

PROCEDURAL DIFFICULTIES ENCOUNTERED BY ROMANIAN COURTS IN APPLYING EUROPEAN UNION LAW IN THE MATTER OF UNFAIR TERMS IN CONSUMER CONTRACTS

Marian GOCIU*

Abstract

While the Member States of the European Union have similar legal systems, they also have many specific procedural differences. This is the reason why the Council Directive 93/13/EEC on unfair terms in consumer contracts states the general provisions, mostly of substantive law nature, and offers the essential criteria to determine if a contractual term is unfair. It becomes the Member State's duty to transpose the Directive into the national legal framework and to regulate adequate and effective specific means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. Romanian authorities didn't provide a minimum harmonization of the national law with the principles of the Council Directive 93/13/EEC by regulating accurate legal provisions to ensure that there are effective remedies in the light of article 7 of the Directive, by adapting the guidelines of the directive to the national legal framework and by amending the national rules that didn't comply with the principles of the Directive, they just took over the text of the Directive, with minor additions, and the list of the terms which may be regarded as unfair. Having at their disposal only the general criteria offered by the Directive, Romanian courts encountered many issues in the course of proceedings that determined some of them to turn to the Court of Justice of the European Union case law, while other courts made use of the preliminary ruling procedure found in article 267 of the Treaty on the Functioning of the European Union to unify their practice. Identifying the problem is the first step in solving it. This study analyzes the difficulties that the national courts stumbled upon in applying European Union Law in the matter under discussion and the various ways they found to overcome them. The study can be a very useful instrument both for Romanian and Member States practitioners.

Keywords: legal qualification, jurisdiction, admissibility, the *ex officio* principle, statute of limitation.

1. Introduction

During the period of the Romanian Social Republic, the concept of "property" almost disappeared from individual consciousness due to communist principles such as restricting private property (through nationalization, expropriation and confiscation) and restricting, nationalizing and centralizing the essential services. At the same time, the banking services were provided by the state, by nationalizing the

banks and centralizing the banking activity, eliminating the competitive system that could have benefited the consumers.

The legislative framework in the specific matter of consumer protection appeared in Romania after the Revolution of December 1989, in a new socio-political context, determined by the change of power in the state, the emergence of private banks and the desire of the population to have more and more goods and to benefit from services similar to those offered by the other Member States.

* Judge, Bucharest Tribunal (e-mail: marian17gociu@gmail).

Due to the trauma created by the shortcomings they have suffered for so long, people have adopted a coping mechanism which consisted in the excessive purchase of goods and services, a mechanism doubled by the lack of financial education and relaxation of lending conditions which involved even the granting of loans only by presentation of the identity card.

The banking entities established in Romania after the year 1990 took advantage from this context and drafted pre-formulated standard contracts (that usually contained unfair terms) so as the consumer wouldn't have the possibility to influence the substance of the terms.

All of these changes have increased the need of the state to intervene in the contractual relation between professionals and consumers, in order to protect the consumers (taking into account that they are in a lower position of power than the professionals¹) and to improve the banking products on the market by stimulating competition.

The legislative framework in the matter of consumer protection in Romania started with the issuance of Government Ordinance no. 21/1992 on consumer protection, and has experienced a slow, but constant, evolution over time, also determined by the process of joining the European Union. Subsequently, the Romanian Parliament passed Law no. 193/2000 on unfair terms in contracts concluded between professionals and consumers, enforcing the provisions of Council Directive 93/13/EEC (although, at that time, Romania was not yet a Member

State), thus aligning with the European principles on the matter.

These provisions were amended later on by Law no. 363/2007 (which included also the statement on the transposition of the Council Directive 93/13/ EEC), by Law no. 76/2012, by Government Ordinance no. 34/2014 and by Government Ordinance no. 58/2022. Several legal provisions have been introduced in accordance with the case law of the Court of Justice of the European Union and the amendments to Council Directive 93/13/ EEC by Directive (EU) 2019/2.161 of the European Parliament and of the Council.

