



The Legal Protection of the Consumer Granted by the National Legislation of Romania and the Jurisprudence on Abusive Clauses in Consumer Contracts in the Light of the Case Law of the CJEU

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Abstract: *The evolution of the law regarding the abusive clauses in contracts concluded between consumers and professionals is increasingly in the focus of the legal doctrine and legal practitioners in Romania, as it contributes significantly to the development of a new contractual justice, respectively to the modification of the function of fairness in consumer contracts. The paper intends to present the situation of consumers under the protection granted by the national legislation in Romania – Law 193/2000 on abusive clauses in contracts concluded between professionals and consumers, the implementing law of Directive 93/13/CEE on unfair contract terms under the impact of the case law of the CJEU. The current realities of the debated situation have inevitably led to the improvement of the consumer protection mechanism, constantly following the solid principles established by the Court of Justice of the European Union in the framework of the preliminary judgments issued on the Directive.*

1. PRELIMINARY CONSIDERATIONS

The provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Council of the European Communities, 1993, p. 29, hereinafter referred to as "Directive"²) have led to a reform of contract law in the Member States which have implemented this legislative instrument, in particular through the important messages conveyed in the preliminary rulings delivered by the Court of Justice of the European Union.

Directive 93/13/EEC is presented as an instrument for regulating the internal market of the European Union, and, consequently, its purpose is primarily to strengthen the internal market and is unrelated to the assessment of the social consequences of declaring contractual terms contained in consumer contracts to be unfair. The interpretations offered by the European Court of Justice of this legislative act are based on the purpose for which it was drafted and are therefore based on market considerations (Jozon, 2017). On the other hand, contract law and the resolution of related domestic issues remain a matter for the national court, to be assessed in the light of the domestic legal rule, but in strict compliance with the guidelines laid down by the Directive.

Since under the auspices of the Directive, consumer law manifests itself as a mechanism for ensuring the effective protection of the internal market and stimulating economic activity (Toader & Lecomte, 2014), it acquires a hybrid nature, with severe implications and sanctions. The nature and importance of the public interest on which consumer protection is based require the Member States to ensure consumer protection at a fundamental level.

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² Transposed into our legislation by Law no. 193/2000 on unfair terms in contracts concluded between professionals and consumers, republished - Official Gazette no. 543 of 03.08.2012

The Court of Justice of the European Union has established the rule that the protection of consumers against unfair terms contained in non-negotiated contracts is a matter of public policy (Court of Justice of the European Union, 2000), requiring national courts to examine, even of their own motion, whether they are fair, having regard to the situation of the consumer concerned (Court of Justice of the European Union, 2000, 2009, 2010, 2014). In so doing, the European Court has thus given the national courts a particularly important role, that of market surveillance (Jozon, 2020). The related legislation has gradually acquired a dual nature, combining private and public law, which has had direct consequences for establishing a new contract law in the Member States.

According to settled case-law, the system of protection implemented under the auspices of Directive 93/13 is based on the idea that a consumer is in a position of inferiority to a professional in terms of bargaining power and level of information, so that we are in the presence of a contract of adhesion to conditions drafted in advance by the seller or supplier, without any power to influence them, much less to amend or add new ones (Court of Justice of the European Union, 2010).

Under these circumstances, the function of contract fairness law acquires new, specific valences, which we intend to capture in this study. We will start our analysis by outlining an analytical and theoretical framework of the defining ideas of the notion of "consumer", taking into account the protection generated under the Romanian legislative framework as it has been established in relation to the guidelines of the Court of Justice of the European Union, and then we will start by capturing the progress in the field of unfair terms, respectively, capturing the social and economic realities.

2. GUIDELINES IN DEFINING THE NOTION OF "CONSUMER"

Directive 93/13/EEC on unfair terms in contracts concluded between consumers and professionals was transposed into Romanian law by Law 193/2000 (Romania, 2012) on unfair terms in contracts concluded between professionals and consumers. By Article 2, parag. (1) of this act establishes that the notion of "*consumer*" shall mean any natural person or group of natural persons constituted in associations, who, under a contract, acts for purposes outside his commercial, industrial or manufacturing, craft, or liberal activity (Toader & Lecomte, 2014).

The consumer is in a position of inferiority to the professional, who has special expertise in his field. The consumer is therefore regarded as a vulnerable subject of law (Ilieș Neamț, 2021), requiring increased and effective legislative protection, with a presumption of ignorance of the information essential for understanding the contractual provisions that he or she assumes, and even less so with regard to the economic and legal consequences that they entail.

