space, where both parties' autonomy exists in the most effective way. It is the truth that expressing the will gives the consumer power to avoid exploitative arrangements, nevertheless, the "weaker party" is often deprived of the opportunity to get acquainted with every article of the agreement at the pre-contract negotiation stage. Moreover, the customer is often left with no choice but to join the contract.

Precisely the government should balance the rights of weak and strong sides, it must protect citizens from unfair contractual terms.

In 2014 Georgia took a big step towards European integration when it signed the Association Agreement. The 13th chapter obligates the country to protect and ensure the realization of consumer's rights.

In the article, we review specific EU directives with the comparative-legislative methods, that establish principal definitions of protection against unfair contractual terms to the countries. The article also contains directives about consumer rights and conceptual issues of the credit line directives.

The article demonstrates the interpretation of the court of justice, the approach to national legislation and international practice, that will ultimately help the target group to understand and protect the principles of consumer rights.

The presented article is a big step forward to strengthening the field of "consumer rights".

**Keywords:** weak party, corporative piercing, incorporation, harmonization plan, directive, regulation, Euro commission.

## Introduction

In terms of legal and economical aspects, Georgia is a developing country and always strives towards introducing new ideas and regulations. It is working on becoming a member of an international organization – the European Union, for which consumer's rights are in priority. European Union's functional agreement directly emphasizes the obligation of protecting consumer's rights for their respective member countries, which is a certain signal for creating an appropriate legislative database.

Consumer rights are violated on a daily basis in terms of banking, public services, or trading. There is an extremely alarming situation with banking/financial systems, where arranging exploitative contracts appears as an ordinary fact. What levers does the customer have to protect his own rights? How can the government

secure their business subjects in a legislative frame, so it won't disturb the balance between free trading relations and consumer's rights?

Due to the relevance of the theme, it is interesting to observe the guarantees of consumer protection in terms of freedom agreement, active directives in EU's law systems, and their impact on court authorities.

Furthermore, the article discusses the role of association's agreement in national law, as well as evaluation of consumer's protection standards due to curt decision analysis.

Topics that are being observed in the thesis will help practicing lawyers, judges, and specialists in the field to "protect consumer's rights."

### 1. Agreement freedom towards consumer's rights

The principle of agreement freedom is the fundamental principle for developing Georgia's civil legislation. With its essence and the autonomous principle of will, it gives a boost to economic indicators, stabilizes civil rotation, and minimizes the origination of risk disputes. By granting the parties with agreement freedom, we are heading towards the development of civil law institutions, because with existing evidence and court's decision it is possible to improve the standards and realize it in practice. Agreement freedom is also regulated on a legislative level, in particular, according to the first part of Article 319 of the Civil Code, the parties are free to determine not only the form of the transaction, but also the content. The only requirement of the legislation is that the object of the contract must be complied with the imperative framework of the law.

Despite its high legal interest, agreement freedom is not absolute in its nature, in some judicial cases, it can be restricted. According to Article 346 of the Civil Code, a standard condition of a contract that goes against the principles of trust and good faith and thus unequivocally harms the other party is void.

It is the truth that the legislator grants both parties unlimited rights in terms of civil rotation, especially in the agreement freedom aspect, however, it imperatively prohibits any transactions directed against trust and conscientiousness, but unfortunately, it is not a rare occurrence in Georgian reality.

Despite the general notion of conscientiousness, I may find common elements and define legislator's will, whereas considering the aspect of agreement freedom there should not occur oppression of the party or harmful definition of the conditions. If taking Georgia's practice example, exploitative deals take an active place in the civil rotation, which is used against consumers and are reviewed as if they remain agreement freedom.

Indeed, there is no member of society, regardless of his social status, who won't use his consumer's rights. Everyone arranges various contracts with entrepreneurs in everyday life, however, in most cases, we don't understand the context of those contracts. The majority of society doesn't analyze the content of the agreement when they make a deal and they only notice their weak points when they face undesirable facts.

This is understandable because as an example the level of legal self-awareness in most countries is fairly low. European Court of Justice states, that the consumer's side is a weaker one compared to the seller or the supplier taking into consideration the market power and information flow. Consequently, the consumer is always in the need of help, when the strongest party or entrepreneur arranges the contract with the consumer, in plenty of cases he uses the consumer's ignorance of the law to his advantage, besides with no commercial knowledge,

or lack of information about the subject of the arrangement, etc.[1] What is the government's interest in protecting consumer's rights and which legally regulated kindness does it represent?