In 2004, the Romanian Parliament passed the Consumer Code by Law no. 296/2004 and by Government Emergency Ordinance no. 50/2010 the Romanian authorities transposed the provisions of Directive 2008/48/EC of the European Parliament and of the Council on consumer credit agreements. Also in 2004, was regulated the Government Ordinance no. 85/2004 on consumer protection when concluding and executing distance contracts on financial services. Government Emergency Ordinance no. 52/2016, on credit agreements offered to consumers for real estate, amended the Government Emergency Ordinance no. 50/2010 and transposed the provisions of Directive 2014/17 / EU of the European Parliament and of the Council.

As we observe from the legislative framework presented, The Romanian authorities concentrated mostly on the substantive law of the matter at hand and neglected to regulate adequate procedural

¹ The system of protection introduced by Directive 93/13/EEC is based on the same idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (C.J.E.U. decision from 14 June 2012, in the case C-618/10, Banco Español de Crédito SA vs. Joaquín Calderón Camino, paragraph 39, which can be found online at <https://curia.europa.eu/juris/document/document.jsf?jsessionid=5A6382CAD6D9275E8BB1387C90708F71?text=&docid=123843&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1108490> , last access 29.05.2022).

provisions to adapt the general rules of the Council Directive 93/13/EEC to the specifics of national provisions. This situation created inconsistent judicial practice among which the matter of legal qualification of the application, jurisdiction, active role of the judge, the admissibility of the application and statute of limitation.

This study examines the main issues that created inconsistent judicial practice in the matter of unfair terms in consumer contracts, in Romania, it analyses the applicable national legislation, the solutions adopted by national courts and possible solutions by applying the C.J.E.U. case law.

The matter covered by the present paper is different than the ones analyzed by the existent specialized literature because it gathers the main difficulties in the Romanian courts practice in one study and offers the point of view of a practitioner in accordance with the C.J.E.U. jurisprudence. The purpose of the paper is to provide law practitioners from Romania a simple answer to possible procedural problems when dealing with unfair terms in consumer contracts and also to provide law practitioners from other Member States a general view of how Romanian courts applied the European law and jurisprudence in the matter under discussion.

2. The legal qualification of the claim.

If a party wrongly invokes a legal text, the judge is not bound by the respective legal text, but, after informing the parties of that fact and inviting each of them to set out

its views on that matter, the judge may and must apply the incidental legal provision to the factual situation legally substantiated by the party; also, in the same conditions, the court may qualify a request wrongly named by the party². The accurate legal qualification of the submitted application prevents many of the errors that currently appear in the judicial practice during civil proceedings (concerning jurisdiction, admissibility, limitation periods), being necessary for the judge of the case to exercise his active role in this respect.

While a part of the applications/claims is filed by applicants by ordinary way of addressing the courts³ (common law in terms of procedure), the other part is submitted using the special procedure of opposition to enforcement of an enforceable title⁴ (usually a credit contract), in both of the cases with the request that the court shall establish the unfair nature of a certain term in a consumer contract.

In the first case, some of the complainants entitle their claims as “a request to determine a contractual term as unfair”, while others name them “a request for declaring the annulment of the unfair term”. This way of naming the claims misled a part of the Romanian courts which resulted in rendering wrong judgments, because the legal regime of the two types of applications is different in terms of effects.

In reality, regardless of the title, the request has a pecuniary character, because the applicant seeks to remove the effects of the unfair term and not only for the court to declare a term as being unfair. Furthermore,

² Gabriel Boroi, Mirela Stancu, „*Drept Procesal Civil*”, second edition, Hamangiu Publishing House, Bucharest, 2015, p. 23.

³ Based on Article 14 of Law no. 193/2000 : “*Consumers prejudiced by contracts concluded in violation of the provisions of this law have the right to address the courts in accordance with the provisions of the Civil Code and the Code of Civil Procedure*”.

⁴ Article 712, paragraph 1, Romanian Code of Civil Procedure : “*Against the procedure for the enforcement of an enforceable title, as well as against any enforcement act issued by the bailiff, an opposition may be addressed by those interested or prejudiced by the procedure*”.

the type of nullity is absolute and not relative, because Article 6 of the Council Directive 93/13/EEC contains mandatory provisions⁵ in the public interest⁶. This distinction is very important, because it determines the statute of limitation for submitting the claim. While the request of declaring relative nullity is limited to a certain period of time, 3 years, the request of declaring absolute nullity can be submitted irrespective of a period of time⁷.