The assessment of the consumer's position is primarily related to the extra-professional purpose for which he acts (Scafes, 2021). In other words, the consumer is entitled to all the prerogatives of legal protection strictly so long as he or she is acting to satisfy a personal or family benefit. In this regard, we recall Decision No 441 of March 2, 2016, of the High Court of Cassation and Justice of Romania. (2016), delivered on appeal by the Second Civil Section, in which the court ruled that a natural person who has concluded several credit agreements with a bank for the purpose of refinancing other loans, namely to purchase different real estate that he subsequently rented cannot be included in the category of consumers protected by Directive 93/13/EEC. It is therefore also necessary, when considering whether the consumer is a consumer, to establish the actual purpose of the financing obtained by means of the credit agreement concluded with the trader.

Acquiring the status of consumer is associated with acquiring the status of party to a contract concluded with a professional. The asymmetry between a consumer and a trader must be maintained during the performance of the contract until the legal relationship is finalized.

With regard to the period of time during which the status of consumer is maintained after the termination of the legal relationship, we refer to a landmark judgment of the Court of Justice of the European Union, delivered in Joined Cases C699/18 and C-698/18 ([Court of Mureș, 2019](#)), which concerned referrals communicated by the Specialized Court of Mures, Romania. The European Court ruled that *"Article 2 lit. (b), Art. (1) and Art. (1) of Directive 93/13 and the principles of equivalence, effectiveness and legal certainty must be interpreted as precluding a case-law interpretation of national legislation according to which a legal action for the recovery of sums paid but not due based on an unfair term used in a contract concluded between a consumer and a professional is subject to a limitation period of three years prescription running from the date of full performance of that contract, where it is presumed, without the need for verification, that at that time the consumer should have been aware of the unfair nature of the term in question or where, for similar actions based on certain provisions of national law, the same period does not begin to run until the cause of action has been judicially established."* In other words, once the status of "consumer" has been established, the legal protection and all the implications thereof will last for an unlimited period of time in relation to the contractual relationship in question, without being affected in any way by its finality.

With regard to the sphere of persons covered by the notion of "consumer", we underline that it also includes *the co-debtor*. In support of the foregoing, we note that in Case C-348/14, concerning a reference for a preliminary ruling by a Romanian Court for clarification of certain aspects of Directive 93/13/EEC on unfair terms in consumer contracts and Directive 87/102/EEC on consumer credit, the Court of Justice of the European Union ruled, in essence, that, according to Directive 93/13/EEC: *"the concept of "consumer" covers a natural person who is a joint debtor under a contract concluded with a trader, as long as he is acting for purposes which can be regarded as being outside his trade or profession."*

The system of protection settled by the Directive relates directly to the legal transaction undertaken, respectively to the amount of information held by the consumer in relation to the transaction entered into by the professional ([Scafes, 2021](#)). Thus, the status of "consumer" must be analyzed *in concreto*, being likely that a person who normally acts as a professional in a given legal relationship may take the position of consumer, falling under the auspices of the Directive. In this regard, we have in mind the celebrated judgment of the C.J.U.J.E. of September 3, 2015 delivered in Case C-110/14 concerning a reference for a preliminary ruling under Article 267 TFEU by Oradea Court (Romania), *Horațiu Ovidiu Costea v. Volksbank România S.A.*. In the present case, Mr. Costea, a lawyer, entered into a credit agreement, mortgaged with the building where his lawyer's office was located. The European Court has established that the term "consumer" must be interpreted as having an objective character, being independent of the actual knowledge which the person concerned may have or the information actually available to that person, and the possibility of classifying a lawyer as a "consumer" when he acts outside his professional activity is not excluded.

Once the status of "consumer" is established, the scope of the Directive is determined, and the legal framework regarding the unfairness of the terms complained of is analyzed.

