

Case Note

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Reading Consumer Protection in the EU Constitutional Context: What Does ‘Consumer Protection Is Not Absolute’ Mean?

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Abstract: In *Novo Banco SA – Sucursal en España and Others v C F O and Others*, the Court of Justice of the EU held that ‘consumer protection is not absolute’ but may be limited by the Union’s general interest in maintaining financial stability and preventing systemic risk. While the idea that consumer protection is not absolute is not new, the Court’s specific reasoning in this case marks a notable departure from earlier rulings, such as *Gutiérrez Naranjo and Bank M*, where it dismissed similar arguments when interpreting EU consumer law. The Court’s position in *Novo Banco* appears to be informed by unique legal and institutional circumstances – specifically, the reorganisation measures adopted by a national central bank for a failed bank. Nonetheless, the judgment signals a more constitutionally holistic approach to consumer protection and suggests a pathway towards a more balanced view of consumer protection contextualised within the EU’s constitutional framework.

Keywords: EU consumer law; consumer protection; constitutionalisation; financial stability; unfair terms

1 Introduction

The decision of Joined Cases C-498/22 and C-500/22 (hereinafter ‘*Novo Banco*’)¹ adds another sequel to the fallout from the failure and resolution of the

¹ Joined Cases C-498/22 to C-500/22 *Novo Banco SA – Sucursal en España and Others* [2024] ECLI:EU:C:2024:686.

Judgment of the Court of 5 September 2024, Joined Cases C-498/22 and C-500/22, *Novo Banco SA – Sucursal en España and Others v C F O and Others*.

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Portuguese credit institution Banco Espírito Santo ('BES').² In this judgement, particularly in the context of Case C-498/22, the Court of Justice of the EU ('CJEU' or 'the Court') clarified how reorganisation measures taken for a failed credit institution impact consumers' reimbursement claims under the Unfair Contract Terms Directive ('UCTD').³

In Case C-498/22, a consumer had made payments under a 'floor' clause in a mortgage loan contract initially concluded with BES, but the Spanish Supreme Court later found this clause to be unfair. Per Article 6(1) UCTD, which provides that unfair terms shall 'not be binding on the consumer', the consumer sought to claim reimbursement of the sums unduly paid. However, in August 2014, following BES' financial difficulties, the Bank of Portugal adopted resolution measures for BES and transferred its certain assets and liabilities to a newly set up bridge bank, Novo Banco. Importantly, according to the reorganisation measures, this transfer nonetheless excluded certain liabilities, including 'all the claims and indemnities related to the alleged annulment of certain terms of loan contracts in which BES was the lender'. As a result, Novo Banco refused to reimburse the consumer, arguing that this liability remained with BES.

This raised a dilemma: If the effects of the reorganisation measures by the Bank of Portugal were to be recognised in another Member State according to EU law,⁴ the effectiveness of Article 6(1) UCTD could be compromised, as the consumer would be unable to recover unduly paid sums from BES due to its insolvency, thereby being forced to bear the financial consequences of an unfair term. In this light, the referring court requested a preliminary ruling from the CJEU, asking for clarification on the compatibility of the effects of these reorganisation measures with the fundamental right to property under Article 17 of the Charter of Fundamental Rights of the EU ('CFREU' or 'the Charter'), the principle of a high level of consumer protection under Article 38 of the Charter, Article 6(1) UCTD and the general principle of legal certainty.

² Case C-396/19 P *ECB v Espírito Santo Financial Group* [2020] ECLI:EU:C:2020:845; Case C-504/19 *Banco de Portugal and Others* [2021] ECLI:EU:C:2021:335; Case C-83/20 *BPC Lux 2 Sàrl and Others* [2022] ECLI:EU:C:2022:346.

³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

⁴ The core issue in *Novo Banco* revolves around Article 6 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions, which mandates the publication of reorganisation measures. Specifically, the referring Spanish Supreme Court is uncertain about the obligation of Spanish courts to recognise the effects of the reorganisation measures adopted by the Bank of Portugal because those measures were not published as required by Article 6.