In the second case, when the complainant addresses the court using the special procedure of opposition to enforcement, he is submitting two claims: the request to declare a contractual term as unfair and the request to annul the enforcement procedure as a consequence of the first request. Both of them were qualified as main claims by the majority of national courts, but the civil proceeding must be viewed in a unitary way.

In view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy. The determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he

would have been in if that term had not existed. It follows that the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts. Article 2(b), Article 6(1) and Article 7(1) of Council Directive 93/13 must be interpreted as precluding a judicial interpretation of the national rule according to which the legal action for reimbursement of amounts unduly paid on the basis of an unfair term in a contract concluded between a consumer and a seller or supplier is subject to a three-year limitation period which runs from the date of full performance of the contract, where it is assumed, without need for verification, that, on that date the consumer should have known about the unfair nature of the term in question or where for similar actions, based on certain provisions of national law, that same period starts to run only from the time when a court finds there to be a cause of those actions.⁸.

Therefore, the consequence of determining a contractual term as unfair under article 6 of the Council Directive 93/13/EEC is equivalent to determining absolute nullity of that contractual term according to Romanian legal provisions and the consumers right to file a claim to seek reimbursement of amounts unduly paid on

⁵ C.J.E.U. decision from 21 February 2013, in the Case C-472/11, Banif Plus Bank Zrt, paragraph 20; this document is available online at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=134101&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1396165> (last access: 29.05.2022).

⁶ C.J.E.U. decision from 26 October 2006, in the Case C-168/05, Mostaza Claro, paragraph 38; the document is available online at <https://curia.europa.eu/juris/liste.jsf?language=ro&jur=C,T,F&num=C-168/05&td=ALL> (last access: 30.05.2022).

⁷ According to article 4 of the Government Ordinance no. 58/2022 : “By derogation from the provisions of the Civil Code that regulates the statute of limitations, the action seeking a finding of nullity of an unfair term is not subjected to a time limit.”.

⁸ C.J.E.U. decision from 9 July 2020, in the joined Cases C-698/18 and C-699/18, SC Raiffeisen Bank SA, BRD Groupe Société Générale SA , par. 51, 54 and 84; the document is available online at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=228365&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2473743> (last access: 30.05.2022).

the basis of an unfair term in a consumer contract is limited to a 3 years period⁹.

The author's opinion is that the three-year limitation period runs from the date since the judgment which determined the nullity of the contractual term remained final - *res judicata* (as being the date the right arose), in order to comply to the principle of equivalence and the principle of effectiveness stated in the Council Directive 93/13/EEC.

3. Establishing substantive and territorial jurisdiction.

The jurisdiction provisions at the European Union level, in the matter of unfair terms in consumer contracts, are stipulated in Regulation (EU) no. 1215/2012 of the European Parliament and of the Council and are relevant only in relation to cross-border proceedings.

Regarding national legal provisions in the matter at hand, Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers¹⁰. Thus, Member States have the obligation to regulate provisions that establish rules of substantive jurisdiction (distribution of national proceedings vertically between courts of different levels) and territorial jurisdiction (distribution of national

proceedings horizontally between courts of the same level) and organize remedies so as to ensure that the consumer has effective access to the proceedings and does not create additional burdens which would make it impossible or excessively difficult to exercise the rights which litigants have under European law¹¹.

In Romania, regarding the substantive jurisdiction, the legal qualification of the claim determines the competent court. As we clarified before, the claim to determine a contractual term as unfair using the common procedure represents a pecuniary claim¹² and, according to article 94, paragraph 1, letter k) and article 95 of the Code of Civil Procedure, local courts have jurisdiction over claims under 200.000 RON inclusive, as first courts notified, while municipal tribunals have jurisdiction over claims that exceed this amount.

Some of the national courts qualified the claims as being non-pecuniary because of the title that the complainants gave to them ("application to determine a contractual term as unfair") and applied only article 95 par.1 of the Code of Civil Procedure¹³, concluding that only the municipal tribunals have jurisdiction to settle this type of claims. In result, they didn't comply with the substantive jurisdiction provisions, aspect analyzed by

⁹ According to article no. 2517 of the Romanian Civil Code.

¹⁰ Article 6 of the Council Directive 93/13/EEC; this document is available online at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993L0013&from=RO#d1e39-29-1> (last access: 29.05.2022).