3. THE PROTECTION SYSTEM IMPLEMENTED BY ROMANIAN LEGISLATION

In light of the Principle of Procedural Autonomy (Orza, 2019) conferred on the Member States, enshrined in the provisions of Article 8, para. (1) of Directive 93/13 read in conjunction with the provisions of preamble 21 of the same normative act, the manner of the procedures designed to guarantee the protection of the rights of individuals before the Courts is a matter for the internal legal order of the Member States (Court of Justice of the European Union, 2013). Under the auspices of this autonomy, the Romanian legislature has established the regime of absolute nullity as applicable to unfair terms (Terzea, 2021). The main rule governing absolute nullity is that it may be invoked by any interested person, at any time, and is not subject to any statute of limitations (Article 1249 of the Romanian Civil Code) (Brațu, 2020). Moreover, this sanction is best suited to the spirit and objective of high-level consumer protection in relation to unfair contractual terms. It is also fully consistent with the principles of equivalence and effectiveness of Union law.

In this context, it can be said that consumer protection takes precedence over legal certainty, the Romanian legislator providing a procedural framework that complies exactly with the ideals of EU law, but, in particular, taking into account the purpose of the Directive (Ștefan, 2020).

In parallel with the procedure for establishing the absolute nullity of unfair terms, the Romanian legislation has also established a mechanism for resolving matters of property law, namely, an action for restitution of the services rendered by the consumer affected by the unfair terms, which is governed by a three-year prescription period, which starts to run from the date on which the court establishes that the unfairness of the terms has been established (Andrei, 2016).

In our law, therefore, there is a duality of regimes: a more severe regime, the aim of which is to establish that contractual terms are unfair, which is not subject to a limitation period and has retroactive effect, and a regime based on this first approach, which seeks to recover the financial restitution of benefits, which is subject to a prescription period of three years.

This system of protection is activated whenever the national court establishes *in concreto* that the contractual provision complained of by the consumer meets the requirements established by the legislator in order to be classified as unfair. The national court will examine those requirements as laid down by Romanian law, which reproduce to the letter the provisions of Article 3 of Directive 93/13. In order to establish the unfairness of a term, it must not have been negotiated with the consumer; that is to say, it must, by itself or together with other contractual provisions, cause a significant imbalance (Court of Justice of the European Union, 2017) to the detriment of the consumer, contrary to good faith (Glodeanu, 2020).

The protective purpose of the Directive is not, however, an absolute one, as the provisions of Art. (2), three cases of exclusion of the unfairness of a term are regulated, as follows: (i) the contractual provision in question reflects either an act having the force of law or a mandatory administrative rule or provisions or principles of international conventions to which the Member State in whose territory the contract was concluded is a party (Court of Justice of the European Union, 2020); (ii) the term complained of as unfair concerns the definition of the subject matter of the contract, or the adequacy of the price or remuneration in relation to the services or goods supplied in exchange for them (Court of Justice of the European Union, 2017); (iii) finally, the term is expressed in a clear and intelligible manner (Court of Justice of the European Union, 2015).

Both the requirements that must be met in order to establish the unfairness of a term and the cases of exclusion relied on by the professional in his defense must be interpreted in the context of all

the circumstances that materialize at the time of the conclusion of the contract in question, in the light of the guidelines given by the Court of Justice of the European Union to the national judge. Thus, gradually, a new contractual justice aimed at combining the private interest of the parties to the agreement with the public interest, ensuring effective protection of the internal market and stimulating economic activity, has gradually emerged. Naturally, the legal regime is a specialized one, which requires specific assessment criteria that cannot be placed in a matrix, with a view to increasing the liability of the professional and preventing consumer prejudice.

4. CONCLUSION

By analyzing the Romanian legislation on unfair terms as a whole, as influenced by the guidelines contained in the judgments of the Court of Justice of the European Union on Directive 93/13, as well as European law in general, we can state that it is materialized as an instrument of application of the theory of contractual solidarism (Jamin, 2001; Mazeaud, 1999), which has as its premise the economic, technical and legal inequality between the consumer and the professional. The legal solutions adopted are such as to limit the parties' freedom of will, extending the possibility of censuring it, and the possibility for the judge to intervene in the contractual field, all with a view to safeguarding the imperatives of fairness and good faith.

All these approaches can be explained in terms of the Directive's aim, which is to "facilitate the establishment of the internal market and to protect the citizen in his role as consumer" (Council of the European Communities, 1993), respectively to safeguard commercial competition at the European Union level.

We conclude by emphasizing, in this connection, the importance of the preliminary references, which have come to represent the main instrument for legitimizing the new role assigned to the judicial system, since they are intended to remove the difficulties in theorizing and conceptualizing progress in the field of unfair terms in consumer contracts and to ensure that the purpose of the Directive is fully respected.

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