2 The CJEU's Ruling

The CJEU first recalled its interpretation of Article 6(1) UCTD in *Gutiérrez Naranjo*⁵ and *Bank M*,⁶ highlighting that the purpose of Article 6(1) is to 'restor[e] the consumer to the legal and factual situation in which that person would have been in if that term had not existed'.⁷ This typically entails a restitutionary obligation on the business.⁸ By doing so, the CJEU is basically confirming that the consumer's claim for reimbursement in the referred case is indeed merited and can, in principle, be upheld.

However, the CJEU goes on to explain why this case does not fall under the 'in principle' situation. As previously acknowledged by the CJEU, though guaranteed by Article 38 CFREU, 'consumer protection is not absolute'.⁹ Given that 'ensuring the stability of the banking system [and] preventing a systemic risk' constitute 'objectives of general interest pursued by the Union' in the sense of Article 52(1) CFREU, the CJEU concluded that consumer protection 'cannot go so far as to ignore the allocation of financial liabilities between a failing credit institution and a bridge bank' as determined in the reorganisation measures adopted by the home Member State.¹⁰ Otherwise, if the home Member State – in this case, Portugal – has assigned the liability for claims under Article 6(1) UCTD to the failing bank, but consumers in other Member States are still able to sue the bridge bank, then Portugal's measures, aimed at 'ensuring protection of the stability of the banking system', could be rendered ineffective across all other Member States where the failing bank has branches.¹¹ The CJEU thus ruled that the measures to retain the obligations arising from Article 6(1) UCTD with the failing bank are compatible with the said provision and Article 38 CFREU.

This conclusion is further supported by the Court's analysis of Article 17 CFREU on the right to property and the general principle of legal certainty. First, following AG Richard de la Tour,¹² the CJEU is apparently of the view that a consumer's restitutionary claim under Article 6(1) UCTD should be protected by Article 17 CFREU as a proprietary interest.¹³ Therefore, the reorganisation measures not only have an

5 Joined Cases C-154/15 and C-307/15 *Gutiérrez Naranjo* [2016] ECLI:EU:C:2016:980.

6 Case C-520/21 *Bank M* [2023] ECLI:EU:C:2023:478.

7 Joined Cases C-498/22 to C-500/22 *Novo Banco*, para 139.

8 *Ibid*, para 140.

9 *Ibid*, para 141.

10 *Ibid*, para 144.

11 *Ibid*, para 145.

12 Opinion of Advocate General Richard de la Tour on Joined Cases C-498/22 to C-500/22, delivered on 21 March 2024, para 111.

13 Joined Cases C-498/22 to C-500/22 *Novo Banco*, paras 112–113. It is worth noting that the right to property under Article 17 of the Charter is broadly defined as 'rights with an asset value creating an

impact on Article 38 but also on Article 17 of the Charter. Similar to consumer protection, the right to property is ‘not absolute’ but is subject to Article 52(1) CFREU, which explicitly permits limitations on Charter rights under certain conditions. The key analysis in this regard concerns whether the limitations imposed by the reorganisation measures on a consumer’s right to property are ‘necessary and genuinely meet objectives of general interest recognised by the Union’ in line with ‘the principle of proportionality’. The Court’s answer is positive. As mentioned, ‘ensuring the stability of the banking system [and] preventing a systemic risk’ fall under ‘objectives of general interest’, and the proportionality test is also satisfied as the ‘reorganisation measures make sense only if the liabilities and assets of the failing credit institution, namely, here, BES, are triaged in order to achieve the objectives of general interest pursued by those measures’.¹⁴ As to the principle of legal certainty, the CJEU again invoked ‘an aim of general interest’ to justify its disapplication to the cases at hand.¹⁵ Clearly, financial stability as a general interest plays a central role in *Novo Banco*.

3 Comment: A Step Closer to a Constitutionally Holistic Approach to Consumer Protection?

3.1 Consumer Protection is not absolute... But what does it mean?

The CJEU’s ruling in *Novo Banco* aligns with the broader trend of the constitutionalisation of European private law, where private law doctrines are increasingly interpreted and applied in view of EU fundamental rights and constitutional principles.¹⁶ Since *Aziz*,¹⁷ the CJEU has made frequent references to

established legal position under the legal system concerned, enabling the holder to exercise those rights autonomously and for the holder’s own benefit’, see para 109. This is also in line with the case law of the European Court of Human Rights on Article 1 of Additional Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, see para 112.