¹¹ In this regard, C.J.E.U. decision from 5 December 2013, in the Case C-413/12, *Asociación de Consumidores Independientes de Castilla y León*, paragraph 39; this document is available online at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=145247&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2110215> (last access: 29.05.2022).

¹² Decision no. 32 dated 09.06.2008, issued by the High Court of Cassation and Justice - United Sections, this document is available online at <https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=86093#highlight=##> (last access: 29.05.2022).

¹³ According to article 95 paragraph 1 of the Code of Civil Procedure "The tribunal settles, in the first instance, all the claims that are not given by law in the jurisdiction of other courts".

higher level courts in the special procedure of settling conflicts of jurisdiction¹⁴.

However, when the complainants are using the special procedure of opposition to enforcement to invoke an unfair term in a consumer contract, only the enforcement court (local court) has the jurisdiction over such claims, according to article 651, par. 1 and article 714, par. 1 of the Code of Civil Procedure, regardless of the pecuniary threshold mentioned.

Another distinction must be made between the claims filed by consumer complainants, and those submitted by the National Authority for Consumer Protection or other legal institutions with responsibilities in the matter, pursuant to article 12, paragraph 1 of Law no. 193/2000. In the latter case, the claims are settled, in first instance, by specialized sections in civil matters (litigation with professionals) within the municipal Tribunals from the domicile or from the registered office of the vendor or supplier and not by local courts¹⁵. The possibility for an organization or body with a legitimate interest in consumer protection to bring a lawsuit to court, to prevent the use of unfair terms in consumer contracts was initially stipulated in article 7, paragraph 1 of the Council Directive no. 93/13.

When establishing the territorial jurisdiction, the following legal provisions shall be taken into account: article 113, paragraph 1, point 8 and article 121 of the Code of Civil Procedure, as well as article 17 and article 18 of Regulation (EU) no. 1215/2012 of the European Parliament and

of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (in relation to cross-border proceedings). In all of these cases, the general rule is that claims submitted by a vendor or supplier against a consumer may be brought to justice only in the court of the consumer's domicile/abode.

If the parties stipulate an attributive clause of jurisdiction, it produces its effects only after the birth of the right to compensation, according to article 126, paragraph 2 of the Code of Civil Procedure. Also, article 19 of Regulation (EU) no. 1215/2012 stipulates that the parties may derogate from the provisions of article 17 and article 18 only in three cases: by agreements after the dispute has arisen, by agreements which allows the consumer to bring proceedings in courts other than those indicated in this Section or by agreements concluded between the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Concerning the attributive term of jurisdiction, national courts must order ex officio measures of inquiry to determine whether a clause conferring exclusive territorial jurisdiction, which is stipulated in a consumer contract, falls within the scope of Directive 93/13 and, if so, must assess of its own whether such term is unfair¹⁶.

¹⁴ Judgment no. 20 dated 25.02.2015, issued by the Pitesti Court of Appeal, which can be found online at <http://www.rolii.ro/hotarari/5895de70e49009340f00039d> (last access: 30.05.2022).

¹⁵ Decision no. 24/2015, appeal in the interest of the law, issued by the High Court of Cassation and Justice; this document is available online at <https://www.scj.ro/1093/Detailii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=126173#highlight=##> (last access: 30.05.2022).

¹⁶ C.J.E.U. decision from 09.11.2010, in the Case C-137/08, VB Pénzügyi Lízing Zrt., paragraph 57; the document is available online at <https://curia.europa.eu/juris/document/document.jsf?jsessionid=>

In the practice of Romanian courts, the contractual term according to which only the court of the bank's registered office was determined to be competent, was considered unfair¹⁷.

A contractual term, previously drafted by a seller or a supplier, which has not been the subject of an individual negotiation, that confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, may be considered to be unfair. In small claims litigation, the costs of appearing in court could be daunting and could lead the complainant to waive any legal action or defense¹⁸.

4. The ex officio principle (by its own motion).

National courts are required to examine, of their own motion, the unfairness of a contractual term which falls within the scope of Directive 93/13, compensating in this way for the imbalance which exists between the consumer and the seller or supplier¹⁹.