Protection of consumer's rights is directly connected with the development of civil rotation. In turn, the market is regulated by the interaction of its supply and demand and their subjects playing their roles on the marketplace as consumer transaction's parts – consumer and contractor. The consumer law is very sensitive towards the consumer and protecting his rights is of utmost importance. That being the case is the result of typical approaches of the modern world, owing to the fact that modern law recognizes the supremacy of an individual, and definitive factors of the supremacy of an individual are the maximum realization of their rights and freedom. Therefore, consumer's special defense and creating strong guarantees for the protection affects the growth and development of the market, healthy competition.[2]

Both a physical person and a juridical person can use a consumer's status, nevertheless, it will be more accurate to point out that the physical person is the weaker party. He is in the need of a higher standard of legal defense from the government because when a juridical person buys goods, his interests are represented by lawyers, and that minimizes the risk of becoming a victim. This is why the physical person is being emphasized.

As it's well know , that by putting exploitative terms in the agreement, the strongest part violates not only consumer's rights but also the fundamental principle of civil law – "conscientiousness". There are examples in the practice when with agreement freedom and using bilateral will unconscientious party is wittily constrained. Hence, it is interesting where is the border between the conscientiousness principle and agreement freedom and what levers do they have for legal defense? First of all, we must explain the concept of conscientiousness and its signs.

## 2. Conscientiousness principle in contract law

In modern Georgian legal space conscientiousness became a substantive legal norm and united into the legal system that relies upon justice and equality, therefore it gained wider definition. The conscientiousness principle is commonly connected with moral standards according to the legislation and doctrines of the modern developed countries. Article II of the Civil Code 361 considers this: "Obligation must be carried out properly, with conscientiousness, at the appointed time and place".[3] With this arrangement legislator obliged both subjects carrying out a contractual relationship to act conscientiously. The various functions of the conscientiousness principle were used to help Judicial Law carry out fair verdicts and at the same time avoid unjust results.[4]

How can we qualify a person's actions as unfair? For any vise person, his actions must include preliminary signs of intentional guilt, because his actions transparently show the violation of the existing principle.

Under Article 8 of the Civil Code, civil law contractors are obliged to exercise their rights and duties in good faith.This regulation defined conscientiousness as a mandatory component for the agreements, despite the conditions that the parties choose, this must be executed as a matter of priority. Defined article is imperative and parties can't eliminate it.

[1] E. Kardava, Defending consumer's rights, a comparative legal review of European Standards on the example of a street contract, Review of Georgian Law, 2007, 126.
[2] Ibid., P 122.
[3] Article 361 of the Georgian Civil Code, Parliament statements, 31, 24.07.1997.
[4] A. Ioseliani, The conscientiousness principle in a Contract Law (Comparative-legal research), Review of Georgian Law, Special edition, Tbilisi, 2007, 12.

It should be noted that the present norms provide for the legitimacy of civil turnover. In addition to the above, the obligation to conduct private legal relations in good faith is imperatively indicated by a number of norms of the Civil Code, however, it should be noted that the definition of a vague norm is still based on the principle of good faith and requires its indirect interpretation. The function of the principle of good faith is not to oppose the interests of the contractors, but to protect them, which creates a kind of solidarity in the legal space. It is also a presumption of duty. Good faith means the actions of the participants in civil turnover to treat them responsibly and with respect for each other's rights. Based on the principle of good faith, both law and contract deficiencies are eliminated.

The conscientiousness principle is consolidated in international treaty and agreement, in particular, the Vienna Convention on the Law of Treaties, where Georgia openly admits the conscientiousness principle and emphasizes with 1st Article of Civil Code 31 that: "The agreement must be defined fairly according to the usual meaning, resulting from the agreement object and its goals, therefore the terms of the contract should be given in their context".[5] The judgment stated above follows that the conscientiousness principle must not be neglected in civil relations. During the implementation of agreement freedom, the legislator grants the party great power, so he can conduct the civil rotation himself, arrange any kind of legal contract without boundaries and define his conditions. Nevertheless, despite the granted freedom, the party is bounded with constraint, he is obliged to act with conscientiousness and follow the common principles. In Anglo-American countries, most of the law courts judge the defendant with two different standards if the defendant acted with conscientiousness or not.[6] This means that the party acted with honesty and not arbitrarily if he was cooperating with another party to achieve his goals.[7] Common law countries review the conscientiousness principle in the context of corporate law, more specifically, if the head of

a company or an authorized person acted with honesty when they violated their contract with a third party. The so-called "Business Judgment Rule" protects the head of the company with a corporate "cloak" and throws the load of proving his unfair actions on the plaintiff. The main purpose of my article is to point out the consumer-oriented contractual relationship in EU law, which protects "weakest party's" interests so firmly and in detail. It is interesting to review the prehistory of the origin of consumer rights.