¹⁴ *Ibid.*, paras 120–123.

¹⁵ *Ibid.*, paras 131–132.

¹⁶ See, for example, A. Colombi Ciacchi, ‘The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice’ (2006) 2 *European Review of Contract Law* 167; H.-W. Micklitz (ed), *Constitutionalization of European Private Law* (Oxford: Oxford University Press, 2014); H. Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Cambridge: Intersentia, 2017); Ch. Mak and B. Kas, *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (London: Bloomsbury Publishing, 2023).

¹⁷ Case C-415/11 *Aziz* [2013] ECLI:EU:C:2013:164, in particular para 61. The reasoning in this case has been described as ‘hidden constitutionalisation’, see G. Comparato and H.-W. Micklitz, ‘Regulated

fundamental rights in interpreting the UCTD, notably Article 7 CFREU (the right to accommodation),¹⁸ Article 38 CFREU (consumer protection)¹⁹ and Article 47 CFREU (the right to an effective judicial remedy).²⁰ General principles of EU law were also invoked, such as the principle of effectiveness²¹ and the principle of proportionality.²² In most instances, the effects of these rights and principles remain rather procedural. For example, in a well-known line of cases regarding mortgage contracts, the CJEU only invoked the right to housing when evaluating the effectiveness of national procedure law (to ensure that it is not procedurally impossible for consumers to challenge a term), but not when assessing the fairness of the relevant contract term itself.²³

Increasingly, however, these rights and principles are taking on a more substantive role in the assessment of unfairness as such and in determining the appropriate remedy after removing an unfair term.²⁴ In *Novo Banco*, Article 6(1) UCTD was interpreted in light of Article 17 and Article 38 CFREU, alongside the principle of legal certainty. This constitutionalised approach has a bearing on the material scope of Article 6(1) UCTD and thus consumers' substantive rights under it: when the stability of the banking system is at stake, consumers may be deprived of their valid legal rights under Article 6(1).

In this way, *Novo Banco* provides greater clarity on what 'consumer protection is not absolute' means within the EU legal order. Though this statement is not new, its exact meaning remains unclear. In relation to what competing interests is consumer

Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU', in *General Principles of EU Law and European Private Law* (Alphen aan den Rijn: Kluwer Law International, 2013) 140.

¹⁸ For example, Case C-34/13 *Kušíonová* [2014] ECLI:EU:C:2014:2189, para 65; Case C-598/21 *VÚB Bank* [2023] ECLI:EU:C:2023:845, para 85.

¹⁹ For example, Case C-470/12 *Pohotovosť* [2014] ECLI:EU:C:2014:101, para 52; Case C-34/13 *Kušíonová*, para 47.

²⁰ For example, Case C-472/11 *Banif Plus Bank* [2013] ECLI:EU:C:2013:88, para 29; Case C-470/12 *Pohotovosť*, para 53.

²¹ For example, Case C-415/11 *Aziz*, para 53.

²² For example, Case C-520/21 *Bank M*, paras 73–74.

²³ J. Rutgers, 'The Right to Housing (Article 7 of the Charter) and Unfair Terms in General Conditions', in Collins (ed), n 16 above.

²⁴ For example, respectively, Case C-598/21 *VÚB Bank* (where, referring to Articles 7 and 38 of the Charter and the principle of proportionality, the Court suggested that an acceleration clause could be unfair if it allows the lender to enforce the sale of the consumer's family home after only a few missed instalments, as this would constitute a disproportionate restriction on the consumer's right to housing); Case C-520/21 *Bank M* (where, referring the principle of proportionality, the Court permitted consumers to seek additional compensation from the financial institution beyond the amounts paid, provided that such claims do not 'go[] beyond what is necessary to achieve the objectives [of the Directive]').

protection not absolute? And to what extent is consumer protection not absolute? To clarify these questions, I have surveyed 14 cases predating *Novo Banco* in which the CJEU explicitly made this statement, revealing at least four concrete judicial expressions of this principle.