The national court which has found of its own motion that a contractual term is unfair is not obliged, in order to be able to

draw the consequences arising from that finding, to wait for the consumer, who has been informed of his rights, to submit a statement requesting for that term to be declared invalid. However, the principle of „audi alteram partem” (let the other side be heard as well – the adversarial principle), as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure²⁰.

A part of the Romanian Courts interpreted this jurisprudence as being the same with the active role of the judge, stipulated in article 22 of the Romanian Code of Civil Procedure.

The author's opinion is that the general principle according to which the judge should have an active role in civil proceedings implies also to comply with the principle of maintaining the equality of arms. In civil proceedings regarding the unfairness of a term in a consumer contract, the premise situation is that there is an imbalance between the consumer and the

D093584B8181BF4C4EC72825D924F437?text=&docid=79164&pageIndex=0&doclang=EN&mode=lst&dir=&oc=first&part=1&cid=1638471 (last access: 30.05.2022).

¹⁷ For example: Decision no. 2938 dated 27.09.2013, issued by the High Court of Cassation and Justice – Civil Section II, conflict of jurisdiction; this document is available online at <http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=82841#highlight=##> (last access: 30.05.2022) and Decision no. 634 dated 14.09.2016, issued by Timisoara Court of Appeal, Civil section II, mentioned in the book written by Adriana Pena, „Clauzele abuzive în contractele de credit”, Hamangiu Publishing House and Litteris e-Publishing, Bucharest, 2017, p. 116.

¹⁸ C.J.E.U. decision from 4 June 2009, in the Case C-243/08, Pannon GSM Zrt., paragraph 45; the document is available online at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=74812&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1655065> (last access: 30.05.2022).

¹⁹ C.J.E.U. decision from 26 October 2006, in the Case C-168/05, Mostaza Claro, paragraph 38; the document is available online at <https://curia.europa.eu/juris/liste.jsf?language=ro&jur=C,T,F&num=C-168/05&td=ALL> (last access: 30.05.2022).

²⁰ C.J.E.U. decision from 21 February 2013, in the Case C-472/11, Banif Plus Bank Zrt., paragraph 42; the document is available online at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=134101&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1658568> (last access: 30.05.2022).

seller or supplier and this imbalance should be compensated by the intervention of the court. Thus, the equality of arms is reestablished by the court's intervention. The European principle stated above was interpreted autonomous of national regulations and it implies that national courts should exercise their active role more than their national legal provisions allow, in order to comply with the principle of effectiveness stipulated by the Directive. Nonetheless, national legal provisions cannot offer less protection to the consumer than the protection stipulated in the Council Directive 93/13/EEC.

The Court of Justice of the European Union has frequently ruled that the Council Directive no. 93/13 opposes a national provision under which the national court addressed does not have the option, either on application by the consumer or of its own motion, to examine whether the terms in a consumer contract are unfair within the meaning of the directive²¹.

5. The admissibility of the claim.

Regarding the plea of inadmissibility, it has been frequently raised in relation to the definition of the notions „consumer” and “seller or supplier”.

From the perspective of European law „consumer” means any natural person who, in contracts covered by the Council Directive 93/13/EEC, is acting for purposes which are outside his trade, business or profession. „ Seller or supplier” means any

natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.²²

In the national jurisprudence, some courts have interpreted that the issue of defining the two concepts above concerns the legal standing of the complainant or the defendant²³ to bring a claim to court. The author's opinion is that it is a matter of admissibility of the claim, because it represents a „sine qua non” condition (something absolutely indispensable) to bring a civil proceeding, like the one in question, to court.

The national courts have held that these legal provisions defining the consumer and the vendor or supplier are not of exclusive application, as long as the Council Directive 93/13 does not define the activities which the two actors are related with. Therefore, the two concepts are determined in relation to the activities actually carried out by them, in accordance to the national provisions²⁴.

A professional is a person who exploits an enterprise and an enterprise is the systematic exercise, by one or more persons, of an organized activity consisting in the production, administration or sale of goods or the supplying of services, whether or not for profit (according to article 3, paragraph 2 and 3 of the Romanian Civil Code).

²¹ C.J.E.U. decision from 26 June 2019, in the Case C-407/18, Addiko Bank, paragraph 69; the document is available online at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=215509&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1667791> (last access: 30.05.2022).

²² Article 2 of Council Directive 93/13/EEC, which can be found online at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013> (last access: 30.05.2022).