### 3. The origin of consumer rights in the EU

World globalization and the development of the International Business Sector caused the establishment of consumer rights mechanisms.

"Each one of us is a consumer" – those words coming from president Kennedy proceeded the universal recognition of the four fundamental consumer rights – obtaining the information, safety, choice, and representation.[8] The United States of America became the birthplace of consumer rights. In the 1950s European countries joined this activity and several International organizations were created to develop this field of law. The first organization for protecting consumer rights was established in Europe, in 1945 Denmark, as for England, in 1955 the government established "Consumer Council" at the state level, which assisted the injured party with trading relationships. The essence of the establishment of consumer rights is connected with the

[5] Vienna Convention on the Law of Treaties, 1st Article of Civil Code 31, N1/1-RS, Legislative Herald of Georgia, 11.12.2014.
[6] <http://www.rotlaw.com/legal-library/what-is-good-faith/> [L.s. 24.04.2017].
[7] https://www.accc.gov.au/business/franchising/acting-in-good-faith#more-information>Australian Competiotion& Consumer Commission, Acting in good faith. [L. s. 02.01.2021].
[8] T. Lakerbaia, European standard for informed consumers, Journal of Law, #1, 2015, 1461. (V vol., 28:29, 2006), 90.

development of the trading market, where we had buyer and seller, and the subject of the contract was represented by specific goods. The first real European normative act was the Treaty of Rome, which strictly specified consumer will at the legislative level.

The Maastricht Treaty played a crucial role in the present field of law, it was concluded on the 7th of February 1992. This act caused the European society's deep involvement, and in legal terms, it created real protective levers, which didn't exist before in any legislative acts. From 1990 European Commission provided 3 yearlong plans for harmonization, which contemplates several countries to ratification of the act and bringing closer local legislation.[9] The first harmonization plan had not brought a positive result because it contradicted with European countries' domestic legislative bases, those member countries hadn't wished to fully transform it.

The second harmonization plan was conducted in 1993-95, but the most effective appeared to become the third one, which was developed in 1996-97 and provided the introduction of a standard for consumer informing, it also developed a proper strategy to expand this policy.

EC Directive 85/574 With the implementation of this directive, the issue of the manufacturer's responsibility before the consumer for the damage it caused because of product defects, was developed for the first time in Italy.

The Legislative Decree 174/95 Consumer's withdrawal from the contract with fair conditions and guarantees was established in Italy. In most cases, the consumer couldn't ask for a fine at a contractual level, despite the delay in the contractual obligations of the seller. This problem was resolved with the previous act.[10]

In today's reality, there are active directives and regulations in European law. Directives are representing the traditional instruments of EU law, their implementation is obligatory for member countries, there are minimum (it consists of minimum protection standard and the country can decide which defensive mechanisms they want to choose for legislative acts) and maximum directives (maximum protection standard, it is directly emphasized by EU which directives must be implemented if the country wants to become the member) that EU imposes for developing country if it wishes to become EU member. As for regulations, they have mandatory roles, their implementation isn't necessary because they are already active for the member countries. They are becoming more and more actual/popular in EU law.

## 4. Regulations governing the contract law

### 4.1 Unfair contract terms directive 93/13/EEC

The given directive is very clear and imperative, it absolutely draws towards the protection of consumer's interests and distinctly sets prerequisites for existing standard terms. With its analysis, all norms that are not orally settled and confirmed with the consumer, which sets up another picture of existing practice – are a non-standard discipline and require oral explanation. An explanation must be organized in a clearly understandable language, be straightforward and the consumer must have an opportunity to consider it. As you may know, consumer contracts stand out with their capacity, and in many cases, even for lawyers, it is difficult to analyze the contracts in detail. Therefore, two obligations rest on the stronger side: 1. The text must be in a clearly understandable language, formulated with appropriate shrift, 2. All non-standard norms should be orally

[9] See. Il piano d'azione della Commissione CE, in "Rivista critica di Diritto Privato", II/94, p. 153.
[10] See <<https://www.nyulawglobal.org/globalex/International_Law_Consumer_Protection.html#_edn4>> [L. s. 04.01.2021].

explained to the consumer. This fact is emphasized by The European Court of Justice (ECJ) judicial practice which always recognized the power of the strongest party in terms of the contract.