First, in an interpersonal sense, this principle is intended to ensure a fair distribution of risks between consumers and businesses. For example, consumers may lose their right to withdraw once the performance has been rendered in full, even in the absence of notification,²⁵ or consumers may assume certain obligations towards traders when exercising their right of cancellation.²⁶ Second, the non-absolute notion has also been used in a very narrow, arguably misguided,²⁷ sense to define the scope of an exception to an EU directive. Here, it is ruled that such a (legislative) exception cannot be interpreted too narrowly.²⁸ Thirdly, consumer protection is not absolute in relation to the principle of legal certainty, particularly *res judicata* that upholds ‘stability of the law and legal relations, as well as the sound administration of justice’.²⁹ Accordingly, establishing reasonable time-limits for consumers to bring proceedings is allowed by EU law, even if it compromises consumers’ right to challenge an unfair term in cases where the deadline has passed.³⁰ The same holds true for national rules on procedural finality (e.g. an arbitral award), even if this would deny remedies to consumers bound by an unfair term that was mistakenly not removed by that procedure.³¹ Fourthly, consumer protection is also limited by the remedial autonomy of the Member States. That is, procedural requirements imposed on consumers, such as the obligation ‘to produce certain evidence in support of [their] claim’, do not in itself deprive the consumers of effective judicial protection.³²

²⁵ Case C-412/06 *Annelore Hamilton v Volksbank Filder* [2008] ECLI:EU:C:2008:215.

²⁶ Case C-215/08 *E. Friz* [2010] ECLI:EU:C:2010:186.

²⁷ St. Weatherill, ‘Consumer Protection under EU Law “Is Not Absolute”: Yes, but Be Careful!’ (2012) 8 *European Review of Contract Law* 221.

²⁸ Case C-166/11 *González Alonso* [2012] ECLI:EU:C:2012:119.

²⁹ Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECLI:EU:C:2009:615, para 36.

³⁰ Joined Cases C-154/15 and C-307/15 *Gutiérrez Naranjo*, para 69, citing Case C-40/08 *Asturcom Telecomunicaciones*, para 41; Joined Cases C-698/18 and C-699/18 *Raiffeisen Bank* [2020] ECLI:EU:C:2020:537, para 56; Joined Cases C-224/19 and C-259/19 *Caixabank* [2020] ECLI:EU:C:2020:578, para 82; Case C-485/19 *Profi Credit Slovakia* [2021] ECLI:EU:C:2021:313, para 57; Joined Cases C-776/19 to C-782/19 *BNP Paribas Personal Finance* [2021] ECLI:EU:C:2021:470, para 32.

³¹ Joined Cases C-154/15 and C-307/15 *Gutiérrez Naranjo*, para 68, citing Case C-40/08 *Asturcom Telecomunicaciones*, para 39; Case C-421/14 *Banco Primus* [2017] ECLI:EU:C:2017:60, para 47; Case C-869/19 *Unicaja Banco* [2022] ECLI:EU:C:2022:397, para 33; Joined Cases C-693/19 and C-831/19 *SPV Project 1503* [2022] ECLI:EU:C:2022:395, para 58; Case C-600/19 *Ibercaja Banco* [2022] ECLI:EU:C:2022:394, para 42; Case C-531/22 *Getin Noble Bank* [2024] ECLI:EU:C:2024:58, para 57.

³² Case C-483/16 *Sziber* [2018] ECLI:EU:C:2018:367, para 50.

As we can see, these instances either pertain to the balancing of *private* interests (Category 1) or to the *procedural* aspects of consumer protection (Categories 3 and 4).³³ Until now, the CJEU has not rejected the absolute protection of EU consumers based on any *substantive* grounds of *public* interests or broader socio-economic contexts. *Novo Banco* has addressed this gap. The CJEU in *Novo Banco* was rather unequivocal in holding that the exercise of consumer rights should be subject to the ‘objectives of general interests’ of the EU, including the stability of the banking system.