²³ Judgment no. 536 dated 07.02.2014, issued by the Bucharest Tribunal – Civil Section IV, this document is available online at <http://www.rolii.ro/hotarari/587bb545e49009dc34006d6c> (last access: 30.05.2022).

²⁴ For example: Decision no. 1987 dated 06.10.2015, issued by the High Court of Cassation and Justice – Civil Section II; this document is available online at <https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=129111#highlight=##> (last access: 31.05.2022).

For example, a natural person who has concluded several credit agreements with a bank for the purpose of refinancing other loans obtained from another bank, for acquiring real estate, which he subsequently leased, does not fall into the category of „consumers” under the protection of Council Directive 93/13/EEC, because the activity carried out is of commercial nature²⁵.

In the C.J.E.U. case-law, The Court has ruled that Articles 1(1) and 2(b) of Council Directive 93/13/EEC must be interpreted as meaning that the directive can be applied to a contract of guarantee or a contract providing security concluded between a natural person and a credit institution in order to secure contractual obligations owed by the commercial company to the credit institution under a credit agreement, where that natural person acted for purposes outside his trade, business or profession and has no link of a functional nature with that company²⁶. The

same conclusion was reached with regard to the situation of the co-debtor²⁷ and to the situation of the debtor exercising the profession of lawyer, as long as the credit agreement is not related to his professional activity²⁸.

A natural person who has close professional ties with a company, such as its management or holding a majority of shares in a company, cannot be considered a consumer within the scope of the Directive, when endorsing a promissory note issued to guarantee the company's obligations under a credit agreement²⁹.

On the contrary, a company cannot be classified as a "consumer", because the notion refers exclusively to natural persons³⁰.

The plea of inadmissibility has also been raised from the perspective of article 4, paragraph 2 of the Council Directive no. 93/13/EEC, according to which „Assessment of the unfair nature of the terms shall relate neither to the definition of

²⁵ Decision no. 441 dated 02.03.2016, issued by the High Court of Cassation and Justice – Civil Section II; this document is available online at <https://www.scj.ro/1093/Detaili-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=128554#highlight=##> (last access: 31.05.2022).

²⁶ C.J.E.U. decision from 19 November 2015, in the case C-74/15, Tarcău, par. 31; the document is available online at <https://curia.europa.eu/juris/document/document.jsf?jsessionid=38DDA2576AAACE781C0AFC52C017F63F6?text=&docid=172182&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2670438> (last access: 31.05.2022).

²⁷ C.J.E.U. decision from 9 July 2015, in the case C-348/14, Bucura, par. 67; the document is available online at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=165660&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=2672031> (last access: 31.05.2022).

²⁸ C.J.E.U. decision from 3 September 2015, in the case C-110/14, Costea, par. 31; the document is available online at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=166821&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2672511> (last access: 31.05.2022).

²⁹ C.J.E.U. decision from 20 September 2012, in the case C-419/11, Česká spořitelna; the document is available online at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=127263&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2684753> (last access: 31.05.2022).

³⁰ For example: Decision no. 321 dated 11.02.2016, issued by the High Court of Cassation and Justice – Civil Section II; this document is available online at <https://www.scj.ro/1093/Detaili-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=128558#highlight=##> (last access: 31.05.2022); C.J.E.U. decision from 22 November 2001, in the joined Cases C-541/99 and C-542/99, Idealservice Srl; the document is available online at <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:61999CJ0541> (last access: 31.05.2022).

the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.”

Romanian authorities have transposed the provisions listed above in art. 4, paragraph 6 of Law no. 193/2000, without stipulating a higher degree of protection for the consumer. Therefore, Romanian courts cannot examine the unfair nature of the contractual terms related to the definition of the main subject matter of the contract, nor the adequacy of the price and remuneration, if they are drafted in plain intelligible language, but only when these terms are not drafted in clear and precise language³¹.

Finally, the admissibility of the claim was called into question when the request has been submitted using the special procedure of opposition to enforcement. In the past few years, a lot of debtors have requested the annulment of unfair contractual terms in consumer contracts, which, together with the lack of harmonization of national legislation, has led to an inconsistent jurisprudence on the admissibility of such request.