The given directive had an amazing effect on the National Law when it put all the responsibility of explaining every non-standard norm, unfamiliar to the practice on the shoulders of the stronger party. Very often similar norms even contradicted the autonomy of the parties as well.[11] Therefore, it must be stated that in the future consumer himself won't be able to abuse his condition because the oral explanation of the norm standards is not obligatory for the second party.[12] In my opinion, the balance of power is logically distributed by the stated directive and it reasonably defends consumer's rights. The main purpose of the stated directive is to bring closer the Legal System of the member countries as well, to minimize unfair terms in contract law and fully harmonize mentioned imperatives. It is an interesting circumstance because the directive was implemented in 1993 and after all this time no addition or addendum was added to it. This directive can't impose the responsibility of control on the court, nevertheless, in case of dispute, it can definitely obligate the court to investigate if the standard norm was orally explained by the party. In the review of the Nordic legislature, Thomas Wilhensson expressed discontent in his article, where he underlined the difficulties of deciding who should take the responsibility for the oral explanation of this disputed norm, if it was implemented and if that kind of tools would be available on practice. According to him: "Despite the existing respect for the agreement freedom, unfair contract directive will resolve the problems we face in practice on a minimum level, it only organized the norms of non-standard agreements, when it implemented the responsibility of oral agreement. Besides, the corresponding limitation doesn't exist even in the appendices of CPA".[13]

### 4.2. The retail directive (99/44/EC,OJ L 171, 7.7.1999)

In the present directive chapter, we will review the activity scope of the retail directive, the mechanisms for their explanation, and various problematic topics that arise in the member countries.

As we see in the practice, there are three ways to implement the present directive. The first way is when the legislature's mechanism easily adapts this tool to existing practice, or it only "translates" with a separate act. On one hand, this minimalistic approach maintains the directive mode "as it is", without touching the outer system. On the other hand, in this case, the legislator ignores the accompanying problems of the mode, because the directive can't be reflected with simple translation and we won't receive any feedback on the existing sales problematics. Despite the existing difficulties some countries have chosen this way (those are: England, Italy, Scotland).

The second way is to incorporate the directive's imperative norms with internal regulations. As you may know, it is closely related to contract law, therefore some norms of the Civil Code will need to be adjusted in order to harmonize the existing version. This third version is the most daring one. This is a huge challenge for both the legislature and the academy. It is interesting to point out that it has been a long time that member countries tried to introduce new systems to the existing legislation, it turned out to be difficult for most of them to reconcile the current reforms with the old fundamental norms. Nevertheless, we must highlight those member

[11] A. M. Mancaleoni, 'The Obligation on Dutch and Italian Courts to Apply EU Law of Their Own Motion' (2016) 24 European Review of Private Law, Issue 3/4, pp. 553.
[12] See COUNCIL DIRECTIVE 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts 93/13/EEC.
[13] T. Wilhemsson, Implementation of the EC Directive on Unfair Contract Terms in Finland, The, 1997, Page 7.

countries, for example, Austria and Denmark that use this method and despite the differences, they went back to the old version.[14]

The confrontation between the fundamental systems of the given directive was caused by the issue of compensation for damage during a defective performance. As you may know, it sets the order for the exact way for a seller to resolve the problem. The first strategy is to mend/replace the item. A consumer can't directly cut off his deal and demand compensation for the damage, because he must consider the rules established by the relevant legislation.[15] Here we face the main problems. First of all, if the authorized seller has the right to claim the benefit received from the use of the item, and second – the problem of the regulations for damage compensation. In German codification, the seller's right to claim the product obtained while using the item is directly mentioned, but not every member country agrees with this approach.[16] As for the damage issue, English practice directly grants the consumer with the right to claim the damage compensation, the right to cut off their agreement and it does not impose any preconditions for the termination. Other member countries, including Georgia, in case of defective performance, don't give the right to terminate the contract immediately, they obligate even consumers to notify the company about the damage, allow them to make amends, and only request restoration of the original condition in extreme circumstances.[17]

### 4.3 Consumer credit directive -2008/48/EC

The goal of the directive's legislative proposal which was supposed to change 87/102/EEC, was implemented in September 2002. In April 2004 the European Parliament added a substantial correction to the text. The Commission published a modified proposal, which attachment/addendum should be fully accepted and which not.