Methodologically, this aligns with Article 52(1) of the Charter, which refers to ‘objectives of general interests’ as a ground for limiting Charter rights. Note, however, that in *Novo Banco*, unlike its analysis of the right to property under Article 17 CFREU, the CJEU made no direct reference to Article 52(1) in its reasoning regarding consumer protection under Article 38 CFREU. This is probably because the Charter distinguishes between ‘rights’, such as Article 17, and ‘principles’, such as Article 38, and Article 52(1) only applies to the former.³⁴ Of course, this does not imply that principles are absolute; quite the contrary, principles appear to have less force than rights, evident in the wording chosen for principles, such as ‘recognise’, ‘respect’ or ‘ensure’³⁵ and their lack of self-standing justiciability.³⁶ Instead, Article 52(1) should be construed as meaning that by their nature, principles allow the EU and its Member States a considerable degree of discretion in implementation, so a broader array of policy objectives should already be taken into account in deciding whether there was a violation of the principle in the first place.³⁷ Regarding consumer protection, while it is one of the important objectives set out by the Treaties and the Charter, it is not the only one. The phrase ‘a high level of consumer protection’ in Article 38 of the Charter – as opposed to the ‘highest level’³⁸ – already betrays its non-absolute nature, as the determination of the optimal level of protection ultimately relies on the right balancing of consumer protection with other policy objectives and general interests of the EU. Nonetheless, I am of the view that, in order to achieve greater

33 Category 2 is not discussed here because, while it does concern the substantive interpretation of (the exceptions to) consumer rights, the balancing was ultimately made at the legislative level. Moreover, it contradicts the general stance of the Court that exceptions in EU law should be interpreted restrictively.

34 See, generally, T. Lock, ‘Rights and Principles in the EU Charter of Fundamental Rights’ (2019) 56 *Common Market Law Review* 1201.

35 For example, Article 36–38 of the Charter.

36 See Article 52(5) of the Charter.

37 M. Kellerbauer, M. Klamert and J. Tomkin, *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford: Oxford University Press, 2021) 2250.

38 Case C-233/94 *Germany v Parliament and Council* [1997] ECLI:EU:C:1997:231, para 48 (‘no provision of the Treaty obliges [EU] legislature to adopt the highest level of protection which can be found in a particular Member State’).

methodological coherence, Article 52(1) CFREU should be a reference point even when considering the limitations to consumer protection and other Charter principles.

3.2 Consumer Protection is not absolute... But has it always been the case?

It seems to be ‘settled case-law’ that consumer protection is not absolute. Unfortunately, this is not the case. Particularly in the context of the UCTD, the Court has, on numerous occasions, narrowly defined its objective as solely to protect the consumers. While, as discussed, the Court has considered a fair distribution of risks between the parties when applying consumer law, in *Banco Santander*, it held that the UCTD aims ‘to prevent an imbalance [...] to the detriment of consumers’ and not ‘to guarantee an overall contractual balance’.³⁹

As to general public interests, the CJEU has displayed an even more hesitant attitude. In *Gutiérrez Naranjo*, the CJEU was asked by the Spanish Supreme Court whether the restitution effects under Article 6(1) UCTD could be restricted to undue payments made only after the judicial declaration that a term – in this context, the ‘floor’ clause – is unfair. As argued by AG Mengozzi, given the ‘endemic nature of the use of “floor” clauses’ in Spanish practices, consumer protection must be balanced with ‘the macroeconomic challenges to the already weakened banking system of [Spain]’.⁴⁰ Without a temporal limit on consumers’ refund claims, a surge of lawsuits could flood into the courts and further destabilise Spain’s financial system already strained by the housing market crisis.⁴¹ However, the final judgment delivered by the CJEU disregarded this macroeconomic aspect and was strongly in favour of the effective protection of individual consumer rights.⁴² Likewise, in *Bank M*, the CJEU

³⁹ Joined Cases C-96/16 and C-94/17 *Banco Santander* [2018] ECLI:EU:C:2018:643, para 69.

⁴⁰ Opinion of Advocate General Mengozzi on Joined Cases C-154/15 and C-307/15, delivered on 13 July 2016, para 72.