A part of the national courts considered that such request is not admissible by using the procedure of opposition to enforcement, as long as the application can be filed using the common procedure, in accordance with

Article 713, paragraph 2 of the Romanian Code of Civil Procedure. The other part considered the claim admissible on the grounds of the obligation of the national court to examine *ex officio* the

unfair nature of the contractual term and by virtue of the effectiveness principle established in the jurisprudence of the Court of Justice of the European Union.

The opinion of The Romanian National Institute of Magistracy on the subject, expressed during the meeting of the presidents of the specialized sections (former commercial) of the High Court of Cassation and Justice and Courts of Appeal, held in Bucharest, on 15 December 2020, was that the courts notified with procedure of opposition to enforcement must remove, *ex officio*, the application of the provisions of article 713 paragraph 2 of the Romanian Code of Civil Procedure, without waiting for their removal by law or as a result of a constitutional procedure, the control of the unfair character of the contractual terms being admissible and mandatory³². The participants at the meeting unanimously endorsed this opinion.

The Court of Justice of the European Union reached the same conclusion in the case C-75/19, BNP Paribas Personal Finance Paris SA – Bucharest Branch, Judgment rendered on 6 November 2019, and in the case C-725/19, Impuls Leasing Romania IFN SA, Judgment rendered on 17 May 2022.

Following the C.J.E.U. case-law and national jurisprudence, The Romanian Government issued the Emergency Ordinance no. 58/2022 for the amendment of several national legal provisions in the matter of consumer protection, which entered into force on 28.05.2022. According to article 1, point 4 from the stated ordinance: „after paragraph 4 of article 13

³¹ Decision no. 2875 dated 26.09.2013, issued by the High Court of Cassation and Justice – Civil Section II; this document is available online at <https://www.scj.ro/1093/Detaliu-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=102674#highlight=##> (last access: 31.05.2022).

³² The document is available online at http://inm-lex.ro/wp-content/uploads/2021/01/Minuta-intalnire-litigii-cu-profesionisti-si-insolventa-15-decembrie-2020_Bucuresti.pdf, page 40 (last access: 31.05.2022).

Law no. 193/2000, five new paragraphs are inserted [...]: (8) By derogation from art. 713 paragraph (2) of the Code of Civil Procedure, the enforcement court has the possibility to examine in the procedure of opposition to enforcement, at the request of the consumer or ex officio, whether the terms of a contract concluded between a professional and a consumer constituting an enforceable title are unfair, and such a claim can be filed without limitation period.”

6. Conclusions

Although the Romanian Parliament passed Law no. 193, on unfair terms in contracts concluded between professionals and consumers, in the year 2000, enforcing the provisions of Council Directive 93/13/EEC, it took almost 22 years for the Romanian authorities to provide a minimum harmonization of the national procedural law with the principles of the Council Directive 93/13/EEC and only after the national courts identified a series of issues in the matter and brought them to the attention of the executive and the Parliament. The first amendment to the Law no. 193/2000 was regulated after 7 years by Law no. 363/2007 and stipulated the possibility for a consumer to address the court with a request to determine if a vendor or a supplier is guilty of unfair business practices, but it didn't stipulate rules regarding substantive and territorial jurisdiction (article 10).

Law no. 76/2012 modified article 12 of the Law 193/2000 stipulating that claims submitted by the National Authority for Consumer Protection or other legal institutions, with responsibilities in the

matter, are settled, in first instance, by the municipal Tribunals from the domicile or from the registered office of the vendor or supplier. These provisions didn't answer the questions which section from the Tribunal is competent in this case and which court is competent to settle the claims filed by consumers, generating again inconsistent judicial practice.

The Romanian Code of Civil Procedure (Law no.134/2010) entered into force on 15.02.2013 and established the territorial jurisdiction for settling claims submitted by de consumer, as analyzed in the section 2.2 of the paper, but the substantive jurisdiction has been the subject of different interpretations in the national jurisprudence.

The issues of admissibility of the claim when the request has been submitted using the special procedure of opposition to enforcement, the application of the ex officio principle and the statute of limitation have been resolved recently by Government Emergency Ordinance no. 58/2022. The other procedural difficulties analyzed in this study have been resolved by the national jurisprudence and C.J.E.U. case-law.

The process of harmonization of the national procedural law with the principles of the Council Directive 93/13/EEC was slow, but in the present, with the contribution of the national courts, almost all of the important procedural issues have been covered and there is a certain stability and predictability.