In the future, the Commission came to the conclusion that they must exclude secured loans from the directive's purpose because the domestic market and General Directorate (DG Market) was going to propose mortgages in the new directive. The commission accepted the second modified proposal on the 7th of October 2005, in a format of consolidated text. The competition board accepted the political agreement on the directive on 21st May 2007. In the end, the European Parliament approved the modified text on the second hearing, which ended with the Council's approval of this text in April 2008.[18]

The main purpose of the present directive is to provide detailed information to the consumer when issuing a loan, protecting their rights, and ensuring the domestic market with better conditions. Its area of regulation is: A) Credit which will fit in between a minimum of 200 – maximum of 75 000 euros, nevertheless, those numbers aren't the minimum frame, the member countries can regulate them. B) Information that should be provided to the financial sector during the advertisement, the pre-contractual, and contractual negotiation process, all three phases are covered with its regulation. C) It gives the right to the member countries not to spread the directive's regime on the credit institutions if their credit contracts do not even makeup 1% of the credit agreements in the country. D) It obligates the member countries to evaluate consumer creditworthiness

[14] E. Hondius; C. Jeloschek, Towards a European Sales Law - Legal Challenges Posed by the Directive on the Sale of Consumer Goods and Associated Guarantees, 2001, page 158-159.
[15] See DIRECTIVE 1999/44/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, article 3.
[16] G. Capilli, Quelle Case: The Directive on the Sale of Consumer Goods at the European Court of Justice, 2010, 86-87.
[17] Ewoud Hondius; Christoph Jeloschek, Towards a European Sales Law - Legal Challenges Posed by the Directive on the Sale of Consumer Goods and Associated Guarantees, 2001, 160.
[18] Web address : <http://europa.eu/legislation_summ aries/consumers/protection_of_co nsumers/l32021_en.htm> [L.s.04.01.2021].

before they apply for the loan, E) Information delivery standard, which must be included in the article of the loan agreement, F) 14 days period for the customer to withdraw from the contract, when no penalty/sanctions are imposed on him, G) Fair and impartial regulation of the commission to be paid in advance, which depends on the loan extension, also on the minimum of the returned amount and its percentage (which doesn't have an impact on the root).[19]

### 4.4 2008/122/EC (Timeshare) Directive

The main idea of the directive was to protect the consumer (tourist), who was having a long vacation in a comfortable environment, during which he was paying the appropriate amount and he wasn't responsible for any other extra charges. The first regulations for tourists using this period of time were implemented by the directive 94/47/EC, its purpose was to develop minimum legal standards, so any tourist buying this package would be protected within its frames. The minimum harmonization plan of 94/47/EC directive was unsuccessfully shared by the member countries, this caused the European Parliament to create a new modernized document.

In 2009, a new, completely modern Directive 2008/122/EC was adopted. At present, its maximum harmonization is mandatory for member states, which guarantees high standards of consumer protection, as they often face unfair business practices and an information vacuum in legal aspects.[20]

### 4.5. The Consumer Rights Directive (2011/83 / EU)

The Consumer Rights Directive (2011/83 / EU), the so-called CRD, is a new legal framework that protects the rights of consumers during distance selling. This Directive repeals and replaces the Distance Selling

Directive[21] as well as the Doorstop Selling Directive[22]; it also made minor additions to the Agreement (Contract) Directive[23] as well as the Sale of Consumer Goods and Associated Guarantees Directive[24].

The CRD was adopted in Ireland in 2013 as the Eurobarometer report for the same year reflected a significant increase in the number of customers benefiting from an online purchase agreement. Statistics have increased by 44% since 2006[25].

This Directive is a horizontal legislation that regulates certain aspects of the risks of contracts between consumers and businesses. It includes contracts for the purchase of goods, services, digital content that is not available through material means and also public consumptions. Nevertheless, validity of some contracts are

[19] See - DIRECTIVE 2008/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.
[20] A. Petrovic "The legal Pozition of the counsumer in timeshare contracts-Analizes of Directive 2008/122/EC, 273.
[21] Parliament and Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19 (Distance Selling Directive).
[22] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31 (Doorstop Selling Directive).
[23] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (the Unfair Terms in Consumer Contracts Directive).
[24] Parliament and Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (Consumer Sales Directive).
[25] Peter O'Sullivan, Does the New Consumer Rights Directive Enhance Consumer Confidence in the Online Market, 6 King's Inns Student L. Rev. 64 (2016) , Page 65.

excluded from the scope of the Directive (eg contracts for social services, healthcare, toys, real estate, financial services, travel package, time, food delivery or - except for certain provisions - passenger transport).