⁴¹ It is estimated that more than 3.5 million mortgages are affected and that banks potentially have to pay back an amount of 3.000–5.000 million euros, see ‘Unos 3,5 millones de afectados por las cláusulas suelo: Cataluña, Madrid y Andalucía donde más hay – idealista/news’ (22 December 2016) <<https://www.idealista.com/news/finanzas/hipotecas/2016/12/22/744706-unos-3-5-millones-de-afectados-por-las-clausulas-suelo-cataluna-madrid-y-andalucia>> accessed 30 October 2024; Claudi Pérez, ‘La justicia europea obliga a la banca a devolver todo lo cobrado por “cláusulas suelo”’ *El País* (21 December 2016) <https://elpais.com/economia/2016/12/21/actualidad/1482306332_458117.html> accessed 30 October 2024.

⁴² Joined Cases C-154/15 and C-307/15 *Gutiérrez Naranjo*. See Ch. Mak, ‘Gutiérrez Naranjo – On Limits in Law and Limits of Law’, *Amsterdam Law School Research Paper No 2017-38*, *Centre for the Study of European Contract Law Working Paper Series No 2017-06*.

blatantly stated that the stability of the financial markets is ‘not relevant’ to the interpretation of the UCTD, which is ‘intended to protect consumers’, and thus cannot be used to circumvent this objective.⁴³ Banks have a duty ‘to organise their activities in a manner which complies with [the UCTD]’ and have to bear the adverse financial consequences of their illegal actions.⁴⁴

However, in stark contrast to its position in *Gutiérrez Naranjo* and *Bank M*, the CJEU in *Novo Banco* openly embraced the stability of the financial system as a balancing factor in delimiting the effects of the UCTD. The immediate question is: Why? We can find some traces of evidence in the judgment itself and in AG Richard de la Tour’s Opinion. According to the CJEU, ‘the existence, in the present case, of reorganisation measures adopted by the competent Portuguese authority in respect of BES [makes] the present cases clearly differ from [*Gutiérrez Naranjo*]’.⁴⁵

Why does the existence of reorganisation measures create such a marked difference? Why do the reorganisation measures create such a marked difference? First, the mutual recognition of the effects of reorganisation measures, including their impact on consumers’ claims under the UCTD, is a mandate derived from EU law, namely Directive 2001/24. In *Novo Banco*, while the CJEU’s ruling *limited* the effectiveness of the UCTD, a reverse decision would likely render Directive 2001/24 *entirely* ineffective.⁴⁶ Second, and related, if the reorganisation measures are completely ineffective, ‘given the highly integrated nature of the banking markets in the European Union, the failure of one credit institution may have the knock-on effect of causing systemic damage affecting the stability of those markets and the stability of the EU internal market more generally’.⁴⁷ Third, AG Richard de la Tour pointed out that, while *Gutiérrez Naranjo* was concerned with ‘the protection of just one consumer’, the reorganisation measures discussed in *Novo Banco* were ‘to ensure the stability of the financial system and therefore, ultimately, the systemic protection of other consumers, customers of the bank and of the banking system more broadly’.⁴⁸ In any case, ‘consumer protection does not extend as far as guaranteeing the reimbursement of overpaid interest in the event of the failure of the

⁴³ Case C-520/21 *Bank M*, para 83.

⁴⁴ *Ibid.* In other contexts not directly related to the UCTD, the CJEU more explicitly stated that ‘the importance of the objective of consumer protection [...] may justify even substantial negative economic consequences for certain economic operators’, see, for example, Case C-28/20 *Airhelp* [2021] ECLI:EU:C:2021:226, para 50.

⁴⁵ Joined Cases C-498/22 to C-500/22 *Novo Banco*, para 146.

⁴⁶ See *ibid.*, para 145.

⁴⁷ *Ibid.*, para 146.

⁴⁸ Opinion of Advocate General Richard de la Tour, para 131.

debtor bank’,⁴⁹ which seems to flow from the very logic of insolvency law, where compromising creditor interests is part of its institutional design.

It is hard to say whether such differentiation is convincing. On the one hand, the context of reorganisation does set *Novo Banco* apart from the other cases, as only ‘the adoption of [reorganisation] measures in the banking sector’ directly corresponds to the general interest of financial stability,⁵⁰ rather than any measure that might have an indirect bearing on it. On the other hand, why does the CJEU only consider the macroeconomic impact when the bank has already failed? Isn’t it equally important to prevent credit institutions from failing in the first place? ‘The knock-on effect’ could be more effectively mitigated if the systemic impact of consumer protection is considered from the onset. Even from the perspective of consumer protection, I fail to see how *Gutiérrez Naranjo* is about ‘the protection of just one consumer’ – especially given the widespread use of floor clauses in Spain.