Nevertheless, there is still another important part to research and cover in the future, the process of harmonization of the national substantial law with the principles of the Council Directive 93/13/EEC.

References

- Adriana Pena, „*Clauzele abuzive în contractele de credit*”, Hamangiu Publishing House and Litteris e-Publishing, Bucharest, 2017;
- C.J.E.U. decision from 3 September 2015, in the case C-110/14, Costea;
- C.J.E.U. decision from 4 June 2009, in the Case C-243/08, Pannon GSM Zrt;
- C.J.E.U. decision from 5 December 2013, in the Case C 413/12, Asociación de Consumidores Independientes de Castilla y León;
- C.J.E.U. decision from 6 November 2019, in the case C-75/19, BNP Paribas Personal Finance Paris SA – Bucharest Branch;
- C.J.E.U. decision from 9 July 2015, in the case C-348/14, Bucura;
- C.J.E.U. decision from 9 July 2020, in the joined Cases C-698/18 and C-699/18, SC Raiffeisen Bank SA, BRD Groupe Soci t  G n rale SA;
- C.J.E.U. decision from 09 November 2010, in the Case C-137/08, VB P nz gyi L zinq Zrt;
- C.J.E.U. decision from 14 June 2012, in the case C-618/10, Banco Espa ol de Cr dito SA vs. Joaqu n Calder n Camino;
- C.J.E.U. decision from 17 May 2022, in the case C-725/19, Impuls Leasing Romania IFN SA;
- C.J.E.U. decision from 19 November 2015, in the case C-74/15, Tarc u;
- C.J.E.U. decision from 20 September 2012, in the case C-419/11,  esk  Spořitelna;
- C.J.E.U. decision from 21 February 2013, in the Case C-472/11, Banif Plus Bank Zrt;
- C.J.E.U. decision from 22 November 2001, in the joined Cases C-541/99 and C-542/99, Idealservice Srl;
- C.J.E.U. decision from 26 June 2019, in the Case C-407/18, Addiko Bank;
- C.J.E.U. decision from 26 October 2006, in the Case C-168/05, Mostaza Claro;
- Council Directive 93/13/EEC on unfair terms in consumer contracts;
- Decision no. 1987 dated 06.10.2015, issued by the High Court of Cassation and Justice – Civil Section II;
- Decision no. 24/2015, appeal in the interest of the law, issued by the High Court of Cassation and Justice;
- Decision no. 2938 dated 27.09.2013, issued by the High Court of Cassation and Justice – Civil Section II, conflict of jurisdiction;
- Decision no. 2875 dated 26.09.2013, issued by the High Court of Cassation and Justice – Civil Section II;
- Decision no. 32 dated 09.06.2008, issued by the High Court of Cassation and Justice - United Sections;
- Decision no. 321 dated 11.02.2016, issued by the High Court of Cassation and Justice – Civil Section II;
- Decision no. 441 dated 02.03.2016, issued by the High Court of Cassation and Justice – Civil Section II;
- Decision no. 634 dated 14.09.2016, issued by Timisoara Court of Appeal, Civil section II;
- Gabriel Boroi, Mirela Stancu, „*Drept Procesal Civil*”, second edition, Hamangiu Publishing House, Bucharest, 2015;
- Government Ordinance no. 34/2014;
- Government Ordinance no. 58/2022;
- Ioan Gheorghiescu, Ovidiu Ioan, „*Daune Morale.Clauze abuzive*”, Moroşan Publishing House, Bucharest, 2017;

- Judgment no. 20 dated 25.02.2015, issued by the Pitesti Court of Appeal;
- Judgment no. 536 dated 07.02.2014, issued by the Bucharest Tribunal – Civil Section IV;
- Law no. 134/2010 of the Code of Civil Procedure;
- Law no. 193/2000;
- Law no. 287/2009 of the Civil Code;
- Law no. 363/2007;
- Law no. 76/2012;
- Regulation (EU) no. 1215/2012 of the European Parliament and of the Council;
- Summary of the meeting of the presidents of the specialized sections (former commercial) of the High Court of Cassation and Justice and Courts of Appeal, held in Bucharest, on 15 December 2020;
- Treaty on the Functioning of the European Union.