The directive stipulates that the consumer must receive complete and transparent information on the elements of the contract, formal requirements for distance and offshore contracts, clear rules for the delivery of goods and payment of risk and certain specific provisions on the use of fee of payment fees, telephone communication between customers and traders, and rules on surcharges. In general, the directive has the character of full harmonization, which means that it is directly transposed by the Member States. However, the Directive specifically allows Member States to waive additional pre-contractual information requirements for contracts. In addition, it allows Member States to apply certain regulatory norms of their own national legislation[26].

It will be interesting to consider the critique of this Directive that has been published in relation to it. Criticism is proposed in terms of the effectiveness of information in distance contracting and online agreements, it also provides for the consumer confidence issue. This criticism has arisen from the existence of its predecessor Directive 97/7/EC and, as we can see, remained firm even after the publication of the current CRD and Regulation 2013... In his article, Geraint Howells explicitly stated: "simply providing information to consumers is not enough to protect them legally, as people cannot receive information properly in order to be empowered appropriately".[27] There are many reasons for this, such as the time factor that customers do not devote to reading the contract, as well as vague terms/clauses, etc. Users also look at issues with excessive optimism and fail to calculate potential risks from the beginning, which ultimately hurts them. According to Howells, leaving the customer alone in this difficult process is ineffective. The article is mainly aimed at developing a behavioral economics model. In his view, gathering information in a contract alone is not enough to protect the rights of the consumer.

## 5. Judicial practice in Georgia

A study of the judicial practice has shown that consumer protection directives are applied in court decisions, moreover, judges indicate the obligations under the Association Agreement, after which they try to reinforce the arguments with the precedents of the European Court of Justice. Judges certainly talk about the non-binding nature of their use, but they well substantiate why they should protect consumer rights and what is the main goal in the development of this institution.

On the case #AS-237-2019 of the Supreme Court of 17/05/2019, by which the cassation appeal was declared inadmissible, the decision of the Chamber of Civil Cases of the Tbilisi Court of Appeals of November 22, 2018 is well considered, the analysis of which I will provide. [28]

*Claim: Fulfillment of a monetary obligation, sale of the subject of the mortgage.*

*Facts:*

1. In 2007, a loan agreement was signed between JSC Bank and an individual and to secure this, the real estate of another owner, which is currently owned by the defendant (natural person), was mortgaged. Numerous changes and additions were signed between the parties. The natural person in good faith, duly fulfills the obligations imposed on him.

[26] DG JUST, UNIT E2 Report "Evaluation of the Consumer Rights Directive 2011/83/EU".
[27] G. Howells, "The Potential and Limits of Consumer Empowerment" (2005) 32 Journal of Law and Society 349.
[28] See on the website of the Supreme Court<<http://prg.supremecourt.ge/DetailViewCivil.aspx>> [L. s. 04.01.2021].

2. During the period of validity of the contract dated August 27, 2007, the Bank provides insurance for the loss of income caused by the client's unemployment at its own expense. In case of unemployment for a reason independent of the client, the client is obliged to notify the bank in writing, no later than 3 calendar days after the onset of unemployment and submit the documents requested by the bank. However, the client will be released from the obligations under this agreement only to the extent that the bank will be reimbursed by the insurance company for the damage caused by such an insurance event. Only the bank will be the user (beneficiary) of such insurance policy, however, the client has the right to refuse such insurance. In accordance with the reservation in the agreement, the client will benefit from unemployment loss insurance in case of filling in the application form (Annex № 9) attached to this agreement. The terms of the insurance implementation are set out in Annex 10 to this agreement.
3. The loan agreement of 27 August 2007 contains № Annex 10, which deals with the terms of unemployment insurance for mortgage borrowers. It is concluded between a particular insurance company and the plaintiff. However, Annex 9 is not drawn up.
4. The first instance interviewed a witness - a credit expert, who said that clients were given unemployment insurance as a gift, which included the period of the loan agreement. In case of job loss, the bank would be compensated for lost income by the insurance company.
5. The natural person has lost his job, procedurally fulfilled the obligation within 3 days.
6. The Bank disputes the existence of the agreement as Annex 9 has not been signed and demands a full refund.

Result: The first instance did not comply with the bank's request, and the Court of Appeals upheld the decision.