At the same time, it is true that credit institutions should not profit from their illegal operations, under the impression that they are ‘too big to fail’ and can thus take undue risks. Moreover, there is also an institutional dynamic at play. But this preventative rationale no longer applies if the institution is already undergoing reorganisation. Compared to devising its own pre-emptive measures, the Court may be more willing to uphold a reorganisation scheme already adopted by a competent institution – one that is presumably better equipped to determine what is needed for ‘ensuring the stability of the banking system [and] preventing a systemic risk’ and thus what is ‘necessary and genuinely meet[s] objectives of general interest pursued by the Union’. This institutional interplay warrants the Court’s deference to the competent institution, especially given that Article 52(1) CFREU assigns judicial balancing to ‘rights’ and thereby leaves the discretion to implement ‘principles’ to the relevant institution.

3.3 Consumer Protection is not absolute... But where does it lead us?

Granted, the outcome of *Novo Banco* seems rather contingent on the specific context of the implementation of reorganisation measures for a failed bank. The Court, however, could have reached its conclusion by focusing solely on the effectiveness of EU (insolvency) law, without invoking the far-reaching notion of ‘objectives of general interest’ – especially as this marks a clear departure from its

⁴⁹ *Ibid*, para 132.

⁵⁰ Joined Cases C-498/22 to C-500/22 *Novo Banco*, para 120.

previous jurisprudence. As such, we should explore the broader implications of this case to tease out the constitutional outlook of EU consumer protection further.

As argued, Article 52(1) CFREU should be a reference point when finetuning the optimal level of consumer protection in view of ‘objectives of general interest recognised by the Union’. Even if we concede that the relevant institution is better positioned to determine *how* to implement ‘a high level of consumer protection’ as a Charter ‘principle’ in relation to other policy objectives, the Court still has – and should have – a say in verifying, articulating and spotlighting *what* constitutes the ‘objectives of general interest’ within the EU constitutional framework. To wit, while the Bank of Portugal’s discretion to prioritise a successful re-organisation over consumer protection should be respected in this case, it is the CJEU that has clarified and affirmed that the adoption of reorganisation measures in the banking sector indeed aligns with the Union’s general interest. In doing so, the CJEU exercises its constitutional authority to safeguard EU values, yet in a dialogic manner – by making a clear policy statement and promoting a specific notion of the EU common good, while searching for the desirable level of intervention in the light of the EU’s institutional set-up and democratic concerns. In this way, a constitutional holistic approach to consumer protection, viewed as a broader exercise of constitutionalism, serves a pro-democratic function.⁵¹

Note, however, that these procedural constitutional dialogues moderated by the CJEU can lead to varied substantive illustrations of the EU common good. The internal market rationality remains the dominant notion of the common good within the European integration project.⁵² Under its clout, consumer law, traditionally viewed as protective, interventionist and market-restricting, has increasingly been instrumentalised as an empowerment tool for the average consumer to meaningfully participate in and contribute to the internal market.⁵³

51 See, generally, Ch. Mak, ‘The One and the Many: Translating Insights from Constitutional Pluralism to European Contract Law Theory’ (2013) 21 *European Review of Private Law* 1189; O. Gerstenberg, ‘Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts’ (2015) 21 *European Law Journal* 599.

52 M. Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political: Internal Market Rationality’ (2015) 21 *European Law Journal* 572. It is arguable that, in view of the recent legal and policy developments in the EU, the core of EU law is changing, see M. Dawson, ‘The Changing Substance of European Law’ (2024) *European Constitutional Law Review* 1.

53 Ch. Schmid, ‘The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell’, in Ch. Joerges, *European Constitutionalism Without Private Law: Private Law Without Democracy* (Arena, 2011); H.-W. Micklitz, ‘The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic’ (2012) 35 *Journal of Consumer Policy* 283.

Thus, on one end of the spectrum, the internal market rationality mandates a liberal-style European free market. Along this line, fundamental rights can be mobilised as yet another justification to entrench the instrumentalist logic of EU secondary legislation in favour of a more integrated single market. Notably, Article 16 of the Charter establishes a freedom to conduct a business, which may have elevated this freedom to an excessively high level.⁵⁴ In one – and hopefully only one – instance, it has even been expanded to include the freedom of contract as a fundamental right, thereby justifying the limitations on workers' right to strike.⁵⁵ Against this backdrop, the ruling in *Novo Banco* could be read as an instrumentalist limitation on consumer protection aimed at fostering greater confidence among investors and businesses in the European financial market, while also signalling the need for a stronger Banking Union.⁵⁶

On the other end of the spectrum, however, a constitutionally contextualised internal market is way more complex than simply a free market. Article 52(1) CFREU foregrounded the constitutional role of 'objectives of general interest pursued by the Union', which, according to the Explanations relating to the Charter, include those 'mentioned in Article 3 of the Treaty on European Union' ('TEU').⁵⁷ While Article 3 TEU specifies the establishment of the internal market as an objective of the EU, it is not the sole objective, nor does it conform to the liberal prototype. The internal market is intended to promote 'the sustainable development of Europe based on balanced economic growth and price stability', 'a highly competitive social market economy, aiming at full employment and social progress' and 'a high level of protection and improvement of the quality of the environment'. Viewing consumer protection as a manifestation of a 'social market economy', it is positive that the CJEU upholds a high level of consumer protection to counter an unfettered conception of business freedom.⁵⁸

At the same time, as indicated by *Novo Banco*, it should also be welcomed that other grounds of public and general interest can serve to problematise an unqualified notion of consumer protection. This is crucial given the staggering social and

54 See, generally, H. Hogan, 'The Origins and Development of Article 16 of the Charter of Fundamental Rights' (2023) 2 *European Law Open* 753.

55 Case C-426/11 *Alemo-Herron* [2013] ECLI:EU:C:2013:521. See St. Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract": Judgment of the Court of 18 July 2013: Case C-426/11, Mark Alemo-Herron and Others v Parkwood Leisure Ltd' (2014) 10 *European Review of Contract Law* 167.

56 See 'Op-Ed: "Novo Banco: Yet Another Illustration of the Need for a Strong(Er) Banking Union"' (*EU Law Live*, 21 October 2024) <<https://eulawlive.com/op-ed-novo-banco-yet-another-illustration-of-the-need-for-a-stronger-banking-union/>> accessed 22 October 2024.

57 Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02.

58 For example, Case C-28/20 *Airhelp*.

ecological implications of mass consumption.⁵⁹ If the CJEU's ruling in *Novo Banco* is not strictly confined to the context of a failed bank's reorganisation, similar reasoning can be applied to limiting consumer protection based on other public interests, such as balancing consumer claims with workers' claims, adjusting consumer remedies in light of public health considerations and restricting unlimited consumer choice to support environmental protection. Such interpretations all pose further complexities such as the extent of restrictions and the need to protect vulnerable consumers. Nonetheless, *Novo Banco* should be read as an invitation to engage in serious discussions to (re-)define what consumer protection should look like in the EU constitutional framework.

4 Conclusions

In *Novo Banco*, the CJEU adopted a constitutionally holistic approach to consumer protection by further clarifying the notion that 'consumer protection is not absolute' within the EU constitutional context. It held that 'a high level of consumer protection' can indeed be limited by the Union's general interest in maintaining financial stability. Marking a notable shift from earlier cases like *Gutiérrez Naranjo* and *Bank M*, the CJEU's position in *Novo Banco* appears to be grounded in unique legal and institutional circumstances – a national central bank has adopted reorganisation measures for a failed bank, whose effects should be recognised across the Union under EU law. Nonetheless, when abstracted from this specific context, the constitutional reasoning in *Novo Banco* suggests a pathway towards a more balanced level of consumer protection – one that aligns with the constitutional mandates of a European social market economy which is pluralist, inclusive and socially and ecologically embedded.

⁵⁹ See, generally, J. Ouyang, "Embedded Consumer": Towards a Constitutional Reframing of the Legal Image of Consumers in EU Law' (2024) 47 *Journal of Consumer Policy* 395.