Important definition:

The Chamber of Appeals paid attention to Article 342 of the Civil Code of Georgia (hereinafter - the Criminal Code), which strengthens the definition of standard terms of the contract. The Court considered that the impugned reservation of the contract was a pre-established condition of multiple-use, which is imposed by one party (in this case the bank) on the other party (in this case the debtor). This is confirmed by the testimony of a credit expert questioned as a witness in a court of first instance, according to which clients were given unemployment insurance as a gift, which covered the period of the loan agreement. Taking into account the testimony of the witness, the Chamber of Appeals considered that at the time of the conclusion of the agreement, the said condition existed globally in the loan agreements and it was not the subject of individual negotiations between the parties. The impugned reservation, as already noted by the court, allows for its various interpretations that indicate to its ambiguity, whereas under Article 345 of the same Code, the ambiguity of standard terms must always be resolved in favor of the other party. It is noteworthy that the object of compulsory unemployment insurance protection is the consumer. Accordingly, resulting from the purpose of the object of protection, using both logical and literal methods, the Court of Appeals held that the impugned condition of the agreement between the parties did not include the performance of an action subject to the client's will. This means that if a bank representative had not submitted №9 to him for signature, he could have assumed that signing the main contract would automatically mean the introduction of compulsory unemployment insurance, especially if, according to a credit expert interviewed as a witness, it was established that Clients were given an explanation of the insurance orally and no other documents were signed.

A different interpretation of this norm would have an anti-consumer result, which would be contrary to the principles of consumer protection strengthened by the acts of both national and international law. Although the Chamber of Appeals has taken into account the non-binding/recommendatory nature of EU legal instruments (directives, regulations) for Georgia, due to the importance of the Association Agreement and the importance of commitment of Georgia to implement the good standard established by the European Union, for the purposes of the dispute under consideration, the Chamber of Appeals considered it important to review the existing directives in the field of consumer protection in the European Union and the practice established by the European Court of Justice.

EU Directive 93/13/EEC on unfair contract terms is directly related to the dispute under consideration[29]

The directive provides for three main mechanisms for the protection of consumers: 1) when the condition is not unequivocally unjust, but is ambiguous/vague and/or its content is doubtful, such a condition must always be interpreted in favor of consumers (Ar.5.1), 2) An unfair standard condition is unconditionally void, it is not considered obligatory for the consumer from the moment of conclusion, it does not apply in cases when the consumer does not request the invalidity of the condition (Ar.6) C-137-08 (par.49), and 3) Consumers who consider themselves victims of unfair terms have the right to use an effective legal mechanism to protect themselves from unfair terms.

In addition, in its judgments at different times, C-137-08 (par.46), C-40/08, C-240/98, the European Court of Justice has indicated that the consumer protection system governed by this Directive is based on the idea that that the consumer is a "weak side" compared to the supplier, not only because of the lack of ability to negotiate, but also because of its low level of awareness of the standard.[30]

## 6. Court practice in the European Union (ECJ – Europian court of justice)

The ECJ is a court applied by local courts of EU member states for a fair interpretation of EU law. Entrepreneurial entities also apply in exceptional cases if they realize that their rights set out in directives are being violated.[31] The ECJ provides the clarification of the norms, uses security measures, annuls EU legal acts, ensures the work of the relevant structures of the EU (Parliament, Commission), reviews complaints in this regard and, at last, imposes sanctions on EU institutions.

As mentioned above, local courts apply to the ECJ for non-compliance of the national law of the Member State with the directives and/or for elimination of ambiguity in the norm of the Directive. There is no perfect act on earth, all of them needs refinement and explanation of norms, therefore neither directives have become an exception and too many times their norms has caused confusion for the parties. Below I will discuss an important decision in terms of consumer protection.

### 6.1 Case C-240/98 - Contract with the customer and unfair terms

*Facts:*

[29] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013 [L.s.07.01.2021].
[30] See Judgment of the Supreme Court, Case No. 237-2019, May 17, 2019.
[31] <<https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en>>[L.s.07.01.2021].

1. On May 24, 2004, the company Asturcom and Mrs Rodríguez Nogueira signed a telephone installment agreement containing an arbitration clause, which contained an arbitration provision according to which any dispute under the agreement had to be settled by an arbitration, known as de Areschie e Eididasad ((European Union Arbitration in Law and Capital) (AEADE). The place of this arbitral tribunal, which is not indicated in the agreement, is located in Bilbao.

2. After Mrs Rodríguez Nogueira failed to pay the full amount and terminated the agreement before the agreed minimum subscription period expired, Asturcom began an arbitration hearing against her before AEADE.

3. On 14 April 2005, Ms Rodríguez Nogueira was charged in the amount of EUR 669.60 by decision of the arbitration.

4. Ms Rodríguez did not take part in the arbitration, she was not given the opportunity to express her opinion because in fact, appearing before the tribunal was associated with great expenses for her.

5. On October 29, 2007, for the purpose of enforcing the arbitral award, Asturcom filed A decision of the tribunal to the Juzgado de Primera Instancia (Court of First Instance) No de Bilbao (Spain) that has entered into force, the term of which has already been missed by the consumer.

Several issues arose in court. The fairness of this rule in relation to the consumer's right was unequivocally questioned, in addition, the court and arbitration are deprived of the opportunity to check the fairness of the case in accordance with national law if the case concerns a decision that has already entered into legal force. However, for Ms. Rodríguez, the present arbitration reservation, which did not even indicate the location of the tribunal, and where the arrival of the customer is more expensive than the contract itself - is clearly an unfair record.

The Court therefore referred to the ECJ with following issues: According to [Directive 93/13], does the court have the right to nullify an unfair provision at the stage of enforcement of an arbitral award when a decision has already entered into force?

*Legal assessment and conclusion:*

First of all, the court made an explanation of what the Directive 93/13 serves and what legal consequences might result from its implementation. Since the consumer is a weak side who does not have the power to negotiate and trade, even his/her acquaintance with an unjust norm cannot cause the enterprise to change the standard condition,[32] therefore, the directive is very strict and directly emphasizes the right of the consumer not to be bound by an unfair condition since such a norm is not binding in nature. Accordingly, the national court must have the inquisitorial power to investigate itself and, if any, to annul an unjust norm against the consumer. The Court clarifies that the above provision is a fundamental and starting point in the field of consumer protection. However, the present case is absolutely different from all existing cases, given the fact that Mrs Rodríguez did not use the time limit for appeal and waited for the decision to enter into force. Under Spanish civil law, there is a 2 (two) month appeal period after which the decision enters into force. The course of calculating the deadline for filing an appeal starts from the day of its delivery to the party. Sometimes the Court of Justice has dealt with questions as to whether this time limit for appeal was reasonable. In this case, however, neither side has questioned the issue and has not appealed the timeliness. Therefore, we consider that the 2-month appeal period is absolutely fair and expedient.

[32] See similar ECJ JUDGMENT C-240/98 to C-244/98 Océano Grupo Editorial and Salvat Editores [2000] ECR I-4941, paragraph 25, and Case C-168/05 Mostaza Claro [2006] ECR I-10421, paragraph 25.

Therefore, using the principle of proportionality, it should be determined if there is an effective balance between contractual freedom/legislation on the one hand, which gave the parties the right of drawing up points as well as appealig, and on the other hand, on the obligation of the court, whether it should fully protect the right of the consumer in the part of enforcement!!

The Court of Justice has strictly clarified, whether it is contrary to the public order and imperative law of the country to enter into the content of a decision that has entered into force, even to protect the rights of the consumer, it is part of national law. The ECJ certainly cannot interfere in the domestic politics of the Member States, nor does it have the competence to do so. It is simply up to the national court to examine whether it or the tribunal has the right to nullify a norm the appealing deadline of which has expired. Whether this provision is contrary to public policy is a matter for the national court. As for the circumstances of the case, it is really clear that the place of arbitration was not clear to the consumer even from the contract itself, even if this issue was clear, the consumer would not have the power to change it. This provision substantially violates the right of the consumer and is unconditionally void if the consumer uses the right of appeal. However, in terms of enforcement, how the National Court defines the invalidity is its domestic policy. In some countries, the rights of the consumer are protected at such a high level that even during enforcement the judge may not enforce this part of the norm. It is also interesting to know whether the arbitral tribunal had the power to consider whether the right of the consumer in the given contract was contrary to public order and the policy of the country. With this provision, it will be even more possible to invalidate the arbitral award and refuse its enforcement. Accordingly, it is the policy of the Spanish Government to what extent and how it protects the rights of its own consumers and whether the enforcement of this case is inconsistent with public order.[33]

**Conclusion**

The present article demonstrates the very important role of consumer's rights in contract law. Obligation to protect "the weak party" is the fundamental principle of a democratic country.

The EU law managed to delineate consumer rights. In this article we review only contractual protection guarantees, nevertheless, in the present reality, their rights are guaranteed almost in every aspect.

The Association Agreement also obliges us to work in this direction and to adopt solid legislative acts.

The article demonstrates the role of the Georgian court, also how important is the analysis of international law and practice.

I truly wish for every judge to have an opportunity to get acquainted with the practice of the Court of Justice and to share their useful advice/recommendations. This is the exact purpose of this scientific article, to help Georgian consumers get acquainted with their rights and to put them into realization, and for practicing lawyers to develop a defensive strategy.

[33] ECJ Judgment Case C-40/08, 6 October 2009.

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